April 17, 2017

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

Dear Sir or Madam:

Re: Definition of the Term "Fiduciary" Rule Examination – RIN: 1210-AB79

Alaska USA Federal Credit Union (Alaska USA) appreciates the opportunity to comment on the U.S. Department of Labor's (DOL) Fiduciary Rule. Alaska USA is a federally chartered credit union with $7 billion in assets and serves over 600,000 members.

Alaska USA supports the rule's goal to protect consumers, and ensure that investment advice is impartial and in the consumers best interest. The structure of credit unions, as member-owned cooperatives, aligns credit union advice and product offerings with the best interests of their members. The rule's complexity and broad reach, however, leave many unanswered questions for credit unions regarding applicability, relevant exceptions, and potential new risks.

Rule Applicability to Credit Unions

Alaska USA offers non-deposit investment products in accordance with the National Credit Union Administration's (NCUA) Letter to Credit Unions 10-FCU-03 (attached). As described in the Letter, "No employee of a federal credit union may provide investment advice that would subject the employee or credit union to federal or state securities laws. A federal credit union, however, may offer investment advice services to its members by establishing a shared employee arrangement with a third-party registered investment adviser." In order to provide these services, Alaska USA partners with a third-party broker dealer, and employs investment professionals as dual employees. The DOL's guidance thus far, has not specifically addressed whether or not the rule and its exemptions apply to dual employee arrangements. Specific clarification is needed to determine when credit unions, and credit union employees, are excluded as a fiduciary under the rule.

The rule's expansive definition of fiduciary "investment advice" creates many questions for credit unions about when the rule would be triggered. Normal NCUA-accepted activities that traditionally fell outside the scope of such advice, are now potentially included. Since these activities are not considered investment advice under state and federal securities laws, credit unions have always been able to provide valuable assistance to members with retirement-related questions, without the risk of being considered a fiduciary under the DOL's definition. Overlapping or conflicting regulatory definitions of what constitutes investment advice is problematic and complicated. Many questions still exist about which activities the rule would apply to, and when the rule could be triggered by credit union employees.

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Rule Impact and Unintended Consequences

Due to a lack of statutory authority for certain account types, responsibility for rule enforcement will fall to investors and attorneys through private legal action. The risk associated with this form of enforcement is concerning and difficult to quantify. Class action litigation could rise in credit unions, due to their partnering with investment providers, if plaintiffs bring an action against multiple parties. Such class action defense would generate additional costs, which are ultimately paid for by credit union members. Unfortunately, credit unions may evaluate the risks of collaborating with third-party investment providers, and determine that it is not worth the exposure, or burdensome compliance expense.

In preparation for the rule's implementation, investment providers have made many changes to their service offerings, which have already negatively impacted low- and middle-income savers. Large investment firms have pushed their clients into less scrutinized investment solutions, and terminated many small accounts altogether. As this trend continues, the impact of this rule will largely be felt by those with smaller account balances as they experience a reduced ability to receive basic financial advice.

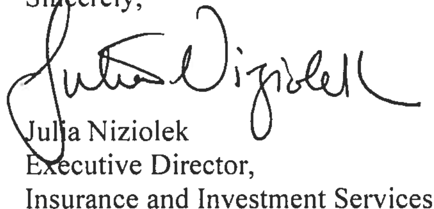
Other investment providers have implemented significant changes in an effort to continue offering as many different types of investment products as possible. We believe this is preferable over forcing clients into portfolios that are less risky for a company, without consideration as to the best fit for the client. Advisors have experienced a reduction in the number of mutual fund families and annuity products offered by brokers. Basic and useful information on marketing materials has been scaled down for fear of making inadvertent 'recommendations' under the rule. Mandatory assessment tools have been implemented, which may not add value to the planning process, but nonetheless are required in order to produce additional documentation and protect the advice provided. Significant resources have been spent to implement these changes, which have proven to narrow investment choices and slow planning processes.

Conclusion

True impartial financial advice considers each person's individual financial goals, risk tolerance, and unique considerations. It requires a large breadth of tools and resources, and the ability to present diverse solutions and weigh their costs and benefits. Credit unions provide savers at all income levels with access to a large range of financial products and services, and investment and retirement advice. However, the rule has already narrowed the investment options available, and increased the risk associated with providing retirement solutions. Burdensome compliance and increased likelihood of legal action is misplaced on credit unions who have historically been good stewards of members' resources and trust.

All consumers should receive impartial, comprehensive retirement and investment advice. However, the rule, in its current form, has a long way to go before it will achieve its intended protections, and should be reevaluated to ensure it regulates the proper entities. We support efforts to further analyze the rule's economic, legal and consumer impact, especially as it relates to credit unions and their members.

Sincerely,



Julia Niziolek
Executive Director,
Insurance and Investment Services

Enclosure

NCUA LETTER TO FEDERAL CREDIT UNIONS

NATIONAL FEDERAL CREDIT UNION ADMINISTRATION
1775 Duke Street, Alexandria, VA 22314

DATE: **December 2010** **LETTER NO.: 10-FCU-03**

TO: **Federal credit unions**

SUBJ: **Sales of Nondeposit Investments**

Dear Board of Directors:

The purpose of this letter is to provide guidance to federal credit unions on the establishment and operation of third party brokerage arrangements for sales of nondeposit investment products.[1] This letter supersedes and replaces NCUA's Letter to Credit Unions No. 150 (December 1993) (Letter No. 150), which contains NCUA's previous guidance to credit unions on the sales of nondeposit investments.

NCUA needs to update its guidance because of several changes that have taken place since Letter No. 150 was issued in 1993. First, NCUA replaced the group purchasing activities rule with the incidental powers rule, eliminating some restrictions on the compensation a federal credit union may receive for its finder activities. *See* 12 C.F.R. Part 721. Second, the NCUA Office of General Counsel has issued several legal opinion letters since 1993 regarding the sale of nondeposit investments that add to or refine the previous guidance.[2]

Background

Nondeposit investments, including stocks, bonds, mutual funds, and variable annuities, are subject to a complex set of federal and state securities laws. In particular, federal securities laws require that any entity "engaged in the business of effecting transactions in securities for the account of others," must register as a securities broker with the SEC and comply with SEC broker-dealer regulations. *See* 15 U.S.C. 78c.

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[1] NCUA issued a proposed Interpretive Ruling and Policy Statement (IRPS) to address the sale of nondeposit investment products in 2005. This rulemaking was not finalized because securities regulations for federal credit unions are under consideration by the Securities and Exchange Commission (SEC). *See*, n.3.

[2] *See e.g.*, OGC Op. 01-0742 (August 31, 2001); OGC Op. 02-0277 (May 24, 2002); OGC Op. 03-0308 (May 1, 2003); OGC Op. 03-0736 (January 19, 2005); OGC Op. 09-0511 (June 3, 2009).

Historically, banks had enjoyed a "blanket exemption" from SEC's broker-dealer registration requirements until Congress repealed this broad exemption in the Gramm-Leach-Bliley Act of 1999 (GLBA). GLBA sets out specific exemptions for certain bank activities.

The Financial Services Regulatory Relief Act of 2006 (FSRRA) required the SEC and the Federal Reserve to jointly issue a regulation governing the broker exemptions. FSRRA also amended the definition of the term "bank" to include thrifts or other savings associations insured by the Federal Deposit Insurance Corporation (FDIC). In 2007, the SEC and the Federal Reserve issued Regulation R to implement the GLBA broker exemptions relating to third party networking arrangements, trust and fiduciary activities, sweep activities, and safekeeping and custody activities. *See* 12 C.F.R. Part 218; 17 C.F.R. Parts 240 and 247; *see also* 72 Fed. Reg. 56,514 (Oct. 3, 2007). Regulation R does not apply to federal credit unions.[3]

Federal credit unions have limited powers and are not authorized under the Federal Credit Union Act (the Act) to sell nondeposit investments directly to their members. Further, federal credit unions cannot register as broker-dealers because the SEC requirements, including capital and reserve requirements, are inconsistent with those NCUA and state supervisory authorities place on federal credit unions. Federal credit unions, therefore, must structure their securities activities carefully to strictly meet the terms of SEC guidance applicable to federal credit unions contained in a "no action" letter. *See, eg.,* Chubb Securities Corp., 1993 SEC No-Act. LEXIS 1204 (Nov. 24, 1993) (Chubb Letter).

The most common way for federal credit unions to offer nondeposit investment products to their members is by employing third party brokerage arrangements.[4] Federal credit unions involved in third party brokerage arrangements must have a written agreement clearly outlining the duties and responsibilities of each party in the arrangement. Generally, there are three permissible ways to structure a third party brokerage arrangement. First, a credit union may wholly or partly own a credit union service organization (CUSO) that sells nondeposit investment products, primarily to credit union members.[5] Based on the SEC's review of the extent of the CUSO's involvement in the

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[3] Although Regulation R does not apply to federal credit unions, SEC has recognized that third party brokerage arrangements are permissible for federal credit unions and is considering the possibility of a separate federal credit union regulation. The preamble to Regulation R notes: "While the GLBA's "bank" exceptions do not by their terms apply to federal credit unions, [requests for similar exemptions for federal credit unions] are under consideration by the Commission, which is the agency with authority to address these matters. The Commission notes the existence of SEC staff positions with regard to networking relationships between a federal credit union and a broker-dealer and is not addressing this issue at this time. See, e.g., Chubb Securities Corp., 1993 SEC No-Act. LEXIS 1204 (Nov. 24, 1993)." 72 Fed. Reg. 56,514, 56,516, n.26 (Oct. 3, 2007).

[4] State chartered federal credit unions must look to their own state law for authority to engage in third party brokerage arrangements.

[5] Third party brokerage arrangements with a CUSO can be bilateral or multilateral. Bilateral arrangements involve an agreement between a federal credit union and a registered CUSO. Multilateral arrangements involve an agreement between a federal credit union, an unregistered or registered CUSO

purchase and sale of nondeposit investment products, the CUSO may have to register with the SEC as a broker-dealer.

Second, a federal credit union may use a shared employee arrangement with a third party brokerage firm. In a shared employee arrangement, a "dual employee" operates as both a federal credit union employee and an employee of a third party broker. A shared employee may sell nondeposit investment products to the credit union's members on its premises or from another location; however, it must be clear that when a shared employee is selling nondeposit investment products, the employee is acting exclusively in his or her capacity as an employee of the third party broker, not the credit union. *See* OGC Op. 01-0742 (Aug. 31, 2001).

Third, a federal credit union may act as a finder. The incidental powers rule allows a federal credit union to bring, through a networking agreement or other means, a registered third party broker to its members for the sale of nondeposit investment products. 12 U.S.C. §1757; 12 C.F.R. §721.3(f). A federal credit union may earn income from finder activities. 12 C.F.R. §721.6; OGC Op. 02-0523a (May 24, 2002). The SEC permits credit unions to receive transaction-related compensation from the third party broker without triggering the broker-dealer registration requirements, as long as the brokerage arrangement adheres strictly to the terms of the Chubb Letter.

Guidelines for the Sales of Nondeposit Investments

I. *Scope*

The guidelines in this letter provide assistance and direction to federal credit unions offering the sale of nondeposit investment products to their members through third party brokerage arrangements, including:

- Sales by a CUSO wholly or partly owned by a federal credit union.
- Sales by a "dual employee" operating as both a credit union employee and an employee of a third party broker.
- Sales resulting from a federal credit union bringing a registered third party broker to its members through a networking agreement or other means.

II. *General Guidelines*

Federal credit unions must comply with all the applicable laws, regulations, and sound business practices in the sale of nondeposit investment products through third party brokerage arrangements. The credit union's directors should, as with any business

or CUSOs, and a registered broker or brokers. A CUSO in a multilateral brokerage arrangement will likely have to register with the SEC as a broker-dealer, depending on the extent of its involvement in the securities activities. *See* SEC "Guide to Broker-Dealer Registration" (online at http://www.sec.gov/divisions/marketreg/bdguide.htm).

activity, fully evaluate the risks involved with nondeposit investment activities, including legal risks, reputation risks, and economic risks.

A. Due Diligence

Federal credit unions should take care to select an appropriate broker before entering into a third party brokerage arrangement for the sale of nondeposit investment products. In selecting a third party broker, credit unions should:

- Ensure the broker can provide the services credit union members need.
- Review the broker's financial statements and capital adequacy.
- Determine if the broker can adequately supervise its sales representatives at the credit union's location.
- Seek references for the broker and the sales representatives that will be working at the credit union (preferably other depository institutions) and speak with those references.
- Conduct background and Financial Industry Regulatory Authority (FINRA)[6] checks on the broker's principals and the sales representatives that will be working at the federal credit union. For example, FINRA BrokerCheck® is a free resource federal credit unions can utilize to help research the professional backgrounds of current and former FINRA-registered brokerage firms and brokers.[7]
- Retain key documentation reflecting its due diligence process in selecting a broker for a third party brokerage arrangement. Documentation should be made available to NCUA examiners, if necessary.

B. Credit Union Policies, Procedures and Agreements

The federal credit union's board of directors should adopt written policies and procedures concerning third party brokerage arrangements to ensure compliance with applicable law and regulation and to ensure consistency with these guidelines. Credit unions should consider engaging legal counsel to evaluate their policies, procedures, and contractual agreements.

Federal credit unions must have a written agreement outlining the duties and responsibilities of each party in a third party brokerage arrangement. Contracts with

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[6] The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization of securities firms and the successor to the National Association of Securities Dealers, Inc. (NASD).

[7] FINRA BrokerCheck® is online at http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/. NCUA does not require or endorse FINRA BrokerCheck® and we are providing this link for information purposes only.

third party brokers should reflect the federal credit union's policies and procedures regarding brokerage arrangements. At a minimum, the credit union's policies, procedures, and contracts should address the following:

- *The features of the sales program.* Credit union policies and agreements should describe the types of products that a broker may offer through the third party brokerage arrangement. For all products, the credit union should identify specific laws, regulations, and any other limitations or requirements, including qualitative considerations, that will expressly govern the selection and marketing of products a third party broker may offer. Qualitative considerations include an analysis of the level of complexity and volatility in the investments that the credit union will permit the broker to offer members. For example, comprehensive qualitative investment data (e.g., key ratios, dollar amounts, risk parameters, etc.) should be prepared and presented to the federal credit union's management and board of directors for review.

- *A description of the responsibilities of the credit union and the third party broker.* Credit union policies and contracts should make clear that the third party broker is primarily responsible for ensuring that the nondeposit sales function is conducted in compliance with all applicable laws, regulations, and policies. The credit union should maintain the right to check for compliance and access member accounts for verification and oversight.

- *Indemnification by the third party broker.* Credit unions should require contracts with third party brokers to include provisions to indemnify the federal credit union for any monetary damages arising from nondeposit sales activities.

- *The roles of credit union, third party broker, and dual employees.* Policies should describe the roles of credit union employees in nondeposit investment activities, including the limits on their activities. Policies and contracts should also identify and describe the duties of the broker's sales representatives and indicate who will supervise the sales representatives. If the third party brokerage arrangement involves the use of a dual employee, credit union policies should include job descriptions for the duties performed for the credit union and the nondeposit investment sales duties performed for the third party broker. Credit unions should seek an indemnification agreement from the broker, as described above, to limit credit union liability arising from employee misconduct related to nondeposit investment activities conducted by a dual employee.

- *The location of nondeposit sales.* Credit union policies should describe where nondeposit sales may take place and how those sales will be separated from deposit-taking activities.

- *The use of credit union member information.* Policies should describe the information that may be transferred between the credit union and the third party

broker or the broker's sales representative. The policies and contracts should describe how such information will be used, how the information will be safeguarded, and the associated privacy notices to be provided to members. The policies and contract terms should comply with NCUA's Privacy of Consumer Financial Information Rule and NCUA's Security Program Rule. 12 C.F.R. Parts 716 and 748. The third party broker should agree in writing to comply with the credit union's policies on information practices.

- *Termination of the contract.* Contracts should contain a provision that permits the credit union to terminate the contract for both cause and for the convenience of the credit union. Failure by the third party broker to supervise its sales representative adequately should be included as a specific for-cause reason for contract termination.

- *Compliance with the requirements of all applicable law and regulation.* Credit unions should maintain programs to monitor compliance by the third party broker, its salespeople, and other entities involved in the sales of nondeposit investments. The compliance function should be performed independently of any nondeposit investment product sales and management. At a minimum, the compliance function should include a system that monitors member complaints and periodically reviews and randomly samples member account activity to look for evidence of abuse. Credit unions should also provide regular, periodic compliance reports to their board of directors to ensure appropriate oversight.

C. Conduct in Third Party Brokerage Arrangements

Federal credit unions offering the sale of nondeposit investment products through a third party brokerage arrangement should do so in a manner that does not mislead or confuse members as to the nature or risks of these uninsured products. To avoid member confusion, third party brokers should not offer investment products with a product name that is intentionally similar to the federal credit union's name.

If the third party brokerage arrangement involves the use of shared employees, the dual employee should not use any materials that could potentially confuse a member as to the capacity in which the dual employee is functioning. For example, dual employees should use separate business cards for their credit union and investment sales functions. Likewise, dual employees should use separate stationery for credit union correspondence and investment activity correspondence.

When selling, advertising, or otherwise marketing uninsured investment products to members, members must be informed that the products offered:

- are not federally-insured;

- are not obligations of the credit union;

- are not guaranteed by the credit union;

- involve investment risk; and
- if applicable, are being offered by a dual employee who accepts deposits on behalf of the credit union and also sells nondeposit investment products on behalf of a third party broker.

These disclosures should be made in writing and in a location and type size that are clear and conspicuous to the member. Oral disclosures should also be made as part of any oral sales presentation.

Credit union policies should specifically address the locations at which sales will take place. The credit union's routine deposit-taking activities should be physically separated from nondeposit investment sales functions to emphasize that important differences exist between these activities, such as the degree of risk and insurability. If limited office space makes physical separation of these functions impractical, nondeposit investment sales and deposit-taking may be conducted in close proximity to each other if appropriate disclosures, as described above, are made to members.

D. Investment Advice

No employee of a federal credit union may provide investment advice that would subject the employee or credit union to federal or state securities laws. A federal credit union, however, may offer investment advice services to its members by establishing a shared employee arrangement with a third party registered investment adviser. The dual employee may provide investment advice on behalf of the third party, but not the credit union.[8] A federal credit union may also act as a finder[9] to introduce or otherwise bring together an outside vendor of investment adviser services to its members or wholly or partly own a CUSO that provides investment adviser services. OGC Op. 09-0511 (June 3, 2009). A CUSO may have to register with the SEC as a Registered Investment Adviser (RIA). 15 U.S.C. §80-3(a).

III. *Conclusion*

Compliance with this letter is essential for credit unions to establish third party brokerage arrangements properly and prevent triggering SEC's broker-dealer registration requirements. By adhering to these guidelines, credit unions will also help to avoid member confusion about the risk and uninsured nature of nondeposit investment products. Prudent management of securities activities will ensure credit

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[8] A federal credit union offering investment advice services through the use of a shared employee with a third party registered investment adviser should adhere to the guidance regarding dual employees found in Part C of this letter.

[9] This authority is pursuant to the incidental powers rule, which defines "finder activities" as "activities in which [a federal credit union] introduce[s] or otherwise bring[s] together outside vendors with [its] members so that the two parties may negotiate and consummate transactions". 12 C.F.R. §721.3(f). Under the Investment Advisers Act of 1940, "finders," by engaging in solicitation activities, may themselves have to register as advisers or may need to conduct their activities under the oversight of a registered adviser. *See* 17 C.F.R. §275.206(4)-3.

unions are offering their members nondeposit investment options in a safe and sound manner.

If you have any questions related to this letter, you should contact your regional office or district examiner.

Sincerely,

/S/

Debbie Matz
Chairman