



9800 Fredericksburg Road
San Antonio, Texas 78288

July 21, 2015

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
(Attention: D-11712)
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

Re: Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32); Proposed Best Interest Contract (BIC) Exemption (ZBIN 1210-ZA25); Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-24 and PTE 77-4

Ladies and Gentlemen:

In the interest of our members – the men and women of the U.S. military and their families – United Services Automobile Association (USAA)¹ is pleased to provide our comments to the Department of Labor Employee Benefits Security Administration (Department) with respect to the requests for comment on the above-noted proposed rulemakings (the Proposal).

We agree with industry efforts to protect the interests of investors by assuring financial services companies and their advisers avoid conflicts of interest and act in the best interest of investors. USAA has a 93-year history of serving the military and their families and has a unique business model that puts our special customer base first. We have concerns that the Department's Proposal will harm our military members by resulting in fewer options for advice and information, limited investor choice, less acquisition flexibility, as well as more costs for our members, especially active duty military members. Specifically, as a result of the Proposal: (1) USAA's military members may not receive the level of service and convenience to which they are accustomed from USAA; (2) USAA members may not be able to receive important educational information; and (3) the Proposal will limit consumer choices by eliminating viable USAA product and service options that have been developed to serve the needs of our unique customer base.

Background on USAA

USAA is a membership-based association, which together with its family of companies, serves present and former commissioned and noncommissioned officers, enlisted personnel, retired

¹"USAA" is used to refer collectively or individually, as the case requires, to United Services Automobile Association and its applicable affiliates.

military, and their families. Since USAA's inception in 1922 by a group of U.S. Army officers, we have pursued a mission of facilitating the financial security of our members and their families by providing a full range of highly competitive financial products and services, including personal lines of insurance, retail banking, and investment products. Our core values of service, honesty, loyalty, and integrity have enabled us to perform consistently and be a source of stability for our members and customers, even in the midst of the recent financial crisis.

USAA's member service representatives offer a wide range of financial and insurance solutions to our members based upon a member's needs. To meet the unique needs of our members, we have developed a multi-faceted approach through which we communicate with our membership. Although we have branch offices where our members can have an in-person discussion with a representative, USAA primarily uses telephone call centers to provide a convenient and centralized location for our members to discuss USAA's products and services and financial planning. USAA also utilizes "video chat" and similar technologies so that the members get the benefit of "in person" meetings despite deployment, which may be thousands of miles away. Finally, USAA uses internet-based and mobile technology so that members can get some of the same services (*e.g.*, advice on asset allocation) that they might otherwise get through in-person, telephonic or video chat interactions.

The primary vehicles impacted by the Proposal through which we serve our clients are individual retirement accounts and individual retirement annuities (IRAs) and Coverdell Education Savings Accounts (Coverdell ESAs). Currently approximately 1.1 million USAA members have nearly \$60 billion in USAA IRA products. Each of these vehicles are complemented by free financial advice and planning services for our members, many of whom do not have account balances at levels at which they could receive advice of any kind (free or paid) from other financial services providers.

USAA's Recommended Changes to the Proposal

We believe that the Proposal, particularly the BIC Exemption, will significantly limit USAA members' choice and access to products as well as increase their costs. USAA has identified three specific shortcomings of the Proposal that will prevent our members from receiving the benefits of the Proposal and will make it difficult to achieve our goals of providing our members with a high level of service and choices at low costs.

1. USAA's military members may not receive the level of service and convenience they are accustomed to from USAA as a result of the BIC PTE.

The Proposal would significantly inhibit USAA members, especially active duty military personnel, from receiving services prior to and during deployment. Active duty and reserve military personnel are often deployed unexpectedly and on short notice with limited or no accessibility for extended periods, often precluding them from managing personal finances. To meet the unique needs of our members, USAA has designed its member services and call centers to be flexible, convenient and accessible.

USAA is concerned that several conditions of the Proposal, such as the tri-party agreement requirement, will make it impossible for USAA to deliver essential services required by our members, particularly our active duty service members, without processing a non-exempt prohibited transaction.

USAA recommends several changes to these exemptions.

- a. **Insert disclosures in existing documents.** We agree that it is important to ensure that current and prospective account owners of IRAs, annuities, and Coverdell ESAs as well as plan participants receive the written disclosure required by the proposed BIC Exemption. However, we believe it is not necessary or beneficial to our members to require a new document (*e.g.*, the tri-party agreement) to deliver this BIC language. Existing regulations require delivery of IRA and Coverdell ESA custodial agreements and disclosure statements to IRA account owners. Therefore, rather than require a separate document, we urge the Department to allow the contractual requirements of the BIC Exemption to be added to the applicable IRA custodial agreement and disclosure statement and for individual retirement annuities, to the IRA disclosure statement. We feel strongly that including all relevant information in one centralized agreement would be the most straightforward solution for our members. Delivering multiple documents to customers related to the same transaction will be confusing and overwhelming and add unnecessary stress to our service members in times of deployment.
- b. **Adopt an “access equals delivery” model.** The Department should adopt an “access equals delivery” standard similar to the accepted practices used by the Securities and Exchange Commission for delivery of prospectuses. Electronic communication is now accepted and widely used. We urge the Department to adopt this delivery method for all disclosures, including annual disclosures, required under the Proposal. Access to documents via an Internet link also allows for information to be accurate and updated as appropriate. It allows consumers constant access to documents without having to keep a physical copy in a file, which is particularly difficult if not impossible for military members on deployment.
- c. **Two-party agreements for call center models.** The Proposal requires that the customer, USAA, and the USAA representative enter into a tri-party agreement. The proposed tri-party agreement does not provide any additional protections to consumers when compared with a two-party agreement between the customer and USAA and would likely increase cost and decrease availability of advice. This is especially true in a call center model. Unlike some business models that assign a unique registered representative or annuity salesperson to each customer and compensate on commission, as discussed above, USAA operates in a call center environment where generally no single representative is assigned to a member. The Proposal does not consider that in a call center environment, each time a member calls, he or she will speak with a different representative and a new tri-party agreement would need to be executed before each call. Therefore, the Proposal should be amended, so that in the case of a call center model, a two-party agreement between the firm and the customer, not a tri-party agreement, would be all that is needed.

- d. **Electronic signatures.** The Proposal requires a *signed* agreement. The BIC PTE should be clarified so that a “signature” can be satisfied by physical signature or by negative consent, electronic digital signature, verbal agreement or some other reasonable alternative means. In an age where consumers are demanding agility and seamless experience (e.g., mobile banking and “robo” advice), a physical signature takes the industry back in time and does not meet the expectations of consumers. Electronic signature is especially important for our members who are stationed across the globe in places where mail may be especially inconvenient or slow.

These changes would allow USAA to continue to serve military members, especially those requesting advice immediately before a deployment or even while on deployment to a remote location or war zone.

2. USAA members may not be able to receive important educational information because the Proposal’s definition of “Investment Advice” is too broad and the carve-outs are too narrow.

USAA is concerned that the Department’s proposed definition of “investment advice” is so broad that even basic information or general discussions regarding what products and services USAA offers will be considered investment advice.

A key component of the proposed definition of investment advice is that a “recommendation” be made with regard to the purchase, sale or holding of a security. A recommendation is a communication that, based on the facts and circumstances, “would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” So applied, this broad definition appears to render USAA a fiduciary subject to the exemption requirements in situations where USAA, among other things, merely provides information about its products and services, provides brochures, educational and marketing materials, and educates members about certain issues. USAA feels strongly that these materials facilitate the financial security of our members. For example, if USAA includes an article about annuities in its quarterly publication to members, or sends a marketing piece about IRAs, these should not be considered advice. Capturing such informational or educational activities will unnecessarily limit the availability of services to the detriment of our members in situations when they have no need for the protections afforded by the proposed exemptions. Therefore, USAA urges the Department to revise the Proposal to clarify the definition of investment advice so that presenting alternatives or explaining options does not result in a recommendation.

Additionally, under the Proposal, advice must be “individualized to” or “specifically directed to” the advice recipient for consideration in making investment decisions. USAA members often turn to USAA representatives for explanations of how financial products work, which then leads the members to make their own choices. Therefore, in order to allow USAA to continue to help educate our members, we urge the Department to eliminate the “specifically directed” requirement. The Department should modify the test so that USAA would not be deemed to be a fiduciary unless USAA provides advice under circumstances creating a reasonable expectation on the part of the advice recipient that advice is provided in the interest of the advice recipient.

Finally, the Department should clarify that even if USAA provides advice that is individualized or specifically directed to a member, USAA is not a fiduciary unless the investor can substantiate that he or she relied on the advice and such reliance was contemporaneous with the advice.

Moreover, many of the services provided by USAA, which are primarily designed for individual investors who invest through IRAs, Coverdell ESAs, and similar arrangements, do not qualify for the “carve-outs” included in the Proposal. Therefore, USAA requests that the Department make the following changes to the carve-outs in the Proposal:

- a. **Extend the platform carve-out to IRA and Coverdell ESA platforms.** USAA offers certain IRA products that contain only a platform of USAA’s proprietary mutual funds covering a range of assets classes. USAA offers these products as a simple, low-cost, low-minimum balance retirement savings solution, which enhances the financial security of our members. Given the number of funds and range of asset classes available on the platform, we do not believe that a USAA member would reasonably construe the offering of a platform and the provision of information about the funds on the platform (in conformance with the requirements of the carve-out) as a recommendation to invest in all or some of the funds on USAA’s platform. USAA agrees that making an actual recommendation of which funds on the platform to invest in or how to allocate among the funds would amount to advice. But, merely creating a platform does not amount to advice. Without allowing USAA to rely on the platform carve-out, USAA would be unlikely to offer these IRA products, thus eliminating an important product option for our members.
- b. **Include asset allocation models populated with specific mutual funds in the education carve-out.** Any concerns of the Department that asset allocation models populated with specific mutual funds are used to steer investors into particular funds could be mitigated if the Department requires that, as set forth in its exposure draft of the original Interpretive Bulletin 96-1, all investment alternatives (or a reasonable representative sample of those alternatives) available under an IRA platform with similar risk and return characteristics must be included in each generic asset class presented in the allocation model.

3. The Proposal will limit consumer choices by eliminating viable USAA product and service options.

Under the Proposal, nearly any conversation between USAA and its members in connection with USAA’s investment products and services could be “investment advice,” therefore, USAA will have to rely on the BIC PTE, PTE 84-24, or PTE 77-4, which require that USAA and its representatives act in accordance with the Proposal’s “Best Interest” standard.

The Best Interest standard requires that USAA and its representatives only make recommendations “without regard to the financial or other interests of the Financial Institution, any Affiliate or other party....” USAA is concerned that this language may be interpreted by a court to provide that a financial institution cannot recommend proprietary mutual funds, annuity and insurance products, investment products and investment services while still acting in the “best interest” of an investor. While USAA makes nonproprietary investment options available

to its members, it only provides free advice and tools-based recommendations on proprietary products and services.

USAA has created a suite of proprietary index and actively managed mutual funds that offer USAA's members the opportunity to invest in a broad array of asset classes. These options are available at a comparatively low cost, and we offer some of these funds to our members at a lower minimum account balance than is generally available at other mutual fund companies. Thus, our proprietary products enable members to begin investing early in their careers further facilitating their financial security. USAA also facilitates the financial security of our members by offering free advice on our proprietary mutual fund products by member service representatives who are not paid on commission. We also offer fixed annuity products that offer our members guaranteed lifetime income and are backed by USAA's highly-rated and financially strong insurance companies. Our annuities offer competitive features that are some of the best in the market. For example, our annuities offer a shorter surrender charge schedule with a comparatively low fee and our members also are able to annuitize more quickly. Consequently USAA has designed proprietary products to take into account the lower income status of many of our service members to be reasonably in their best interests.

It would be a disservice to our members if USAA is prohibited from recommending our proprietary products and, therefore, eliminating this choice for our members, simply to meet the Best Interest standard. Therefore, the Best Interest standard in the final regulation should mirror the language in ERISA section 404.

Equally troubling is the Proposal's requirement that compensation for representatives offering only proprietary products be reasonable in relationship to the "specific services" provided to the retirement investor. This is a significant departure from the total compensation for total services standard articulated under the BIC Exemption's general Impartial Conduct Standards. USAA urges the Department to amend BIC Exemption to remove the "specific services" requirement under the exemption. Without such a change, USAA may no longer be able to provide advice and recommendations for proprietary USAA mutual funds without causing a non-exempt prohibited transaction, because we cannot necessarily determine or calculate compensation in relationship to the specific services with the required precision. We feel strongly that the free asset allocation services we provide on our mutual funds is an important offering to enhance the financial strength of our members, many of whom do not have account balances that are high enough to receive services like this (free or paid) from other institutions. The Proposal, particularly the BIC Exemption, will impede USAA's ability to provide these services.

Based upon the foregoing, the Proposal should be revised to (a) clarify that an adviser can recommend proprietary products and services only while still acting in the "best interest" of the investor and (b) eliminate the more restrictive reasonable compensation standard.

4. Conclusion

USAA supports a best interest fiduciary standard when providing investment advice to plan sponsors, participants and IRA investors as long as individual retirement savers continue to have choice and access to the products and services they want and need – *on their own terms*. Unfortunately, the Proposal will make it even harder for American savers to get the guidance they need. A rule that effectively bans certain business models will harm investors,

especially our men and women in uniform, by raising their costs, reducing their choices and restricting their access to guidance and education.

We believe there is a balanced approach where savers can be protected by a best interest standard and continue to have access and choice in their retirement products, services, and providers. The proposed rule could provide a reasonable framework for imposing a best interest standard on financial professionals, but the details matter, and the details of the Proposal simply don't work. As a result, the Proposal would effectively prohibit financial professionals from providing a broad range of services and advice – even if the advice is in the best interest of their customers. Low- and middle-income investors will be harmed the most because they are the ones who rely on the business models that are effectively prohibited under the Proposal.

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We appreciate the Department's consideration of our comments. Should you have any questions or wish further clarification or discussion of our points, please contact James Whetzel, General Counsel, Financial Advice and Solutions Group at 210-498-4628.

Sincerely,



Steven Alan Bennett
Executive Vice President
Chief Legal Officer, General Counsel & Corporate Secretary