Northwestern Mutual®

Raymond J. Manista
Senior Vice President - General Counsel and Secretary

720 East Wisconsin Avenue
Milwaukee, WI 53202-4797
414 665 2214 office
414 625 2214 fax
raymanista@northwesternmutual.com

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Filed By Email: e-ORI@dol.gov
e-OED@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Re: Department of Labor Proposed Investment Advice Regulation and Related Exemptions RIN 1210-AB32/ZRIN 1210-ZA25

To Whom It May Concern:

The Northwestern Mutual Life Insurance Company ("Northwestern Mutual") appreciates the opportunity to comment on the Department of Labor's (the "Department") proposed rule and related prohibited transaction exemptions under the Employee Retirement Income Security Act of 1974 ("ERISA"), which would redefine the circumstances in which a person is considered a fiduciary when providing investment advice to employer-based qualified plans ('Plans"), Plan participants and owners of Individual Retirement Arrangements ("IRAs"), among others. Northwestern Mutual has long supported a uniform "best interest" standard of care when providing investment advice across its brokerage and investment advisory businesses (including for retirement account and Plan clients) so long as the standard is business-model neutral, preserves client choice, ensures continued access to investor education and affordable retirement options, and provides reasonable certainty for the adviser in its implementation.

While Northwestern Mutual supports the Department's objective of changing the standard of care that applies to persons giving retirement advice to clients, we believe the proposal significantly misses the mark on the criteria noted above and would lead to increased consumer cost, greater consumer confusion, and reduced consumer access to high-quality investment products. We submit this comment letter to help the Department achieve its goal of providing fiduciary protections for retirement investors, but in a manner that more fully incorporates existing regulatory structures, ensures continued access to products that provide guaranteed lifetime income, and empowers consumers with relevant information to make informed investment decisions regarding their retirement savings.

About Northwestern Mutual

Northwestern Mutual has been helping families and businesses achieve financial security for nearly 160 years. Our financial representatives build relationships with clients through a distinctive planning approach that integrates risk management with wealth accumulation, preservation and distribution. Northwestern Mutual delivers financial security to 4.3 million people who rely on us for insurance and investment solutions, including life, disability income and long-term care insurance; annuities; trust services; mutual funds; and investment advisory products and services. Our financial strength and ability to meet our clients' needs is demonstrated by $230 billion in assets, $27 billion in revenues, $87 billion in assets under management in investment products and services, and $1.5 trillion worth of life insurance protection in force. Northwestern Mutual was recognized by FORTUNE magazine as one of the "World's Most Admired" life insurance companies in 2015.

Northwestern Mutual meets client retirement savings needs through a comprehensive planning process that incorporates solutions primarily using unaffiliated mutual funds and proprietary insurance products such as fixed and variable annuities and life insurance. Our annuity products provide clients with guaranteed lifetime retirement income backed by a company that has the highest financial strength ratings awarded to any life insurer by all four of the major rating agencies. These products often serve as the foundation of our clients' retirement plans, by both helping to ensure clients will not outlive their assets and by supporting prudent decumulation strategies.

We have a sales force of more than 6,200 full-time financial representatives and 4,300 associate financial representatives, most of whom are also registered representatives of our broker-dealer, Northwestern Mutual Investment Services, LLC ("NMIS"), which is among the top 10 independent broker-dealers in the United States. NMIS has more than $46 billion of assets in brokerage accounts.

As our name indicates, Northwestern Mutual is organized as a mutual company, which allows us to manage the company in the best interests of our clients rather than splitting our focus between clients and shareholders. As a mutual, after setting aside a safe margin for reserves and surplus each year, Northwestern Mutual returns gains from its operations, which would otherwise be profits, to its participating policyowners in the form of dividends, which, in turn, lowers the net cost of products to our clients over time. In other words, our mutual advantage brings into alignment the interests of both clients and the company, which is amply demonstrated by our persistency rate for life insurance in force of more than 96 percent, a key indicator of client satisfaction.

We are providing you with this background on our company for the following reasons. First, to demonstrate that we know the retirement investor market well and care deeply that retirement savers continue to have access to quality investment advice, products and services at affordable prices. This market makes up a significant portion of our retail investment business.

Second, we believe that Northwestern Mutual's (and companies like ours) substantial investment in the training of financial representatives and the development of high-quality, guaranteed lifetime income products allows us to deliver a combination of exceptional guidance and investment solutions to help the middle America retirement investor achieve financial security. Doing so while living by mutual values and delivering long-term product value (in the form of low net cost over time) is something that the Department should continue to foster, not hinder, in this rulemaking.

Summary of Our Observations and Recommendations

As described in detail below, our observations and recommendations on the rulemaking include the following:

- The Department needs to more fully consider existing regulatory protections
- The rulemaking places undue emphasis on the lowest cost products
- There should be clarification that investment advice and related definitions do not apply to welfare benefit plans
- Advisers should be permitted to define the investment advice reliance time period
- The investment education carve-out should be broadened
- The seller's carve-out should be expanded
- The Best Interest Contract ("BIC") exemption contracting process should be reformulated
- Existing disclosure regimes should be leveraged rather than creating a new one under the BIC exemption
- The bias against proprietary or other limited range of product offerings should be eliminated
- The Department should use one definition of reasonable compensation and rely on compensation disclosure
- Reliance on the BIC exemption should not trigger registered investment adviser status
- The Department's data request authority should be eliminated
- Variable annuities should be retained within the scope of PTE 84-24
- The definition of insurance commissions within 84-24 should be revised or eliminated
- The effective date of the rulemaking should be extended
- The Department should reconsider its cost-benefit analysis

Initial Observations

Before highlighting concerns with specific provisions of the rulemaking and our related recommendations, we wish to note a few contextual observations that bear on the entirety of the proposal. We respectfully suggest that these considerations be taken into account as the Department begins the process of finalizing the rule and exemptions in response to written comments and public hearing testimony.

Insufficient Consideration of Existing Regulatory Protections

The Department states that this fundamental change to ERISA brought forward by the proposed rulemaking is required because of the changes in the retirement markets over the last 40 years. However, what the proposal fails to take into account, or in places unjustifiably discredits in our view, is that the development of the retirement market has been supported by evolving regulatory oversight mechanisms of other authorities, both at the federal and state level. The SEC, FINRA, the Treasury Department, bank regulators, and state insurance regulators have all been very active in the retirement market since ERISA was enacted. There is already a very robust disclosure regime, enforcement mechanisms, required representative training, marketing material requirements, non-cash compensation restrictions, and heightened standards of care, to name just a few aspects of the existing regulatory structure. In response, firms have developed and continually enhance sophisticated compliance and supervisory structures to help ensure their sales forces meet these regulatory expectations.

The Department has indicated it consulted extensively with other federal regulators, but it appears the Department saw little value in leveraging or coordinating with existing approaches for investor protection. We think this is a serious mistake and one that will lead to consumer confusion as yet another set of standards, processes and disclosures will be applicable to one segment of a client's investment accounts. It will also lead to increased costs and, in turn, less access to retirement solutions by consumers. Given this, a recurring theme in this comment letter is that the Department should work more closely with federal and state regulatory agencies to build upon investor protection structures that already exist and move toward a unified approach to retirement market regulation, rather than a fragmented one.

Existing FINRA rules provide one example of opportunity for the Department in this regard. Today, sales and exchanges of mutual funds and variable annuities are scrutinized under FINRA's Suitability Rule 2111. It is an oft-perpetuated myth that somehow a transaction might be both suitable for a client under FINRA rules and not in the client's best interests. The staffs of the SEC and FINRA have stated that a "central aspect of a broker-dealer's duty of fair dealing is the suitability obligation, which requires a broker-dealer to make recommendations that are consistent with the best interests of his customer."[1] FINRA Rule 2330 requires that firms engage in a detailed analysis of a variable annuity's costs and features in comparison to the needs of the client being sold the product and for the firm to conclude that the customer would benefit from the features of the product. As a result, sales of variable annuities are already highly scrutinized by FINRA, and brokerage firms subject variable annuity sales to an added level of review. An additional layer of regulation in this circumstance is neither good for clarity from the consumer's perspective nor cost-effective from the industry's perspective.

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[1] U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers, at 59 (2011); see also FINRA Regulatory Notice 11-02, FINRA Rules Governing Know-Your-Customer and Suitability Obligations, n.11 (January 2011).

Undue Emphasis on Lowest-Cost Products

The Department's proposal appears to unduly favor low-cost product options such as indexed mutual funds without considering other factors that may be important to retirement investors, as well as in their best interests (e.g., financial strength of the issuing company, flexibility of the product in the event of unforeseen circumstances, ability to lower net cost or enhance product features over time, etc.). Long-term retirement savers benefit from building enduring relationships with their advisers. Companies like Northwestern Mutual believe that a financial representative should have a very direct and positive impact on a client's financial security over the course of the client's lifetime. Our well-trained representatives – among the highest credentialed in the industry – are critical to achieving our clients' goals.

That includes working with our clients to take action on their retirement planning by engaging in ongoing fact finding throughout their life stages to truly understand what goals and investment considerations are most important to them at any point in time. This benefit to our clients does not come without a substantial investment in our representatives' education and training on sales and servicing of appropriate products, programs and strategies for retirement investors. That investment must be factored into the cost of investment products we manufacture.

Focusing too much on low-cost mutual fund investments also does not take into account the value derived from the certainty that a company will be around in 50 years to stand behind its promises. Over almost 160 years, Northwestern Mutual has had a disciplined focus on expertly managing fundamentals such as expenses, underwriting and investment performance in order to provide low net cost insurance products over the long-term. In doing so, we have been (and aim to be) well-positioned in all economic environments to meet our promises to clients, minimize client risks and help clients meet their financial goals. This disciplined management has consistently been rewarded with industry-leading financial strength and exceptional client loyalty – clear evidence of the great value it brings to our clients.

A 2014 study of Fortune 500 companies showed that by the end of 2013, only 24 percent of those companies offered any kind of defined benefit plan to their employees.[2] In addition, less than 20 percent of savers in defined contribution plans are offered access to a product that can generate guaranteed lifetime retirement income.[3] Thus, for the vast majority of Americans getting ready for retirement, annuities issued by insurance companies are the only means a retirement saver is able to have a guaranteed means of not outliving their savings other than Social Security. Northwestern Mutual provides its clients with deferred and immediate annuities that give them access to guaranteed lifetime retirement income backed by a company with the highest financial strength ratings awarded to any insurance company.

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[2] Retirement in Transition for the Fortune 500: 1998-2013, Towers Watson (September 3, 2014).

[3] PSCA Annual Survey (2013) (only 17.1 percent of plans offer an annuity distribution).

To provide the features and insurance and other guarantees of its annuity contracts, Northwestern Mutual charges loads and expenses that would be higher than an S&P 500® index fund, for example. These charges enable Northwestern Mutual to provide the client with financial security by taking on risk associated with guaranteeing lifetime income. Northwestern Mutual must be able to continue to charge a reasonable premium to provide the benefits it promises over a potentially long duration, and as mentioned above, train its representatives, supervise the sale of its products, and compensate its sales force for their time and effort (which may extend over decades when servicing a client's annuity contract).[4]

Given the Department's previous recognition of the importance of access to lifetime income options after retirement due to the trend away from traditional defined benefit plans,[5] it is imperative that the Department not adopt regulations that could reduce access to and use of guaranteed income options offered by insurance companies to retirement investors. To this end, the Department should acknowledge that meeting a fiduciary standard is a process that involves evaluation of many factors, not just cost. Furthermore, as we point out in greater detail below, it should not treat variable annuities differently than fixed annuities for purposes of available prohibited transaction exemptions.

The Proposed Rule

Our specific comments on the provisions of proposed rule defining investment advice are as follows:

Clarify that Investment Advice and Related Definitions Do Not Apply to Welfare Benefit Plans

The definitions of "Investment Advice" as well as some of the terms used within such definitions (e.g., "Plan") in the rule could be read broadly enough to potentially capture activities associated with the sale of long-term care, disability or life insurance products to welfare benefit plans. Northwestern Mutual believes that the Department should limit the extent of its rulemaking to advice regarding retirement investments rather than including products or services that are not properly characterized as investments. Sales of insurance products to welfare benefit plans are not traditionally considered an investment. These products do not have any expectation of return on investment and are usually purchased without any expectation of such. Rather, these products are purchased in order to obtain a specified welfare benefit.

Since there is little substantive discussion of welfare benefit plans in the rulemaking, we believe that the inclusion of welfare benefit plans has not been adequately analyzed by the Department and expect that if the Department were to act in this area, analyses would be done regarding the need for

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[4] The annual expense load for a front loaded Northwestern Mutual RR Series Select Variable Annuity is 1.29 percent, with a front load of 4.95 percent. By comparison, the average front load mutual fund had an annual expense of 1.3 percent and average maximum front load charge of 4.95 percent. Source: Morningstar® Direct for Mutual Funds and Morningstar® for Variable Annuities, based on review of 4,156 A share class funds.

[5] See, e.g., Department of the Treasury and Department of Labor, Request for Information on Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253 (February 2, 2010).

regulation in a separate rulemaking. The Department should make clear in its final rule that a recommendation to purchase an insurance product intended to provide welfare benefits will not be treated as fiduciary investment advice.

Permit Advisers to Define the Investment Advice Reliance Time Period

As proposed, the definition of Investment Advice puts no limits on the period of time during which a retirement investor could reasonably rely on such investment advice, meaning that an adviser could theoretically be liable for transactional activity occurring well after the advice is stale due to any number of factors including market conditions, interest rate changes, issuer developments, etc. When Congress authorized the SEC to adopt a uniform standard of care between broker-dealers and investment advisers in the Dodd-Frank Act, it made clear that such standard would not require a broker-dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing the personalized investment advice about securities.[6] Further, Congress authorized the SEC to facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers-dealers.[7]

We suggest that the Department follow Congress' lead here, as the Dodd-Frank Act provides recent perspective on Congressional expectations regarding fiduciary obligations in a financial services space that overlaps the retirement market. The revised regulation should clarify that it does not establish a continuing fiduciary obligation when discrete transactional advice has been provided to the retirement investor. The Department should also allow parties to define the period over which the advice applies. Absent such an understanding or agreement, we believe that the following presumption should be applied: In order to retain its fiduciary status, advice must be acted upon within a timeframe reasonably contemporaneous with the recommendation, taking into account the type of recommendation and any facts and circumstances to the contrary.

Broaden the Investment Education Carve-out

The investment education carve-out from the definition of Investment Advice as proposed specifically precludes providing investment education recommendations regarding specific investment products or specific Plan or IRA alternatives, or recommendations on investment, management, or the value of a particular security or other property. We believe that goes too far. The financial services industry has effectively used the Department's current regulation under DOL Reg. § 2509.96-1 ("IB 96-1") to help educate retirement clients on investment choices for many years and we believe the current flexibility afforded by IB 96-1 should be retained in the new rule.

There are many situations in which retirement clients need very limited information or examples of investment or retirement alternatives. The format described in IB 96-1 provides a way for a retirement saver to receive low cost and discrete investment education. Often, a retirement investor is

[6] 15 U.S.C. §78o (k)(1).
[7] 15 U.S.C. §78o (l)(1).

interested in obtaining an investment allocation based on their individual characteristics and wants information to help them implement the allocation. Providing examples of products or funds that would fit within the individual asset classes of their allocation, at the very least, gives the investor a good starting point from which to ultimately take action. We have seen that if examples are described as such, the average retirement saver understands the meaning of what is being presented to him or her. The Department's proposed regulation essentially reduces the educational opportunities available to retirement savers. In our view, providing an investment allocation to prepare for retirement without any information on how to actually implement the strategy is useless if the goal is to ensure retirement investors save wisely.

If the Department believes, as Northwestern Mutual does, that many retirement savers could benefit from enhanced financial literacy, the Department should look for paths where retirement investors can receive more information, not less. By removing the ability to provide examples to a retirement investor, the Department puts that investor in an unfavorable position to make sound decisions regarding their investment allocation. In the final rule, the Department should embrace the approach to retirement investor education that was contained in its 2010 effort to modify the fiduciary definition, where it proposed to preserve IB 96-1 in its entirety without change.

Expand the Seller's Carve-out

The proposed rule contains a seller's exemption from fiduciary status for sales to plans with 100 or more participants or when dealing with fiduciaries managing at least $100 million in employee benefit plan assets if certain additional conditions are met, including that the plan fiduciary knows that they are not relying on impartial advice, no fee is being paid to the seller for the provision of investment advice, and the plan fiduciary is informed of the person's financial interest in the transaction. This carve-out does not apply to IRAs. We believe that with the protections afforded by the carve-out's conditions, it should be extended to IRA owners and small employer plans, consistent with the DOL's original approach to this exemption in 2010.

Preserving flexibility to provide non-fiduciary advice to IRAs and small plans would preserve choice and reduce cost for the retirement investor. To do otherwise could cause providers to limit these types of sales due to an unwillingness to accept fiduciary responsibility or comply with an overly burdensome prohibited transaction exemption. We also believe that retail retirement investors and small employers would be capable of understanding the written information required under the conditions and the circumstances that would make clear (e.g., the sale of proprietary products by a representative that has an exclusive relationship with the issuing firm) that they are not being provided impartial advice. Moreover, IRA owners and small plans would still be protected under the federal securities and state annuity laws' suitability standards and, as discussed more fully below, an extensive disclosure regime.

Failure to modify this provision for small employer plans means that there is virtually no way to provide them with valuable investment information. The Best Interest Contract ("BIC") exemption is inapplicable to participant-directed small plans and other carve-outs are too limiting to meet their needs.[8] Without a return to the 2010 approach to the seller's exemption for IRAs, there will be a significant misalignment with the securities laws, which recognize that retail investors can be sufficiently protected in a brokerage transaction even when receiving "incidental advice" in connection with that non-fiduciary relationship. For all of these reasons, we urge the Department to reconsider the scope of this carve-out.

The BIC Exemption

We are concerned that the BIC exemption could result in more customer confusion, increased consumer costs, loss of investor access to high-quality investment products, and curtailment of well-accepted business practices. Without a significant recrafting of the exemption to make it reasonably feasible to implement, we believe that many firms in the financial services industry will not use it. As a result, small IRA accounts will be squeezed out of the retirement advice space as advisers choose not to support unprofitable accounts resulting from these substantial new regulatory burdens or migrate to a fee-based advisory business that will be out of reach or not suitable for many retirement savers.

We urge the Department to take the time necessary to fully consider existing regulatory structures that are familiar to advisers and consumers and which could be more readily leveraged for the benefit of retirement investors. Our specific comments on the provisions of the BIC exemption are as follows:

Reformulate the Contracting Process

One significant departure from common business practices in the Department's proposal is that a contract be signed before the client receives any advice. When engaging in a binding agreement, normally the parties have had some opportunity to build a relationship that would warrant a consumer to want to contract with the service provider. This exemption doesn't give the client time to evaluate the adviser, ascertain the quality of their products and services, assess the individual adviser's knowledge and experience, and compare among different advisers. We expect many investors will be turned off by such an approach and walk away, frustrating the Department's objective of ensuring every American has access to retirement advice. At a minimum, the Department should allow the contract to be entered into as part of an account opening process.

Seeking to apply the BIC exemption to pre-existing accounts where subsequent investment advice recommendations are made will be incredibly disruptive, costly and confusing for clients. If the Department proceeds with its treatment of pre-existing accounts, at a minimum the exemption should allow for the use of negative consent when seeking to effect the contract with existing clients of the advisory firm. While new client relationships afford an understood opportunity to obtain client signatures, obtaining contract signatures from existing clients during the term of relationships is challenging and made more difficult given the timing contemplated in the proposal. It is an accepted

[8] Alternatively, and less preferable given the overly burdensome requirements of the BIC exemption as discussed below, would be to include small employer participant-directed plans within the scope of the BIC.

practice to use negative consent with existing clients for other purposes under the securities law and would strike a more appropriate balance than the exemption currently provides.[9]

There should also not be a specific requirement that the individual adviser sign the contract. Most advisers are agents of the financial institution in their status as independent contractors or employees. Industry practice is for the firm, which has ultimate responsibility to the client, to enter into account agreements and other types of contracts with the client. This practice also prevents the client from having to re-enter into the contract any time an individual representative may depart the firm or the account becomes serviced by call center staff.

Leverage Existing Disclosure Regimes Rather than Create Entirely New Disclosure Requirements

Northwestern Mutual believes that this exemption will be very difficult for financial services firms to use and comply with in a low-cost way for clients and in a manner that avoids customer confusion, in part due to the new proposed disclosure requirements. The Department has proposed new, very extensive and costly disclosures at the point of sale, annually and on an interactive website. Much of the information that would be required to be disclosed can only be obtained from third parties such as mutual fund families and advisers would have no way of verifying its accuracy. Further, entirely new systems would need to be created to capture all the information, individualize it to the client, update it periodically, and retain it over time. This will result in either a massive investment in systems (discussed below), the cost of which will undoubtedly have to be passed on to the retirement investor, or a determination by advice providers that they will either not support IRA account owners with small balances or transition to a fee-based advisory business, which is not an affordable option for many retirement investors.

Northwestern Mutual urges the Department to seriously examine ways to leverage existing disclosure requirements under other regulatory authorities before adopting a final rule. Many of the securities and insurance disclosure regimes currently serve to protect retirement investors when making investment decisions. Northwestern Mutual encourages the Department to work more closely with the SEC, FINRA and other federal and state regulators in order to incorporate the extensive body of client disclosures that already exist in this market.

For illustration of the extensive disclosures clients receive for securities products, we provide the following list for a variable annuity contract:

- A prospectus detailing all the features, risks and expenses of the variable annuity contract in a standardized format that allows comparison to other products, as required by the Securities Exchange Act

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[9] See, e.g., Regulation of Investment Advisers §2:7 (2014) (permissibility of obtaining negative consent from clients in connection with a change of control of the investment adviser).

- Prospectuses for each underlying fund invested in or available for investment under the variable annuity contract containing the features, risks and expenses of each fund in standardized format that affords fund comparison
- A summary disclosure detailing the guarantees, sales charges, withdrawal charges, and annual contract fees, and explaining the costs of taking money out of the contract, as required by the National Association of Insurance Commissioners (NAIC) Annuity Disclosure Model Regulation
- A suitability supplement which requires the client to explain their reasons for purchasing the annuity, their investment objective, and their time horizon for owning the contract, among other things, and which shows the client a comparison of the expenses of the contract they are purchasing and any annuity or insurance contract they may be surrendering in exchange, as required by FINRA Rule 2330

The Department asserts that current regulatory protections are inadequate, but the fact that some investors have not received advice in their best interests should not serve to indict an entire system, developed and refined over 80 years, to protect investors and help them achieve their investment goals. At most, it argues for unifying or enhancing current disclosure practices rather than creating an entirely new regime.

One such existing enhanced disclosure process is that required of registered investment advisers under the Investment Advisers Act of 1940. Registered investment advisers must make available to the public, through the SEC website, information about their advisory business. This enables the public to easily compare and evaluate advisory firms. In addition, registered investment advisers must deliver a Form ADV disclosure brochure in plain English to each client at the outset of the relationship and update the brochure annually (or sooner for more material events). In 2010, the SEC amended the Form ADV to require the disclosure to clients of detailed information about the individual who is providing them with investment advice. In combination, these disclosure include:

- The services the firm provides and the fees charged for the services
- Other compensation the firm receives from the sale of securities
- Any material conflicts of interest the firm has in providing advice or services to the client and how conflicts are addressed
- Material disciplinary information about the firm
- Other financial services activities in which the firm or its affiliates are engaged
- A description of the firm's Code of Ethics
- Information about the investment adviser representative's education, experience, compensation, disciplinary history, supervision and conflicts of interest

The SEC has been successfully regulating investment advisers functioning as common law fiduciaries under this regime since the 1940s. We suggest that the DOL give serious consideration to leveraging this disclosure approach as it has the advantage of being familiar to many financial services firms, provides more clarity as to expectations of the adviser, creates more consistency across the regulatory spectrum, and has a proven track record in this space.

The Department should also coordinate more with the Treasury Department regarding existing point of sale disclosures for IRAs. Treas. Reg. § 1.408-6 already requires disclosure of commissions, predictions of account growth and account expenses. In addition, it does not appear that the Department has analyzed the effectiveness of or duplication of disclosure caused by ERISA § 408(b)(2) and Forms 5500 schedules A and C. The latter disclosures are required at point of sale and annually. The financial services industry, including Northwestern Mutual, has spent considerable resources complying with these new disclosure requirements and seemingly without consideration, the proposed exemption creates completely new point of sale and annual disclosures without reference to the requirements that already exist.

Eliminate the Bias against Proprietary and Other Limited Ranges of Products

The BIC exemption requires that a financial institution face a higher standard of care than "best interest of the client" when presenting proprietary or other limited range of products to a retirement saver. The exemption requires that the financial service provider (i) make a specific written finding that the proprietary or limited range of products do not preclude it from providing advice in the client's best interest, and (ii) adhere to a higher reasonable compensation standard based on the value of the specific service provided to the retirement investor and not be in excess of the service's fair market value. We believe that the DOL's approach to these products is fundamentally flawed.

Inherent in the premise that retirement investors need greater protections when it comes to proprietary or other limited-range products is that they are somehow bad for consumers. We could not disagree more. The reality is that no firm is completely open architecture (i.e., allowing all products on its platform). The Department clearly recognizes this, as it assumed in its disclosure estimate for the exemption that "nearly all financial institutions using the PTE will limit their investment menus in some way and provide the limited menu disclosure."[10] Creating some product limits through various considerations helps refine the appropriate options for the retirement investor, making it easier for the client to take action as opposed to pondering a limitless investment selection.

We believe that well-designed proprietary insurance products (such as annuities) combined with a career agency system to distribute those products (such as what we have at Northwestern Mutual) offers tremendous benefits and long-term value for retirement clients. As discussed above, our mutuality allows us to deliver long-term product value while our exclusive agents are able to focus on learning the benefits and expenses of Northwestern Mutual's products and to match those products to clients' needs. Our career agency system enables us to have one of the best-trained sales forces in the

[10] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960, 21982 (April 20, 2015).

United States.[11] We are also able to compensate sales force management who supervise sales to ensure they meet clients' needs and are in clients' best interests.

There is no reason for the standard applied to Northwestern Mutual and its representatives to be higher when recommending Northwestern Mutual products. That only serves to limit consumer choice unnecessarily when the adviser already has to meet a best-interest standard of care. In fact, Congress considered this very point when authorizing a uniform standard of care between broker-dealers and investment advisers in the Dodd-Frank Act. It provided that the sale of proprietary or other limited range of products by a broker-dealer does not in and of itself result in a violation of the standard of care, choosing instead to authorize the SEC to promulgate a rule to require notice of such limitations and the acknowledgement or consent of the client.[12] We think that is a sensible approach.

Rather than creating new requirements for these circumstances, we suggest that the Department refer to the SEC's approach for registered investment advisers offering fiduciary advice on proprietary or other limited range of products. If an investment adviser only provides advice as to limited types of investments, it must disclose those investment types to the client and explain that its advice is limited in such regard.[13] Additionally, registered investment advisers that recommend to clients securities in which it or a related person has a material financial interest must disclose such practice, the conflict it creates and how the conflict is addressed.[14] There is no reason that the Department's and SEC's approaches could not be harmonized to create a uniform set of standards.

Use One Definition of Reasonable Compensation and Rely on Compensation Disclosure

The BIC exemption employs three different formulations of the "reasonable compensation" concept without defining it. At the same time, it does not account for the existing ERISA construct of "reasonable compensation." ERISA § 408(b)(2) and (c)(2) require that compensation paid to a party in interest for providing something of value or a service be reasonable. This requirement applies to a party in interest regardless of whether the party is a fiduciary or not. The regulation under ERISA § 408(b)(2) makes clear that the examination of reasonableness is a facts and circumstances test.

There is no evident reason why the Department has chosen to advance different formulations of this concept, while apparently seeking to heighten the bar given their varied wording, when the existing term already on the books would work. Acknowledging that this ERISA provision does not currently extend to IRAs, the Department could consolidate its terminology, facilitate administrative ease, and ensure greater clarity in understanding by adopting the existing standard as the one applicable in all cases under the exemption.

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[11] Northwestern Mutual ranked 11th on *Training Magazine*'s Training Top 125 for 2015 (Training Magazine, Feb. 11, 2015), and had the #1 ranked internship in the financial services industry, and the No. 5 ranked internship among all industries according to Vault.com. (Vault.com October 28, 2014).
[12] 15 U.S.C. §78o (k)(2).
[13] SEC Form ADV, Part 2A, Item 4 B.
[14] SEC Form ADV, Part 2A, Item 11 B.

In authorizing the SEC to adopt a uniform standard of care under Dodd-Frank, Congress made clear that traditional forms of compensation arrangements used by broker-dealers, including transaction-based commissions, could not in and of themselves be considered a violation of that standard of care.[15] While the Department proclaims that the exemption preserves traditional brokerage compensation practices, it has unleveled the playing field by expressing a clear preference for fee leveling, creating new standards for defending differential compensation and requiring a warranty that the firm's incentive compensation practices do not tend to encourage individual advisers to make recommendations not in the retirement investor's best interest.

We believe this approach fails to take into account existing approaches to manage the conflicts associated with compensation. Broker-dealers currently abide by FINRA non-cash compensation rules applicable to sales of mutual funds and variable products which require equal weighting of proprietary and non-proprietary products and inclusion of total production when providing non-cash incentives. FINRA has also recently issued a conflicts report that has substantial recommendations for managing conflicts related to compensation. Firms provide website and written disclosure with respect to their revenue sharing partners and payments. Prospectuses contain various disclosures regarding compensation. Registered investment advisers and their investment adviser representatives provide detailed disclosure to clients in their respective ADV brochures of conflicts related to compensation.

If the Department believes that firms should make a representation to retirement investors regarding their compensation, then we believe that representation should go to the reasonableness of the compensation received under the facts and circumstances using the existing ERISA concept and not be limited to arrangements tied to the individual client. Further, the Department has not demonstrated that the disclosure model used by the SEC for registered investment advisers has failed retail investors. We believe upfront compensation disclosure to retirement investors following that model fully serves the interests of the Department in protecting retirement savers and should be incorporated into the final exemption language.

Reliance on the BIC Exemption Should Not Trigger Registered Investment Adviser Status

Another opportunity to further coordinate with other regulatory authorities concerns the requirement in the proposed exemption that any financial representative and firm that wishes to use the BIC exemption acknowledge that they are acting as a fiduciary in the client contract. Currently, broker-dealers navigate the line between that status and the fiduciary investment adviser status by only providing advice that is solely incidental to the conduct of the brokerage business and receiving no special compensation for that incidental advice, in accordance with an exclusion to the definition of investment adviser.[16] Admission of fiduciary status in the BIC exemption contract calls into question whether the broker-dealer is now providing more than incidental advice and thus must register as a registered investment adviser with the SEC. This is not an issue that the Department can resolve on its own. We urge the Department to coordinate with the SEC on a resolution that does not trigger RIA

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[15] 15 U.S.C. §78o (k)(1).
[16] 15 U.S.C. §80b-2(a)(11).

status – a contrary result would further diminish the utility of this exemption and prove more costly to the retirement investor.

Eliminate the Data Request Authority

The data request conditions of the exemption require that a financial institution provide the Department, upon request, various sets of quarterly data including inflows, outflows, holdings and performance returns over the previous six years. The Department states the purpose of this requirement is to determine the proposal's effectiveness. Northwestern Mutual believes that the Department will not able to determine the overall effectiveness of the exemption from the data required to be maintained. Instead, we believe the data request provision is intended to further the Department's premise that low-cost solutions are the "best" for clients. As noted above, we believe that this premise is flawed, and therefore that the benefits associated with this burdensome series of requirements is questionable.

As noted above, advice in a client's best interest should take into account many factors in addition to cost. Furthermore, working with an adviser can assist clients in ways that may not be adequately captured by measuring performance or costs such as (i) selecting the right asset allocation based on the client's total wealth; (ii) making tax efficient decisions to improve the client's net return, and (iii) withdrawing the right amount from an investment to make it sustainable over someone's lifetime. These factors, according to Morningstar, can add as much as 22 percent to the retirement income a client can receive from their assets.[17] Because these benefits that clients gain from their advisers cannot be captured in gathering masses of quantitative data about account performance and cost, we believe the Department should delete this data request provision from the final exemption. To the extent it wants to evaluate relevant data related to the exemption, the Department will know who is using it by virtue of the notice requirement and can obtain appropriate information upon examination.

PTE 84-24

Our comments on the PTE 84-24 amendments are as follows:

Retain Variable Annuities within the Exemption

In the proposed changes to Prohibited Transaction Exemption 84-24, the Department revokes the coverage of variable annuities and mutual funds sold to IRAs under the exemption with the intent of requiring those transactions use the BIC exemption. Fixed annuities that are not securities remain eligible to rely on the PTE 84-24. The Department's basis for drawing a distinction between the two types of annuities is founded in its belief that variable annuities are more like mutual funds and other securities than like insurance products. We disagree with this conclusion and urge the Department to reconsider its treatment of variable annuities.

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[17] David Blanchett and Paul Kaplan, Alpha, Beta, and Now . . . Gamma, 1 Journal of Retirement 29 (Fall 2013).

Variable annuities and mutual funds are fundamentally different products when you consider the nature of the lifetime income guarantee and are most similar to fixed annuities in many respects. They both include fixed options with interest guarantees, mortality-based investment guarantees, and retirement income guarantees, features not offered by mutual funds or other securities. Both types of insurance contracts require the insurance company to bear the longevity risk that the investor will outlive the premium outlays and investment returns, another distinction from mutual funds and other securities. Consequently, these insurance products are far more similar to each other than to mutual funds.

It should also be noted that the Department has not demonstrated why the PTE, which has been in place for more than 30 years, as enhanced with the impartial conduct standards as proposed, would not sufficiently protect the investing public with respect to variable annuity sales. The current exemption has robust disclosure requirements, including clear disclosures regarding compensation. As previously discussed, those disclosures are supplemented by a whole host of other disclosure materials that a retirement investor receives today when purchasing a variable annuity. Accordingly, the Department should reverse course and preserve unfettered access by consumers to these beneficial products.

Revise or Eliminate the Definition of "Insurance Commissions"

The term "insurance commissions" is newly defined and narrowed by the Department in this exemption to limit what traditionally has been viewed by the Department as a commission and generally has been used to compensate sales. It would include renewal fees and trails, but specifically exclude other common revenue sources including revenue sharing, administrative and marketing fees, and other payments from third parties. This restrictive definition of commissions would apply to both Plans and IRAs, diminishing the utility of the exemption substantially.

We believe that this new definition is an unwarranted retreat from the interpretation of that term for more than 30 years. The term should include all of the customary forms of compensation and revenue (including those it currently excludes) that it has historically been viewed to include absent any showing by the Department of substantial abuse. Alternatively, the Department could choose to withdraw the definition. Maintaining the long-established view of this term could be coupled with the type of compensation disclosure to clients discussed above. Taking that approach would ensure a fully informed consumer with continued access to high-quality guaranteed lifetime income products.

Extend the Effective Date of the Rule and BIC Exemption

The Department has proposed that the rule and the BIC exemption become effective eight months after publication in the *Federal Register*. Northwestern Mutual submits that eight months is not a realistic period of time to train employees and agents, build new computer systems, create additional disclosure documents, create new compliance programs and supervisory procedures, and establish new fiduciary processes, to name some of the actions that will be required. Under the two most recent new disclosure regimes promulgated by the Department, Form 5500 Schedule C and the regulations under

ERISA § 408(b)(2), two years was necessary for Northwestern Mutual to build and implement compliant systems. This proposal is significantly more expansive and burdensome and we believe it would realistically take three years to become compliant. We believe our expected timetable to implement this rulemaking is not unique when compared to firms of our size and urge the Department to adopt a manageable compliance period for the industry.

Reconsider the Cost/Benefit Analysis

We believe the Department has substantially underestimated the cost of people, processes and systems necessary for firms of our size to implement this rulemaking as proposed.[18] Our current high-level estimate of costs to implement this rulemaking within our enterprise is in a range of $13-15 million. Our current high-level estimate of annual costs to comply with this rulemaking is $3-4 million. As the Department considers revisions to its rulemaking, it should reconsider its cost/benefit analysis in light of specific cost estimates provided during this comment period to ensure it remains justified in moving forward with this effort, and if so, revise its final rulemaking to more appropriately balance the increased costs to industry and consumers.

Once again, we appreciate the opportunity to provide input on this proposal. If you have any questions regarding our comments or if we can be of any assistance in your consideration of the issues summarized above, please contact the undersigned or John Dunn at 414-665-5443 or johndunn@northwesternmutual.com.

Very truly yours,

Raymond J. Manista

Raymond J. Manista
Senior Vice President, General Counsel
and Secretary

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[18] In the Department's Scenario B cost analysis, which it believed was a more reasonable but still overstated cost estimate as compared to its Scenario A cost analysis, the Department estimated that a large firm would incur $1.1 million of start-up costs and $436,000 of ongoing annual costs to implement and comply with this rulemaking. Fiduciary Investment Advice Regulatory Impact Analysis at 164-169 (April 14, 2015).