



April 26, 2019

Submitted Electronically – [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Ms. Vanessa Countryman  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File Number S7-27-18  
Proposed Investment Company Act Rule 12d1-4**

Dear Ms. Countryman:

Nationwide appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (the "Commission") proposed Rule 12d1-4 under the Investment Company Act of 1940, as amended (the "1940 Act") related to fund-of-funds arrangements (the "Proposed Rule"). We agree that the combination of statutory exemptions, Commission rules, exemptive orders and no-action letters has created a regulatory regime where substantially similar fund-of-funds arrangements are subject to different conditions, and laud the Commission's efforts to streamline and enhance the regulatory framework applicable to funds-of-funds. However, certain aspects of the Proposed Rule, including the proposal to rescind existing fund-of-funds exemptive orders, would significantly reduce the ability of mutual fund investment advisers, such as Nationwide, to operate funds-of-funds in the best interests of their investors. To be very clear, we support the Commission's effort to replace the currently existing exemptive relief with a streamlined, comprehensive fund-of-funds regulatory framework that would enhance investor protection while also providing funds-of-funds with investment flexibility to meet their investment objectives in an efficient manner. Our comments below thus address only three discrete issues related to specific provisions of the Proposed Rule that will negatively impact Nationwide's ability to manage funds-of-funds in the best interests of their shareholders.

#### **About Nationwide**

Nationwide Mutual Insurance Company, a Fortune 100 company based in Columbus, Ohio, and one of the largest and strongest diversified insurance and financial services organizations in the United States (rated A+ by both A.M. Best and Standard & Poor's), for decades has been helping millions of America's workers prepare for and live in retirement. We do this by offering innovative and flexible solutions that allow employee benefit plans, retirees, others saving for retirement and their respective financial professionals to tailor the optimal retirement investment solution for their own unique needs. As a mutual company, Nationwide does not have shareholders, which means our primary goal is serving our

members' best interests. Nationwide's core values center around our associates who make Nationwide a great place to work by making a difference in the lives of others, including the many retirees, small business employers and their workers whom we assist in reaching their retirement goals. This culture was recently recognized by Fortune Magazine, which named Nationwide as among the 100 Best Companies to Work For.

### **About Nationwide Funds Group**

Nationwide Funds Group ("NFG") is a mutual fund service provider with a product range distributed through major financial intermediary channels, retirement products and variable annuity and life insurance products. NFG comprises Nationwide Fund Advisors, Nationwide Fund Distributors LLC and Nationwide Fund Management LLC. Together they provide investment advisory, distribution and administration services, respectively, to the Nationwide Funds. NFG is part of Nationwide Financial Services, Inc., which in turn is a wholly owned subsidiary of Nationwide Mutual Insurance Company.

NFG is a manager-of-managers, partnering with over 30 subadvisers across 110 different mutual funds comprising \$89.6 billion in gross assets as of March 31, 2019. 41 of these mutual funds, representing \$30.1 billion in assets, operate as funds-of-funds pursuant to an exemptive order granted by the Commission in 2002 that permits our funds-of-funds to invest in (i) both affiliated and unaffiliated underlying funds, (ii) portfolio securities in addition to shares of underlying funds, and (iii) a fixed-interest contract, subject to adjustment quarterly, issued by our affiliate, Nationwide Life Insurance Company ("Nationwide Life").<sup>1</sup>

Most of the underlying funds in which NFG's funds-of-funds invest are open-end funds. Nevertheless, many NFG funds-of-funds also invest in exchange-traded funds ("ETFs"), and NFG just launched two funds-of-funds that invest exclusively in ETFs. Many funds-of-funds invest solely or primarily in underlying funds that are managed by NFG, but may use underlying funds that are not managed by NFG consistent with their investment strategies or to the extent necessary to serve the best interests of our funds' shareholders. Other funds-of-funds invest exclusively in unaffiliated funds. For certain funds that are sold to insurance company separate accounts related to variable annuities or variable life insurance policies, NFG relies on the Nationwide Order to combine investments in one or more underlying funds with direct investments in securities or derivatives that are designed to limit such funds' investment losses during periods of high equity market volatility. Some funds-of-funds invest in the fixed-interest contract to obtain competitive interest rates and to help minimize loss of principal during periods when the market prices of bonds are declining. In short, we rely on the Nationwide Order fully to best meet the needs of our customers.

### **Nationwide's Concerns**

The discrete issues that are the subject of our comments are as follows:

- the imposition of a limit on the amount a fund-of-funds may redeem from an underlying fund that operates as an open-end investment company would impede our ability to deliver the investment results our customers seek and reduce the options available for investment by

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<sup>1</sup> Investment Company Act Release No. 25492 (March 21, 2002)(Notice of Application); Investment Company Act Release No. 25528 (April 16, 2002)(Order); and referred to collectively herein as the "Nationwide Order."

funds-of-funds. It also would prevent many smaller open-end investment companies from achieving scalable asset sizes;

- rescission of the Nationwide Order would prevent our funds-of-funds from obtaining the investment benefits they currently receive by investing in the fixed-interest contract issued by Nationwide Life; and
- the requirement that funds-of-funds obtain certifications from the depositors of separate accounts funding benefits related to variable insurance contracts as to the consistency of fees with the standard set forth in Section 26(f)(2)(A) of the 1940 Act imposes an unfair and inappropriate burden on the boards of trustees and investment advisers of such funds-of-funds.

We discuss each of these issues in greater detail as follows:

### **1. Redemption Limits**

Proposed Rule 12d1-4(b)(2) would prohibit a fund-of-funds that acquires more than 3% of an underlying fund's outstanding shares from redeeming or submitting for redemption more than 3% of the underlying fund's total outstanding shares in any 30-day period. The Commission asserts that the proposed redemption limitation is designed to provide a check against the influence a fund-of-funds can have on an underlying fund when it owns a significant percentage of the underlying fund.<sup>2</sup> Most exemptive orders, including the Nationwide Order, impose no such redemption limits,<sup>3</sup> as the Commission itself acknowledges.<sup>4</sup> The Commission nonetheless believes that the proposed redemption limit is designed to prevent a fund-of-funds from unduly influencing an underlying fund through the threat of large-scale redemptions, and suggests that the proposed redemption limit is unlikely to have a large impact on funds.<sup>5</sup> Based on our long-term experience managing numerous funds-of-funds, we disagree. We believe the proposed redemption limit would unduly impede our ability to effectively manage funds-of-funds, to the significant disadvantage of our customers who invest in such funds. We are of the view further that redemption limits are unnecessary to protect underlying funds from improper overreaching by funds-of-funds, and would likely lead to consequences inconsistent with the Commission's goal of providing funds-of-funds with investment flexibility to meet their investment objectives in an efficient manner.

Funds-of-funds typically are classified as "management companies" under the 1940 Act,<sup>6</sup> the portfolios of which are managed by registered investment advisers under the oversight of boards of trustees. Subject to the authority granted to the investment adviser in an investment advisory agreement that has been approved by the fund's board of trustees (including those trustees that are deemed to be not "interested"), the investment adviser exercises investment discretion, in accordance with its fiduciary duties to the fund and its shareholders, to manage the fund-of-funds' portfolio pursuant to its investment objective and investment strategies.<sup>7</sup> Different funds-of-funds are subject to different styles

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<sup>2</sup> Fund of Funds Arrangements, Investment Company Act Release No. 33329 (December 19, 2018) [84 FR 1286] (the "Proposing Release"), at 1298.

<sup>3</sup> See Nationwide Order, *supra*.

<sup>4</sup> Proposing Release, *supra*, at 1299.

<sup>5</sup> *Id.*

<sup>6</sup> 1940 Act Section 4(3).

<sup>7</sup> Section 2(a)(20) of the 1940 Act generally defines an "investment adviser" to an investment company to be a person "who pursuant to contract with such company regularly furnishes advice to such company with

of portfolio management, i.e., some employ more tactical or opportunistic strategies, buying and selling shares of underlying funds more frequently in response to short-term market events, while others apply more strategic approaches, in which allocations among underlying funds change less frequently, based on a longer-term market view. Despite these stylistic differences, common among all such funds-of-funds is the role of the investment adviser in developing a continuous investment program for the funds-of-funds it manages, choosing how to allocate each fund's assets among different asset-classes, types of securities and/or investment strategies, selecting the underlying funds and other instruments in which the fund invests, and making changes to such decisions on an ongoing basis in furtherance of the fund's investment objective. The investors who buy shares of Nationwide's funds-of-funds do so as a convenient way to allocate and diversify their investments through a single, professionally-managed portfolio, expecting Nationwide to use its professional expertise to help them to meet their investment goals. We thus view investment flexibility and adaptability to be critical to our ability to help these investors to achieve their investment needs.

The imposition of redemption limits, however, would frustrate our ability to provide the investment results our customers expect, as most of the underlying funds in which our funds-of-funds invest operate as open-end investment companies. Some of these underlying funds are created primarily, or even exclusively, to serve as underlying funds in which our funds-of-funds invest. Where this is the case, a position held by one of our funds-of-funds often will considerably exceed 3% of the underlying fund's outstanding shares. Even where the majority of an underlying fund's assets is attributable to shareholders other than funds-of-funds, based on the size of some of our funds-of-funds and the amount any one might allocate to an underlying fund, it is not improbable that the fund-of-funds might own more than 3% of the underlying fund's shares. In fact, during the three-year period ending December 31, 2018, 32 of our funds-of-funds regularly held more than 3% of at least one underlying fund's outstanding shares. During these same three years, all 32 such funds-of-funds redeemed, within a 30-day period, more than 3% of an underlying fund's outstanding shares at least once, and some on as many as four separate occasions. It is thus clear that the imposition of redemption limits very likely would impact our funds-of-funds.

To further illustrate this point, Nationwide offers a few examples. Where a large fund-of-funds owns a significant amount of a smaller underlying fund's outstanding shares, and the fund-of-funds' portfolio managers conclude that such underlying fund is underperforming or no longer meets the needs of the fund-of-funds' investment strategy, the portfolio managers would effectively be barred from exchanging the use of such underlying fund for a different one that the portfolio managers believe would improve the fund-of-funds' performance, better manage its risk exposure or otherwise be a more appropriate investment. Even where the portfolio managers intend to continue investing in a particular underlying fund, they routinely change the amounts they allocate among underlying funds in response to economic or market conditions, or in keeping with the fund-of-funds' stated investment strategy. Although the redemption limits technically would not prevent the portfolio managers from *ultimately* implementing the changes they deem necessary, such limits would prevent them from making such changes *in a timely fashion* in service to the fund's shareholders. Finally, open-end funds-of-funds are obligated under Section 22(e) of the 1940 Act to honor redemptions made by their own shareholders.<sup>8</sup> When a fund-of-funds' shareholders redeem their shares, the fund's portfolio managers normally must redeem shares of

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respect to the desirability of investing in, purchasing or selling securities or other property, or is *empowered to determine what securities or other property shall be purchased or sold by such company . . .*" (emphasis added).

<sup>8</sup> Section 22(e) generally prohibits an investment company from suspending the right of redemption or postponing the payment of redemption proceeds for more than seven days after the tender of a security being redeemed.

the underlying funds in which it invests in order to pay the redemption proceeds. To the extent the fund-of-funds must redeem more than 3% of one particular underlying fund's outstanding shares to meet its own large-scale redemptions, the portfolio managers could be forced to redeem more than otherwise intended of *other* underlying funds' shares, resulting in an overweighting in one underlying fund and underweighting in others, thereby distorting their intended allocations. In each of these cases, therefore, the redemption limits proposed would impede the portfolio managers' ability to manage a portfolio in the manner they deem prudent, depriving them of the ability to provide optimal investment results for the fund's shareholders.

The Commission believes that "the universe of permissible fund of funds arrangements generally should not turn on the type of the funds in the arrangement," and that the Proposed Rule would "level the playing field among these entities, allowing each to invest in the same universe of acquired funds."<sup>9</sup> The imposition of redemption limits, nevertheless, would achieve the opposite result, forcing funds-of-funds to invest only in ETFs or other investment companies whose shares trade in the secondary market, or otherwise to select only the largest of open-end funds. When faced with the possibility that their ability to redeem shares of open-end funds could be constrained, fund-of-funds portfolio managers will likely deselect all but the largest of open-end funds, thereby impeding the ability of smaller open-end funds to attract fund-of-funds investments. Meanwhile, open-end funds can offer a variety of investment strategies that are not currently available to ETFs, and thus redemption limits would reduce the investment options available to funds-of-funds. Further, shareholders of many open-end funds currently benefit from significant expense reductions and operating efficiencies due to the scale provided by fund-of-funds investments. It therefore is the *absence* of redemption limits in current exemptive relief that benefits shareholders both of funds-of-funds and underlying funds alike. As Congress suggested when it amended Section 12(d)(1) in 1996, the Commission has the opportunity to use its authority so "the benefits of [funds-of-funds] are not limited only to investors in the largest fund complexes, but, in appropriate circumstances, are available to investors through a variety of different types and sizes of investment company complexes."<sup>10</sup> For the foregoing reasons, we are nonetheless concerned that the imposition of redemption limits would reduce the opportunities for smaller funds to compete in the marketplace, resulting in further industry concentration in the hands of fewer complexes.

Moreover, all of these consequences are unnecessary because of the protections underlying funds currently receive. In the case of an underlying fund for which the investment adviser is the same as (or affiliated with) the fund-of-funds' investment adviser (an "Affiliated Fund"), the investment adviser is subject to the same fiduciary obligations to both the fund-of-funds and the underlying fund, as the Commission has noted.<sup>11</sup> These fiduciary obligations, recognized by the Investment Advisers Act of 1940, as amended,<sup>12</sup> prohibit an investment adviser from favoring one fund it manages over the other.<sup>13</sup>

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<sup>9</sup> Proposing Release, *supra*, at 1290.

<sup>10</sup> Comm. On Commerce, Securities Amendments of 1996, H.R. Rep. No.104-622 (1996), 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. ("1996 House Report"), footnote 22, at 44-45, *cited in* Proposing Release, *supra*, at 1288, footnote 23.

<sup>11</sup> Proposing Release, *supra*, at 1297.

<sup>12</sup> See *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

<sup>13</sup> These fiduciary obligations further prohibit an investment adviser from favoring certain shareholders over other shareholders of the same fund. Redemption limits, however, would effectively create a separate class of underlying fund shareholders (i.e., funds-of-funds) whose redemption rights would be circumscribed by virtue of the common adviser's decision to invest in an Affiliated Fund.

Congress seemed to have recognized these factors when it modified the restrictions in Section 12(d)(1) in 1996, despite its previously-articulated concerns about the ability to use the threat of large-scale redemptions as a means of exerting undue influence over an underlying fund.<sup>14</sup> At that time, Congress amended the 1940 Act to add Section 12(d)(1)(G), permitting a fund-of-funds to invest, without limit in, and to redeem, without limit from, Affiliated Funds. Congress thus in 1996 seems to have concluded that when funds-of-funds invest in Affiliated Funds, the opportunities for unfair overreach are significantly reduced. Section 12(d)(1)(J), granting the Commission the authority to permit other types of fund-of-funds arrangements through exemptive action, was also added in 1996, signaling congressional policy favoring the relaxation of the Section 12(d)(1) restrictions to provide for the development of funds-of-funds subject to *fewer*, not greater, restrictions than otherwise applicable under Section 12(d)(1)(G).<sup>15</sup> In recommending the adoption of Section 12(d)(1)(J), the House of Representatives committee report urged the Commission to use this exemptive authority “in a progressive way as the fund of funds concept continues to evolve over time.”<sup>16</sup> We are perplexed that the Commission now contemplates using its exemptive authority, through the adoption of the Proposed Rule, to *limit* the flexibility encouraged by Congress rather than to expand it in a progressive manner.

We recognize that, where a fund-of-funds’ investment adviser is not the same as (or affiliated with) the investment adviser to an underlying fund (an “Unaffiliated Fund”), the potential for undue influence is greater. Like many other exemptive orders, the Nationwide Order therefore imposes additional conditions when investing in an Unaffiliated Fund. It does not, however, impose any limits on the amount of an Unaffiliated Fund’s shares that a fund-of-funds may redeem. We believe that imposing limits with respect to redemptions from Unaffiliated Funds interferes with an investment adviser’s discretion to effectively manage a fund-of-funds’ portfolio to the same extent as when investing in Affiliated Funds. Rather, the use of participation agreements and oversight by the boards of trustees of both the fund-of-funds and an Unaffiliated Fund, as required by the Nationwide Order and other exemptive orders, protects the shareholders of both funds well. These conditions serve as useful alternatives to limits on redemptions.

Other alternatives to redemption limits also may be employed, as circumstances may warrant. For instance, disclosure in the prospectus of an open-end fund that permits investments by funds-of-funds can warn underlying fund shareholders of the risks of large-scale redemptions by other shareholders, and of the consequences that could result. Where appropriate in light of all prevailing circumstances, an underlying fund can pay the proceeds of large-scale redemptions in-kind with portfolio securities in the manner previously prescribed by the Commission’s staff.<sup>17</sup> Such redemptions in-kind can insulate an underlying fund’s remaining shareholders from the brokerage commissions and capital gains tax

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<sup>14</sup> See Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, H.Rep. No. 2337, 89<sup>th</sup> Cong., 2d Sess. (1966).

<sup>15</sup> Section 12(d)(1)(J) authorizes the Commission to provide additional exemptions (i.e., not otherwise available through statute) to the Section 12(d)(1) restrictions “if and to the extent that such exemption is consistent with the public interest and the protection of investors.”

<sup>16</sup> 1996 House Report, *supra*, at footnote 22, at 44-45.

<sup>17</sup> See *Signature Financial Group, Inc.*, SEC No-Action Letter (December 28, 1999) (no-action position regarding the payment of in-kind redemption proceeds to a shareholder that is deemed to be affiliated, including by virtue of holding 5% or more of the fund’s outstanding shares).

consequences that result from large-scale fund-of-funds redemptions.<sup>18</sup> Further, where feasible, the investment adviser to a fund-of-funds can notify the investment adviser to an underlying fund in advance of a large-scale redemption, enabling the underlying fund's portfolio manager to more efficiently raise cash to meet the anticipated redemption. As the circumstances of each investment and redemption transaction differs from the next, we believe it prudent to allow the investment advisers and boards of trustees involved to evaluate on a case-by-case basis the most appropriate manner in which to effect large-scale redemptions.

## 2. Rescission of Exemptive Orders

In connection with the Proposed Rule, the Commission proposes to rescind previously-granted exemptive orders that permit fund-of-funds arrangements, with the sole exception of such orders that permit certain interfund lending arrangements.<sup>19</sup> The Commission expressed its expectation that "the operations of most existing fund of funds arrangements would not be significantly negatively affected by the need to comply with the requirements of proposed rule 12d1-4, as opposed to" such previously-granted exemptive orders.<sup>20</sup> It is unclear to us whether the Commission's intent is to rescind *only such relief providing exemption from Section 12(d)(1)*, or the entirety of the orders themselves, including all relief from provisions of the 1940 Act other than Section 12(d)(1). This distinction is important because many funds-of-funds that rely on exemptive orders in order to operate, including Nationwide's, could be negatively impacted significantly by the rescission of other relief included in their fund-of-funds exemptive orders.

As noted above, the Nationwide Order also permits Nationwide funds-of-funds to invest in a fixed-interest contract issued by our affiliate, Nationwide Life (the "Nationwide Contract"). These funds-of-funds are able to do so because of the exemption granted from Section 17(a) of the 1940 Act, which otherwise would prohibit these funds from purchasing securities from our affiliate. We feel it necessary to emphasize that this exemptive relief, granted pursuant to Sections 6(c) and 17(b) of the 1940 Act, is separate and distinct from the fund-of-funds relief, which instead was granted pursuant to Section 12(d)(1)(J). The Nationwide Order does include relief from Section 17(a) in order to *give effect* to the relief granted under Section 12(d)(1)(J), because the funds-of-funds and the underlying funds in which they invest may be deemed to be affiliated persons under Section 2(a)(3), either because of having the same investment adviser, or because a fund-of-funds could acquire more than 5% of an underlying fund's outstanding shares. This type of relief, however, is already included in the Proposed Rule. Investing in the Nationwide Contract requires additional relief from Section 17(a), as the Nationwide Contract is not an investment company. The ability to invest in it thus could be extinguished upon the complete rescission of the Nationwide Order.

The Nationwide Contract has a stable principal value and pays a fixed rate of interest to each fund-of-funds that invests in it, which is currently adjusted on a quarterly basis. A fund-of-funds can increase or redeem all or a portion of its investment in the Nationwide Contract on a daily basis at par for any reason without imposition of any sales charge or market value adjustment. The funds-of-funds that invest in the Nationwide Contract do so to allocate a portion of such funds' investments to short-term

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<sup>18</sup> Nationwide Funds often, where appropriate under the relevant circumstances, have paid redemption proceeds with in-kind portfolio securities, regardless of whether the redeeming shareholder is a fund-of-funds or other type of shareholder.

<sup>19</sup> Proposing Release, *supra*, at 1311.

<sup>20</sup> *Id.*

fixed-income securities. The funds-of-funds' portfolio managers believe that the stable nature of the Nationwide Contract may reduce a fund's volatility and overall risk, especially during periods when the market values of bonds and other debt securities decline.

When the Commission granted the relief permitting Nationwide's funds-of-funds to invest in the Nationwide Contract, it did so having found, as required by Section 17(b), that such investment was fair and reasonable and did not involve overreaching, and was consistent with the general purposes of the 1940 Act. It also found, under Section 6(c), that investment in the Nationwide Contract was appropriate in the public interest and consistent with the protection of investors. The Commission has not since articulated any rationale to suggest that it now makes any findings to the contrary, and Nationwide believes that none currently exist. Rather, the use of the Nationwide Contract continues to provide real and tangible value to our fund-of-funds customers. Although we recognize the Commission's authority under Section 38 of the 1940 Act to rescind exemptive orders as are necessary or appropriate to the exercise of its powers, we question its reason for doing so in the absence of findings that conflict with those made previously in granting the exemptive relief. We therefore do not believe that rescission of the relief granted under Sections 6(c) and 17(b) permitting investment in the Nationwide Contract is a result the Commission intends, and seek the Commission's express clarification with respect thereto.

### **3. Duplicative and Excessive Fees**

Proposed Rule 12d1-4(b)(3)(iii) would require a fund-of-funds to obtain from the insurance company offering a separate account that invests in the fund-of-funds a certification that the insurance company has determined that the fees borne by the separate account, fund-of-funds and underlying funds, in the aggregate, are consistent with the standard set forth in Section 26(f)(2)(A) of the 1940 Act.<sup>21</sup> It is unclear from the Proposed Rule whether the obligation to make a finding related to Section 26(f)(2)(A) would belong to the fund-of-funds' investment adviser or its board of trustees, because the Proposed Rule states only that "the acquiring fund must obtain" the certification. What is clear is that parties that are required to receive certifications are expected to make certain findings or decisions based on such certifications, and are thus responsible with respect to the matters being certified. Whether the "acquiring fund" means its board of trustees directly, or acting through its investment adviser, the imposition of such additional responsibility on either is inappropriate due the very distinct legal and business structures between funds-of-funds and insurance company separate accounts.<sup>22</sup>

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<sup>21</sup> Section 26(f)(2)(A) renders it unlawful for any registered separate account that funds variable insurance contracts, or for its sponsoring insurance company, to sell a variable insurance contract unless the fees and charges deducted under the contract, in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company. This provision also requires the insurance company to represent to this effect in the registration statement for any such contract.

<sup>22</sup> The Commission indicates that this condition is based on similar such conditions that already appear in funds-of-funds exemptive orders. The Nationwide Order contains no such condition. Rather, our exemptive application, in which Nationwide Life participated as a co-applicant, contained a representation that, with respect to an investment by a registered separate account in a fund-of-funds, the aggregate of all fees and charges at all levels would be reasonable in relation to the services rendered, the expenses expected to be incurred and the risks assumed by the applicable parties. Within the context of an application in which our affiliated insurance company was a co-applicant, and the fact that the representation was made to the Commission (as opposed to any fund-of-funds), the making of such representation was not unreasonable.

Fund-of-funds boards of trustees have responsibility over what such funds invest *in*, consistent with their role overseeing management investment companies. They do not have responsibility for additional services that may be provided to shareholders outside of the fund, unless the payment for such services is made by the funds themselves.<sup>23</sup> The types of fees that typically would be charged by the separate account, such as mortality and expense risk fees or account fees and expenses, are paid by contract owners, but not by the funds over which the boards of trustees have jurisdiction. The separate account, as a legal entity, is separate and distinct from the fund-of-funds – the trustees do not represent the separate account, nor do they assume any legal responsibility for the separate account – its operations and the fees charged by the insurance company are thus outside the proper domain of a mutual fund's board of trustees.

Similarly, a fund-of-funds' investment adviser cannot be held responsible for evaluating the fees charged in connection with the separate account. The investment adviser enters a contract to manage only the fund-of-funds, and not the separate account. In connection with such contract, it must evaluate the fees charged by any underlying fund to the same extent that it would evaluate any security (including its price) in which the fund-of-funds may invest. Its responsibility to provide a continuous investment program, to manage the fund-of-funds' assets, and to provide other related services do not include the provision of external, insurance-related services to contract owners with whom it has no privity of contract.

We therefore suggest that the responsibility for evaluating whether the fees borne by the separate account, in the aggregate, meet the standard set forth in Section 26(f)(2)(A) of the 1940 Act properly belongs to the insurance company that sponsors the separate account. In making this evaluation, the insurance company is entitled to rely on the obligations already imposed on the investment adviser and board of trustees of any fund in which the separate account invests – otherwise such funds would not be legally required to have their own advisers and boards of trustees. Just as with funds that are distributed through non-insurance channels, the other requirements imposed on the fund-of-fund's investment adviser with respect to the expenses of an underlying fund pursuant to Proposed Rule 12d1-4(b)(3)(i), combined with the investment adviser's and trustees' normal obligations under Sections 15(c) and 36 of the 1940 Act, are designed to ensure that the fees borne by any funds that are available through variable insurance contracts are appropriate. Requiring any certification from the insurance company is thus unnecessary in the Proposed Rule, and would add no additional protections to contract owners, due to the Section 26(f)(2)(A) obligations the sponsoring insurance company already bears and the protections already afforded by the fund's board of trustees and investment adviser.

## **Conclusion**

In summary, we believe that the Proposed Rule, as it relates to the three issues discussed above, would frustrate the Commission's stated goals and policy concerns to the detriment of mutual fund shareholders. We wish to work with the Commission to better serve fund-of-funds investors and to revise the Proposed Rule to function as the Commission intended. The Proposed Rule needs to be modified as described herein to retain the standardization and increased flexibility envisioned and to avoid unintended consequences that would frustrate the Commission's noble intentions.

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<sup>23</sup> For example, boards of trustees have responsibility over distribution and servicing fees to the extent such fees are paid by the funds over which they are responsible.

We look forward to discussing these issues with the Commission, and we hope the Commission will accept that these comments are informed by our real-world experience in managing funds-of-funds for the benefit of Americans who are preparing for or living in retirement. Our commitment to our customers has been the bedrock of our company since the beginning, and we appreciate the chance to offer our views on this important regulatory proposal.

Please contact Ben Brewster in our Government Relations Department at [REDACTED] or via email at [REDACTED] for any follow up questions you may have.

Sincerely,



Michael S. Spangler  
President and Chief Executive Officer  
Nationwide Funds Group