National Planning HOLDINGS, INC.®

Gregory P. Cicotte
Chairman

7601 Technology Way
Denver
CO
80237

Tel: (303) 488-4343
Fax: (303) 488-4353
greg.cicotte@jackson.com

INVEST Financial Corporation
Investment Centers of America, Inc.
National Planning Corporation
SII Investments, Inc.
Members FINRA, SIPC

September 24, 2015

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

Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor (Attention D-11712)
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

FILED ELECTRONICALLY

Re: Definition of the Term "Fiduciary;" Conflict of Interest Rule (RIN 1210-AB32)
Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

To Whom It May Concern:

National Planning Holdings, Inc. ("NPH") is filing this letter to provide comments relative to the Department of Labor's ("DOL") notice of proposed rulemaking concerning the Definition of the term "fiduciary" of an employee benefit plan (the "Proposed Regulation") and the proposed Best Interest Contract Exemption (the "BICE") (collectively, the "Proposal"). NPH owns four retail firms (the "NPH Firms") operating as registered securities broker/dealers and investment advisers, as well as insurance agencies, and is an affiliate of Jackson National Life Insurance Company[1] ("Jackson"). While NPH did not originally file a comment letter, several concerns with the Proposal as it impacts NPH were included in Jackson's original comment letter. Based upon the testimony on the Proposal and the nature of the comments filed in writing, NPH felt that it was imperative to provide additional input and recommendations, separate from those of Jackson.

The NPH Firms are INVEST Financial Corporation, Investment Centers of America, Inc., National Planning Corporation, and SII Investments, Inc. Collectively, the NPH Firms have 3,480 registered representatives (as of December 31, 2014), striving to meet the investment needs of their clients, for both tax-advantaged plan and IRA accounts ("qualified accounts") and taxable accounts ("non-qualified accounts"). NPH and Jackson are wholly owned by Prudential plc (NYSE: PUK), a company incorporated in England and Wales. Prudential plc is not affiliated in any manner with Prudential Financial, Inc., a company whose principal place of business is in the United States of America. The NPH Firms are active in the industry and are proud

[1] Jackson National Life Insurance Company is a stock life insurance company organized under the laws of the state of Michigan since 1961.

supporters of the work provided by the Financial Services Institute ("FSI") and other industry groups in their efforts to provide insight on the potential adverse impacts of the Proposal.

Best Interest Standard

Like most of the firms and individuals who provided comments and testimony, including Jackson, the NPH and the NPH Firms support a best interest standard for interaction with clients. We believe that a workable best interest standard, whether phrased as a fiduciary duty or otherwise, is in the best interest of our clients and the industry in general. However, this standard needs to take into account other regulatory structures and attempt to address factors that may adversely impact clients, or unduly impact the industry.

> ***Recommendation: The best interest standard needs to be realistic and workable. It should also take into account years of common-law and statutory developments relative to prudent investor standards, rather than attempting to develop new and undefined standards.***

Coordination with Securities Regulators

In watching those invited to submit their testimony, it is clear that there are passionate and well-intended individuals in support of, and in opposition to, the Proposal in its current form. In viewing the testimony of the individuals supporting the Proposal, and their rationale and observations in support of the Proposal (whether you believe their statements are correct or not), one may reasonably assume that they would support reform that addresses both qualified and non-qualified accounts in a similar fashion. As has been expressed by FSI and other commentators, the Proposal would result in multiple regulatory standards depending upon whether the account in question is qualified or non-qualified, and whether the services are provided by a firm acting as a securities broker/dealer, an investment adviser, or an insurance agency for fixed annuity and insurance products. The resulting confusion, especially for clients of firms, is a significant concern. Every individual and entity with an interest in this matter, whether pro or con, should support a common and consistent standard for all clients, regardless of whether their account is a qualified account or not.

> ***Recommendation: We urge the DOL to work with the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority, Inc. ("FINRA") to provide this common and consistent standard.***

Best Interest Contractual Exemption ("BICE")

NPH and the NPH Firms appreciate the willingness of the DOL to propose a new administrative exemption under the prohibit transaction rules, which would allow the continued receipt of commissions and other differential compensation by retail broker/dealers. However, we have significant concerns relative to the workability of the BICE as proposed. Changes need to be made to the BICE to allow firms to continue to service clients in a responsible manner, while complying with the newly proposed best interest standard and adopting newly required policies and procedures designed to mitigate the conflicts of interest that arise from their longstanding compensation structures.

The importance of a workable BICE cannot be overstated. As noted in the FINRA comment letter, 98% of IRAs with less than $25,000 in assets are in commission-based brokerage accounts, citing the April 2011 Oliver Wyman Study[2]. We agree with FINRA's observation that these are typically "buy and hold" customers, and we also believe that they may often involve dollar-cost average investments, requiring access to mutual funds or annuities to meet their objectives. Therefore, the BICE exemption needs to be workable for these existing accounts, and similar small accounts that will be opened in the future, which in either case will need access to lower-cost, commission-based products. If a workable commission-based option is not available for these small accounts, the clients will necessarily have to pay more to gain access to investments as well as valuable investment support.

With respect to the BICE, NPH and the NPH Firms are making the following specific recommendations:

> <u>Disclosures and Information Technology (IT) Systems Requirements</u>
> As noted by FINRA, the Department should streamline the applicable PTEs (including the BICE) "eliminating those conditions that do not incrementally address the conflicts of interest at issue in a meaningful fashion."[3] This statement is most applicable to the detailed disclosure requirements built into the BICE in its current form. A significant number of comments were provided by the investment industry relative to the incredible expense to build systems (that do not exist today) and to gather the data necessary to meet the three client disclosure requirements provided in the BICE as follows: (i) the transaction disclosure required prior to the execution of investment purchases, (ii) the annual disclosure, and (iii) the website disclosure. We do not intend to recite these concerns in detail, which were also addressed in Jackson's original letter. Simply put, even with the significant resources available, NPH and the NPH Firms would not be able to come even close to covering the cost of the required systems using its existing IT budget. Based on reasonable estimates provided by IT professionals, the one-time cost to develop systems designed to generate the required disclosures would be a multiple of our annual IT budget for the entire controlled group. Even then, there is no guarantee that NPH would be able to meet all technical requirements of the BICE. Once the systems are built, we would also need the underlying required data from the product sponsors or through third party suppliers. Since we share IT development resources with Jackson, we believe that we

[2] See July 17, 2015 FINRA Comment Letter, page 5.
[3] See FINRA Comment Letter, page 19.

are in a better position than many other retail broker/dealers, and wonder how smaller firms will be able to meet these system development challenges.

Recommendation: The BICE disclosure requirements must be simplified so that it is administratively feasible for firms to generate the required disclosures, integrated with the current securities disclosure requirements, and streamlined so that the resulting disclosures are readily understandable by clients.

<u>Simplify the BICE Disclosure Requirements and Integrate with Current Disclosures</u>

Any client who currently purchases a mutual fund or annuity, or other product sold under prospectus or offering documents, receives documents and materials that outline the costs and expenses associated with the product. Given the nature of these existing disclosures, the DOL's transaction disclosure requirement would in many instances be duplicative for the investor.

The annual disclosure required under the BICE for the client could potentially be tied into existing account disclosures, and year-end disclosures could be enhanced to provide more detailed descriptions of the compensation received and costs paid on the account. However, there would be significant operational costs associated with the disclosure of indirect compensation, such as revenue sharing and ticket charge revenue, for individual accounts, since this type of disclosure would require detailed calculations in order to allocate payment amounts at the client account level. These payments are not shared with the individual advisor and, therefore, these payments do not pose a conflict at the representative level.[4] For the foregoing reasons, in our view, the receipt of revenue sharing payments that are not shared with individual advisors should not trigger enhanced disclosure obligations under the Proposal.

Similarly, we do not believe that the website disclosure would provide a worthwhile benefit to clients, when the required costs of development of the systems is considered. Therefore, we also request that this requirement be eliminated in favor of existing disclosures and the general descriptions otherwise recommended.

Recommendation: The transaction disclosure and the website disclosure should be eliminated in favor of these existing disclosures, or alternatively new streamlined disclosures explaining

---

[4] NPH agrees with the Comment Letter provided by TIAA-CREF, and their observation that there is a fundamental difference between the compensation received by the representative making the recommendation to the client, and revenue that firms may receive from product sponsors and clearing operations that is not shared with representatives. See July 20, 2015 TIAA-CREF Comment Letter, page 40.

internal costs to clients should be permitted. The annual disclosure should be simplified to provide a single statement of the costs and expenses relative to the investment account, without including revenue sharing payment information to the extent such payments are not shared with the individual advisor (and which are already reflected in the costs and expenses disclosed to the client). The annual disclosure should focus on the direct costs and expenses incurred by the client in the account during the past year, as a percentage of the assets for management fees, and as itemized fee disclosures for other costs. Firms should be permitted to provide (as they do now) a general description of the revenue sharing payments that may be paid to the firm, rather than having to disclose payments at the client account level. To the extent that the DOL feels that these disclosures are inadequate, coordination with the SEC and FINRA can help address this concern in a client friendly manner using existing disclosure requirements as the model.

<u>Disclosure of Policies and Procedures to Mitigate Conflicts</u>
As required under the BICE, firms would be obligated to identify all applicable conflicts of interest in formulating policies and procedures reasonably designed to mitigate their impact. This required process should be effectively integrated with current regulatory requirements and FINRA initiatives relative to conflicts of interest.[5]

There were several commentators who discussed their internal processes to mitigate internal conflicts of interest that impact clients. Others testified relative to the adoption of a client bill of rights or similar statement to assure the process of addressing conflicts of interest and disclosures to clients. In addition to requiring firms to identify conflicts of interest and mitigate these conflicts to the extent possible, we believe that providing a formalized disclosure of this process would provide meaningful insight to clients of these conflicts.

Recommendation: The BICE's requirement for firms to identify conflicts of interest when formulating their policies and procedures, should be coordinated with FINRA to provide a workable solution addressing both qualified and non-qualified accounts. Firms should also publish a firm level disclosure document that describes the process undertaken by the firm to identify conflicts with respect

[5] In 2013, FINRA published a Report on Conflicts of Interest. In addition to addressing conflicts of interest in various forms in the FINRA 2015 Examination Priority letter, FINRA initiated a sweep examination in August, 2015, looking at the processes that broker/dealers have implement to identify and mitigate conflicts of interest, in particular relative representative compensation. Integration of the DOL process with FINRA will provide an integrated process to identify conflicts and mitigate these conflicts.

to their commission-based business, and the processes used by the firm to attempt to mitigate these conflicts.

Contract Timing, Contract Terms and Warranties.
NPH feels that certain provisions of the BICE unnecessarily impact the process of meeting with clients, opening accounts and making recommendations. Other provisions would be unduly onerous and raise significant concerns for firms relative to class action litigation.

Specifically, with respect to new accounts established after the Proposal is finalized and implemented, NPH believes that the BICE contract should be delivered during the account opening process, rather than being delivered prior to the time at which a recommendation is made. Typically, there may be several client meetings and discussions relative to different distribution models (such as commission-based products, managed fee based accounts, or fixed annuity and insurance products) before any decision is made on the type of account and the underlying investments. Requiring a contract or written commitment prior to the client's decision to pursue an account type is counterintuitive and would result in further complications and confusion, delaying the investment process.

Similarly, NPH has grave concerns that the broad scope of the warranty provisions will invite class action litigation over technical, non-substantive violations of the warranties, resulting in significant litigation and expenses for firms. We acknowledge that the BICE merely requires the firm to make certain warranties (e.g., complying with applicable law), and that the exemptive relief under the BICE is not actually conditioned on the firm's honoring its warranties. Nevertheless, it is highly likely that any claimant alleging that a firm is in breach of its warranties, will also allege that such breach makes the firm ineligible for the exemptive relief available under the BICE. Because claimants may be eligible for additional forms of relief by alleging a violation of ERISA's prohibited transaction rules (e.g., right of rescission), claimants may be substantially more likely to assert that the firm engaged in a non-exempt prohibited transaction by virtue of a technical breach in the firm's warranties (whether factually grounded or not), increasing the likelihood of class action litigation.

Statistically speaking, if a class is certified in state or federal court, the action almost always settles and claimants counsel receives an award for its legal fees. In most cases, the impacted clients receives little or nothing from the settlement.[6] The NPH Firms do not take issue with a client's right to raise legitimate concerns, and they routinely work with clients and their

---

[6] According to information published by the US Chamber of Commerce Institute for Legal Reform - "*Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*" by Mayer Brown LLP.

representatives in the event a concern is raised with respect to their client accounts. However, the Proposal would create a class of similarly situated clients covered by substantially similar contracts, and claimants counsel may attempt to use technical violations of the contract and ERISA's prohibited transaction rules to turn what would otherwise be a frivolous case into a certified class action.

Recommendation: To the extent that the DOL retains the contract requirement, modify the timing of the contract so that the execution of the required contract at account opening for new accounts would be sufficient, rather than requiring execution of the contract prior to the time any recommendation is made. The BICE should also be modified so that the warranty provisions include a materiality threshold to avoid claims of technical violations without a showing that the firm caused substantive client harm.

DOL Interpretive Bulletin 96-1 and Client Education

Like many within the industry, we believe that the proposed modifications to Interpretive Bulletin 96-1 would be unduly restrictive, and would not further client interests. The majority of the Title I ERISA clients advised by the NPH Firms, including 401(k) plan clients, are in commission-based accounts, typically with group annuities or mutual fund investments. We believe that both group annuities and mutual fund platforms can offer cost effective investment solutions for these plans. In general, as an operational practice, NPH prohibits its representatives from providing fiduciary advice to plan participants, but allows representatives to provide education in accordance with Interpretive Bulletin 96-1. In order to effectively provide education and meet the clients' needs, and consistent with years of past practice, we need the ability to identify and discuss the various investment options that are available under the plan, so that we can provide educational guidance on such options and help participants make informed investment decisions.

Recommendation: Interpretive Bulletin 96-1 should be retained in its current form.

FINRA Arbitration is an Appropriate Dispute Resolution Forum

Several witnesses urged the DOL to prohibit mandatory FINRA arbitration, alleging that it was an inappropriate or conflicted dispute resolution forum. We strongly disagree. Arbitration provides a cost-effective process to resolve disputes, recognized by Congress and the US Supreme Court as a proper and preferred dispute resolution process.[7] Statistics maintained by FINRA also show that the majority of claims brought in FINRA arbitration are settled voluntarily by the claimants, and only

[7] See the Federal Arbitration Act, 9 USC Section 2. The Federal Arbitration Act reflects a "liberal federal policy favoring arbitration." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

19% are decided following a hearing on the merits[8]. Mandatory arbitration is important for claimants and firms alike to reduce the costs of litigation, while providing a fair and timely disposition of the claim. FINRA has made significant changes to their arbitration process, including the elimination of any industry personnel on arbitration panels and significantly eliminating summary dispositions. Elimination of mandatory arbitration would be contrary to the above-cited Congressional intent. Many contracts and agreements that consumers enter into today, including everything from property and casualty insurance to rental agreements, provide for mandatory arbitration. The elimination of mandatory arbitration in this industry would result in forum shopping by the claimants bar, encouraging claims with weak legal arguments to be heard through arbitration (where panels are prohibited from making decisions prior to the hearing), leaving those with adequate legal arguments and strong sentimental arguments to be brought before juries in state courts.

Recommendation: ***The DOL should not address mandatory arbitration.***

Effective Date, Enforcement Date and Impact on Existing IRA Accounts

Testimony and comments were provided relative to the 8-month grace period that has been announced with respect to the implementation of the Proposal and the delayed applicability date for the BICE provisions. While longer implementation periods have been provided for other DOL rulemaking projects, such as the 408(b)(2) fee disclosure requirement where the industry was given two (2) years from the initial publication date,[9] the Proposal with all of its significant complexity, is far more aggressive in its implementation date.

NPH also strongly believes that the DOL should provide practical guidance on how the BICE would apply to existing commission-based IRA accounts when the conditions of the BICE first become applicable. Specifically, the DOL should clarify that firms have the flexibility to publish and implement the required BICE contract by negative consent. This would be in the clients' best interest and allow them to continue to receive the advice they have come to expect, without a disruption in business.

Finally, NPH believes that many firms and individual representatives will elect to move to a level-compensation platform, due to the operational and legal concerns with the BICE, even with the changes suggested above. Therefore, for many commission-based accounts where the representative and the firm have been receiving commissions or trail revenue, it is anticipated that the representative will present an option to the client, transitioning the client to a fee-based, investment advisory account with the client's approval (assuming that the representative is licensed to serve as an investment adviser representative of the firm).

[8] Based upon FINRA published statistics as of August 2015.

[9] The interim final regulation under ERISA Section 408(b)(2) was published on July 16, 2010. However, the 408(b)(2) disclosure requirement was not actually implemented until July 1, 2012.

A client transitioning to the fee-based account would receive the benefit of additional reporting, discretionary management of the account, and the fiduciary standard of care under the Investment Advisers Act of 1940 (in addition to ERISA), but in many cases the ongoing costs would be greater for the client. For example, the representative may have previously recommended A shares in a mutual fund to an IRA client, where the client effectively pre-paid for advice by paying a front-end sales load and is now paying a relatively low 12b-1 fee of 25 basis points on an ongoing basis. If the client were transitioned to a fee-based account, the asset-based fee for advisory services would undoubtedly be higher than 25 basis points. NPH is asking that the DOL provide guidance on these conversion situations, as well as "grandfathering" relief under the prohibited transaction rules.

> ***Recommendation: NPH is requesting a reasonable implementation date of three (3) years for new accounts and for implementation with existing accounts. The BICE should also be modified so that, as of the implementation date for all existing IRA accounts subject to the BICE, firms would be allowed to publish and implement the required contract by negative consent. Additionally, firms should be given "grandfathering" relief so that they may recommend to clients that they move from a commission-based account to a fee-based (level-compensation) account without triggering a prohibited transaction, as long as the compensation received by the firm for the fee-based account is reasonable based upon the services provided to the client.***

Thank you for consideration of these comments and recommendations.

Sincerely,

Greg Cicotte
President
National Planning Holdings, Inc.