



September 24, 2015

*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:

We appreciate the opportunity to offer additional comments following the Department of Labor’s (the “Department”) hearings on the proposed regulation (the “Proposal”) redefining fiduciary investment advice related to ERISA §3(21)(A)(ii);<sup>1</sup> the new proposed prohibited transaction class exemption “Best Interest Contract Exemption” (the “BIC Exemption”);<sup>2</sup> and the proposed amendments to Prohibited Transaction Class Exemption 84-24 (“84-24”).<sup>3</sup> These comments are in addition to the comments we filed in our letter of July 21, 2015.

The Department’s efforts to review and update the regulations governing investment advice are laudable, and we appreciate the opportunity to discuss these critical issues. It is vital that the Department revise the Proposal and its associated Exemptions so that small business employers and their workers will continue to have access to valuable and cost-effective retirement products and services. We appreciate the opportunity to share with the Department our experience in providing essential services to our small business plan clients. We hope this information will be helpful in drafting a final regulation that strengthens our retirement system.

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<sup>1</sup> 80 Fed. Reg. 21,928 (Apr. 20, 2015).

<sup>2</sup> Id. at 21,960.

<sup>3</sup> Id. at 22,010.

Our meeting with the Department on September 16, 2015 was very helpful in better understanding the Department's questions about a number of issues that are critically important to Nationwide's ability to best serve the needs of our retirement plan clients. In response to the Department's request, we write now to offer suggested regulatory and exemption language addressing these issues. Our suggested modifications are intended to better execute the goals of the rulemaking, and to avoid unintended consequences or execution errors that we believe will harm retirement investors. We would be pleased to further discuss these edits at the Department's convenience.

**About Nationwide:**

Nationwide, a Fortune 100 company based in Columbus, Ohio, is one of the largest and strongest diversified insurance and financial services organizations in the United States. We are the 10th largest provider of retirement plans to America's small businesses, the No. 1 provider of governmental plans in the country, the 9<sup>th</sup> largest life insurer and writer of variable annuities, and the largest property-casualty insurer in the small business market. 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. Nearly 40,000 retirement plans representing more than two million participants have entrusted us with more than \$100 billion of their retirement savings. Our mission is to provide quality, affordable financial services and investment products to help America prepare for and live in retirement.

**Overview:**

Building on the comments from our original letter, our additional comments below suggest specific amendments to the language of the Proposal that offer specific solutions to the problems we identified and discussed with the Department. The intent is to preserve the goals of the Proposal while ensuring that the regulation can work in practice, protecting rather than hindering the efforts of our small business clients and their workers to achieve an adequate and secure retirement.

We have limited our suggestions here to issues of particular importance to our ability to serve our small business clients. However, we do have additional concerns about a variety of other issues presented by the Proposal. Therefore, we add our support to the additional, post-hearing comments filed by the American Council of Life Insurers (ACLI), the Insured Retirement Institute (IRI), the Committee of Annuity Insurers (CAI), the SPARK Institute (SPARK), and the Joint Life Insurance Carrier Comment Letter (specific to annuities).

**Suggested Modifications to the Proposal:**

As we discussed with the Department in our recent meeting, we have specific concerns regarding the platform provider carve out, the effect of the regulation on "wholesaling" activity, the participant investment education carve-out, and restrictions on rollovers into employer plans. Additionally, we have concerns about having sufficient time to implement required changes and the resulting impacts to our customers.

- **Platform Provider Issues:**

We are very supportive of the inclusion of the platform provider and selection and monitoring carve-outs in the Proposal. As the Department has noted on many occasions in the past, platform providers are not acting as fiduciaries in constructing and marketing platforms with specified investments and services.

However, Nationwide is concerned that the language of the Proposal could be construed to limit some of these activities, or to treat the marketing and explaining of these specific investments and services as fiduciary advice. To avoid confusion, to reduce litigation risks, and to ensure platform providers can provide appropriate assistance to their plan clients, we suggest language that will ensure platform providers will not be fiduciaries under the final rule when they:

1. Package investments and services into products, contracts, and bundles available for selection and use by a plan fiduciary;
2. Make available and explain or provide information about integrated fiduciary advice or investment management services, and make available and explain or provide information about tools, interactive materials and other information consistent with generally accepted investment theories and prevailing investment industry practices that may assist a plan fiduciary in understanding and meeting their fiduciary obligations; or
3. Respond to questions in a Request for Proposal (RFP), Request For Information (RFI) or similar plan inquiry raised by the plan sponsor.

#### *Creating Bundles of Investments and Services*

Nationwide and other platform providers offer a range of bundled solutions appealing to different market segments or categories of plans based on differences such as plan size, type of industry, and other logical groupings. These are not individualized offerings created for individual plans, but are targeted categories suitable for a large number of plans within different market segment categories.

Marketing these packages should not be captured in a broad reading of fiduciary advice. For example, making available for selection by a plan fiduciary a bundle with a limited menu of 400 available investments should not be viewed as fiduciary advice regarding those 400 investments. The platform and its investment menu is merely an available set of options—one of several different alternatives—providing access to but not recommending any specific investments. Nationwide needs the ability, on a non-fiduciary basis, both to develop these categories of bundled solutions, and to market and explain them to plans and their financial advisors.

### *Integrated Fiduciary Services and Fiduciary Compliance Tools*

Nationwide makes available bundled platform options that integrate 3(21) investment advice or 3(38) investment management services. The plan sponsor (acting in its fiduciary capacity) can select those services at the plan level (*i.e.*, assisting with selecting and monitoring the investments) or as participant-level services. We currently make available two alternatives for plan level services. Plans may select a 3(21) advisor or a 3(38) manager that are available as part of our bundled platform options; alternatively, plans may select a qualified 3(21) or 3(38) fiduciary of their own choosing, and we have an interface that the fiduciary may use to provide their fiduciary services. Each plan has alternatives to receive these services. For participant-level services, we currently make available managed account solutions through various registered investment advisers that a plan may select to be available for participants who wish to hire a professional to manage their plan accounts.

The language in the Proposal at 2510.3-21(b)(3) limits the platform provider carve out to making available “securities or other property” through the platform. Our concern is that this language is too narrow and may not apply to integrated services, including fiduciary services. For example, by making available the fiduciary services, and by explaining their features to plan fiduciaries, our concern is that the platform provider could be construed as a fiduciary for “recommending” a fiduciary service provider to the plan, something not clearly covered by making available “securities and other property.” Platform providers should not be fiduciaries for discussing available features that plans may elect in bundles—this is not investment advice, but an explanation of the features of our platforms.

We also offer a suite of online tools to help our plan clients, especially plans sponsored by small businesses that may or may not have an investment advisor, understand and comply with their fiduciary obligations. These computer-based tools are based on generally accepted investment theories and prevailing investment practices. Clarifying that making these tools available is not providing fiduciary advice will help us continue to make available to small business plan clients these important services without undue risk of providing inadvertent fiduciary advice.

### *Responding to RFPs, RFIs and Other Plan Sponsor Inquiries*

Finally, we are concerned that the language of the platform provider carve-out does not specifically permit Nationwide to respond to questions posed by plan sponsors, such as in RFPs, RFIs and similar documents. More and more of our plan clients are using this approach to select and monitor service providers. However, the language in the Proposal at 2510.3-21(b)(3) limits the platform provider carve out to making available securities or other property on the platform “without regard to the individualized needs of the plan.” We are concerned that responding to an RFP or otherwise answering plan sponsor questions could be viewed as responding to the individualized needs of the plan. Further, plan RFPs and RFIs commonly ask the platform provider to show what investments the platform would make available to the plan, often requiring the platform provider to identify bundles or packages with a specific set of available investments. Platform providers need to be able to respond to plan sponsor questions without

becoming fiduciaries in order to assist plan fiduciaries in carrying out their duties to prudently select and monitor service providers.

*Suggested Language to add Regulatory Clarity to the Platform Provider Carve-Out and the Selection and Monitoring Carve-Out:*

Nationwide recommends the following changes to the regulatory text to address these key concerns:

2510.3-21(b)(3): Platform providers. The person merely markets, *explains*, and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, ~~securities or other property~~ *investment products and/or fiduciary services, including packaged bundles of such investment products and services*, through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

2510.3-21(b)(4): Selection and monitoring assistance. In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act), the person—

(i) Merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality);

*(ii) Merely identifies and explains the features and characteristics of services available on the platform or similar mechanism, including packaged bundles of investment products and services;*

*(iii) Merely responds to questions in Requests for Proposal, Requests for Information, or other inquiries posed by plan fiduciaries;*

*(iv) Merely provides materials and tools assisting plan fiduciaries in understanding and complying with their fiduciary duties; or*

(v) Merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

*2510.3-21(f)(9): “Platform or similar mechanism” means any bundling or grouping of investment options and services marketed or made available to employee benefit plans*

(as described in section 3(3) of the Act), that may be based upon certain market and competitive variables.

Nationwide also recommends a clear explanation of the change in the Preamble to the final regulation. We have provided sample language here:

*In response to comments regarding the scope of the platform provider and selection and monitoring carve-outs, we have modified the regulatory text to ensure that common and useful practices benefiting plans are not fiduciary advice. The Department does not intend that platform providers would be providing investment advice when constructing, offering, marketing and explaining investment products and services available on their platforms, including bundles of investment products and services defined by the platform provider. Further, the Department does not intend platform providers to engage in fiduciary advice when constructing, offering, marketing and explaining, to plan fiduciaries and participants, fiduciary services available on their platforms, such as investment advice or investment management services. Finally, the Department does not intend that platform providers responding to Requests for Proposal, Requests for Information or other solicitations for information from plans are providing investment advice when answering questions posed by the plan.*

- **Wholesaling Activities and “Third Party” Fiduciaries**

The Proposal does not clearly exclude from the definition of fiduciary advice the necessary “wholesaling” activities in which employees of providers of investment products and services market and explain those products and services to third-party financial advisors. These wholesaling activities are conducted in a sales context, with both parties understanding that it is not considered fiduciary investment advice. In these situations, employees of the provider of investment products and services are communicating with financial professionals and not to the end-user plan, participant, or IRA owner. They may, however, be communicating with a financial advisor who serves as a fiduciary investment adviser.

These marketing and sales communications should not be considered fiduciary advice. Capturing such discussions would be severely disruptive of the free flow of useful and necessary information financial advisors require to appropriately serve their plan and IRA clients, and does not appear to have been intended by the Department. The regulatory text should be amended to exclude discussions between providers of investment products and services and “third party” fiduciaries who are service providers to plans and IRAs.

The Proposal’s definition of “plan fiduciary” appears to include not just plan investment committee members and named fiduciaries, but anyone who is a fiduciary under ERISA Sec. 3(21), including “third party” investment advice service providers who are engaged to provide fiduciary advice. As a result, a representative of a provider of investment product or services, such as Nationwide, could become a fiduciary for marketing and explaining products and services to a professional fiduciary investment advisor.

It is vital that providers of investment products and services be able to communicate with financial advisors about these products and services. This causes no conflict by itself—it merely serves to make financial advisors aware of the products and services available for use in connection with their clients' retirement savings. As demonstrated by the existence of the large-plan "seller's" carve out, the Department's primary purpose and concern behind the regulation is protecting unsophisticated persons from conflicts, not regulating or inhibiting investment-related discussions between financial professionals.

The purpose of "wholesaling" is to educate financial advisors about the provider's products and services. This includes, for example, explaining new investments and their attributes; describing how and where an investment product or service could be used; and/or discussing the features and advantages of a particular investment product or service. It is possible that those conversations and materials could be viewed as a "recommendation" to a fiduciary adviser. However, Nationwide believes that a wholesaler should not become a fiduciary by virtue of "recommending" by means of marketing or explaining his or her company's investment products and services to a third party financial advisor who happens to be a fiduciary to a number of plans. The final rule should exclude discussions between providers of investment products and services and financial advisors from the definition of fiduciary investment advice.

#### Suggested Language to Add Regulatory Clarity on Wholesaling Activities

Nationwide recommends the following alternative to the regulatory text defining "plan fiduciary" that would exclude from the definition fiduciary service providers:

2510.3-21(f)(5): "Plan fiduciary" means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code. For the purposes of being an investment advice recipient, "plan fiduciary" shall include named fiduciaries, fiduciaries responsible for selecting plan investments and investment fiduciaries (such as members of plan investment committees), and fiduciaries who are employees of the plan sponsor or its affiliates; but shall not include financial advisors, investment managers or other persons who are licensed to provide financial services and have been engaged by a plan, plan participant or beneficiary, IRA, or IRA owner to provide investment advice or investment management services."

Nationwide also recommends a clear explanation of the change in the Preamble to any final regulation. We have provided sample language here:

*"In response to comments regarding the scope of the definition of "plan fiduciary," the Department has amended the definition to clarify that the Department does not intend so-called "wholesaling" activity, in which representatives of providers of investment products or services discuss those products or services with financial advisors, to be fiduciary advice provided to those financial advisors. In general, where a financial advisor is a fiduciary solely because he or she has been engaged to provide investment advice to one or more plans, plan participants, IRAs, or IRA owners, recommendations to*

*that financial advisor are not fiduciary advice within the scope of the regulation. The Department does not intend that discussions regarding investment products or services between investment professionals would be fiduciary advice—rather, the regulation applies to advice provided by financial advisors to the end recipient of the advice: named fiduciaries; fiduciaries responsible for selecting plan investments and investment fiduciaries (such as members of plan investment committees); fiduciaries who are employees of the plan sponsor or its affiliates; participants and beneficiaries; IRAs and IRA owners.”*

- **Investment Education**

Platform providers must provide information about the plan and its investments to plan participants—this is a typically a contractual obligation to the plan. In addition, platform providers are efficient and low-cost sources to provide educational information. The Proposal would significantly revise the standards of IB 96-1 governing these interactions by preventing references to specific plan investments in several situations, resulting in significant complications for platform providers.

The Proposal modifies and replaces IB 96-1 with an education carve out that creates significant fiduciary risk for platform providers. We are obligated to provide specific investment information to plan participants, but providing that investment information would cause long-standing information and education efforts to become fiduciary advice with respect to interactive investment materials and asset allocation models.

Specifically, the Proposal provides in 2510.3-21(b)(6) that information provided to participants is not viewed separately, but is considered as a whole:

*“...irrespective of...the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials...”*

The Proposal at 2510.3-21(b)(6)(iii, iv) does not permit asset allocation models or interactive investment materials to reference any specific investment product or alternative, or any specific distribution option available under the plan or IRA. Because, as noted above, the information need not be presented together or in the same format, the practical result is that a platform provider cannot use asset allocation models at all without risking fiduciary status because it already provides information about specific investments in other contexts. Similarly, it is unclear how a platform provider may offer interactive materials without referencing available investments and distribution options. The risks posed will significantly chill educational activity and undermine the Department’s purpose in providing an education carve out.

Also, and importantly, in the case of participant-directed retirement plans, the plan sponsor fiduciaries have already vetted the investment options through a prudent process, which



considered the quality of the investments and the reasonableness of the expenses (and must continually monitor for those purposes).

The final rule should be amended to clarify that investment education materials that include asset allocation models or interactive investment materials can identify specific investment alternatives under the plan, provided all available investment alternatives under the plan having similar risk and return characteristics are identified. We note that this solution does not address the needs of an IRA owner to receive similar education, given the likely large number of available investments—we support addressing this issue as well, and refer the Department to the comment letters we endorsed above on this and other matters not addressed here.

Suggested Language to Add Regulatory Clarity on Investment Education Carve-out:

Nationwide recommends the following change to the regulatory text that would permit specific references as long as all available investments are included:

2510.3-21(b)(6)(iii)(C): ~~Such models do not include or identify any specific investment product or specific alternative available under the plan or IRA~~ *If an asset allocation model identifies any specific investment alternative available under the plan, it must identify all available investment alternatives having similar risk and return characteristics available under the plan; and*

2510.3-21(b)(6)(iv)(E): ~~*If the materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, the materials must include or identify all available investment alternatives or options having similar characteristics*~~, unless such alternative or option is specified by the participant, beneficiary or IRA owner; and

Nationwide also recommends a clear explanation of the change in the Preamble to any final regulation. We have provided sample language here:

*“In response to comments regarding the scope of the education carve out and the current guidance in IB 96-1, the Department has amended the education carve out to permit references to specific investment alternatives and distribution options, as long as all similar investments are also listed. As many service providers are required to identify and provide information about available investments and distribution options in other contexts, the Department has concluded that such providers would be hindered in their ability to offer educational materials if they could not reference investments. Accordingly, we have amended the provisions regarding asset allocation models and interactive materials to permit references to all available investments.”*

- **Rollovers to Employer Plans**

The Proposal defines as fiduciary advice a recommendation regarding the advisability of a rollover from a plan or IRA. This broad definition presents two distinct concerns regarding

recommendations to rollover accounts, making it more difficult to combat leakage from qualified plans and adding complexity to plan portability:

1. Recommending consolidation of retirement accounts in a plan to plan rollover is fiduciary advice.
2. Rollovers to and from governmental plans have different and conflicting standards based on the source of the rollover assets.

#### *Traditional Efforts to Combat Leakage Include Consolidation Recommendation*

It is very common in enrollment meetings and other settings to educate new participants about consolidation and recommend that they rollover prior plan accounts and outside IRAs into the new employer's plan. These recommendations are intended to combat "leakage" from qualified plans and to prevent "lost" accounts for those participants. However, the Proposal would require that a fiduciary analysis be undertaken, gathering the information necessary to make a prudent recommendation regarding rolling over the prior plan assets to the new plan. In addition, it may well be a prohibited transaction for the new plan advisor or service provider to give such advice, as he or she could receive additional compensation by bringing the new assets into the plan.

The final rule should clarify that rolling assets into a plan is not fiduciary advice, given the importance of retaining tax-qualified retirement assets in qualified plans.

#### *Restricting Transferability of Assets between Governmental and ERISA Plans/IRAs*

As governmental plans are not subject to ERISA, different standards would apply for rollover advice related to governmental plans. Advice to rollout of a governmental plan would not be fiduciary advice (because the source of the funds is outside the Department's jurisdiction), but advice to consolidate IRA assets into a governmental plan would be fiduciary advice (because the source of the funds is within the Department's jurisdiction). This will cause significant confusion and compliance concerns, as well as potentially restrict the portability of retirement assets between 401(k) plans, 403(b) plans, 457 plans, and other types of plans.

As above, clarifying that rolling assets into a plan is not fiduciary advice would remove the practical issues facing portability of retirement plan assets between governmental and ERISA plans.

#### Suggested Language to Add Regulatory Clarity on Rollovers into Employer Plans

Nationwide recommends the following change to the regulatory text to address these concerns by clarifying that advising a rollover into a plan is not fiduciary advice:

2510.3-21(a)(1)(v): *Such recommendation to take a distribution or roll over securities or other property shall not be fiduciary advice if the securities or other property are rolled*

*into an employee benefit plan (as described in section 3(3) of the Act) or a governmental plan (as described in section 3(32) of the Act).*

Nationwide recommends Preamble language to clarify the intent of the regulatory text. Here is sample language:

*In response to comments regarding the rollover of assets from one plan to another, as well as portability between ERISA plans, IRAs and governmental plans, the Department has modified final regulation to clarify that a recommendation to roll assets into an ERISA plan or a governmental plan is not fiduciary advice. The modification will help ensure that plan assets remain in qualified plans and permit efforts by plan sponsors and service providers to advise participants to consolidate retirement accounts without inadvertent prohibited transaction and other compliance complexities.*

- **Customer Care Impacts-Transition Rule**

Because we focus on the small business employer market, Nationwide is often the first place a plan participant turns when he or she needs information or assistance with his or her retirement plan account, either by telephoning our call center or by accessing our web site. It is very important that retirement plan providers like Nationwide, who service millions of participants and tens of thousands of plans, be afforded sufficient time to assess, plan, design and implement the extensive changes to systems, business processes and the service experience that will be required to comply with the final regulation. It is important that we have adequate time to ensure compliance programs are in place, and to make sure that the resulting customer experience increases the likelihood that small business employers will continue to establish and maintain their plans and that their workers will continue to feel confident in saving for retirement.

While the Department proposed an eight-month delay in the effective date, it did not propose a general transition rule. The final regulation should provide a longer effective date, especially for disclosure and other provisions of the rule that will require significant reconfiguration of information technology system, and a generally applicable transition rule.

Existing service provider contracts and arrangements, for instance, are voluntary contracts entered into by willing parties under valid law—it is not clear that the Department can or should try to disrupt these existing service provider agreements. Instead, we propose a transition rule of twenty-four months that would apply the new rule to all contracts entered into after the applicability date. This would honor existing contracts as written until they are renewed, at which time the new rules would apply.

Nationwide recommends the following language:

2510.3-21(g)

(g) This section shall apply to all arrangements, agreements or understandings entered into after the date that is 24 months following the publication of these amendments in the Federal Register.

**Conclusion:**

Nationwide's mission is to provide quality, affordable financial services and investment products to help America prepare for and live in retirement. We appreciate the opportunity to work with the Department to address our concerns regarding the final rule. Our concerns are informed by our over 40 years of experience in serving America's workers and retirees. We would be happy to meet at the Department's convenience.

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

Sincerely,



Kirt A. Walker  
President and Chief Operating Officer  
Nationwide Financial