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Via Electronic Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

Re: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

This letter is submitted to the Employee Benefits Security Administration of the U.S. Department of Labor (the "Department") by PFS Investments Inc. ("PFSI"), a registered broker-dealer and an indirect wholly-owned subsidiary of Primerica, Inc. ("Primerica"), a financial services company that is publicly-traded on the NYSE.[1] PFSI appreciates the opportunity to comment on the proposed rule amendment that is intended to more broadly define the circumstances under which a person is considered a "fiduciary" for purposes of the prohibited transaction rules in Internal Revenue Code ("IRC") §4975, which generally governs how broker-dealers and other service providers interact with tax-qualified retirement plans and accounts – including individual retirement accounts and Coverdell education savings accounts (hereinafter cumulatively referred to as "IRAs").

The proposed amendment, if adopted in its current form, would have a dramatic effect on how broker-dealers (including PFSI and its registered representatives), acting in their traditional role, serve the middle-income IRA community. As proposed, it would substantially undermine their ability to provide commission based brokerage services to IRA investors. Specifically, if brokers, acting in their traditional role, are deemed "fiduciaries" with respect to IRAs as a result of providing routine brokerage services to such accounts, their activities would be subject to IRC Sections 4975(c)(1)(E) and (F). The result would be to limit such firms' ability to receive and retain certain types of compensation paid by third parties (product providers and their affiliates) in connection with transactions involving assets in IRAs.

[1] Under the ticker symbol "PRI."

Because PFSI, and we believe other firms that endeavor to serve the middle-income market, depend on such compensation to help defray the costs of delivering services to their customers, PFSI and such other firms would be required to substantially restructure their IRA businesses to account for the loss of such revenue. This restructuring would undoubtedly include both raising the minimum account sizes and substantially increasing account fees for IRAs. For these reasons, it is our view that the rule, as proposed, would end up substantially reducing the investment and service options available to middle-income retail consumers for their retirement and educational savings. From our perspective, that result will only serve to exacerbate the national crisis that is the lack of sufficient retirement savings among middle-income consumers.

We respectfully request that the Department amend its proposal to allow broker-dealers like PFSI to continue to serve the needs of IRA investors in a cost-effective manner (as discussed more fully below), by either excluding IRAs from the new rules, delaying the application of the rules for IRAs in order to properly study the effects that such rules would have on the IRA market and its customers, or modifying the "purchase and sale" exception in the proposal to permit broker-dealers to continue to act in their traditional role of providing access, on a commission brokerage-basis, to investment products and services for the retail IRA market.

The IRA Market for Middle-Income Households

Primerica is a leading distributor of financial products to middle-income households in North America. Primerica assists clients by meeting their needs for term life insurance, which we underwrite, and for investments and other financial products, which we distribute primarily on behalf of third parties. Primerica has been in business since 1977 and currently insures more than 4.3 million lives and serves more than two million investment clients. Primerica's clients are generally middle-income consumers, defined by us to include households with annual income of $30,000 to $100,000, which represents approximately 50% of U.S. households.

As you may be aware, the smaller-sized transactions typical of middle-income consumers have led most other financial services companies to focus on more affluent/high net worth consumers and abandon the middle-income market. PFSI's business model, however, is uniquely structured to reach the middle-income clients that we serve. PFSI is an introducing broker-dealer that offers basic investment products (mutual funds, variable annuities, and college savings plans) on an "application-way" basis, and does not carry customer accounts. PFSI representatives are locally-based independent contractors who serve customers in the communities in which they live and are paid only by commissions resulting from product sales. PFSI allows its representatives to be part-time, which permits them to earn supplemental income by concentrating on the smaller-sized transactions typical of middle-income consumers.[2] PFSI believes that its representatives' standing in their respective local communities provides PFSI a unique ability to serve its customers.

PFSI's primary investment philosophy is geared toward our middle-income market. We teach the long-term benefits of dollar cost averaging through systematic investing into a diversified investment vehicle, such as a mutual fund or variable annuity. To help our customers adopt this approach, our affiliated shareholder servicing entity, Primerica Shareholder Services ("PSS"), facilitates monthly investments into mutual fund accounts by processing periodic bank drafts against customer checking accounts. PSS has structured its operations to be able to accept what we believe to be the smallest, minimum monthly investment amounts in the broker-dealer industry which allows individuals with modest means to start a retirement or educational savings account.[3] In addition to the benefits of dollar-cost averaging, PFSI emphasizes the need to begin saving for retirement as soon as reasonably practicable, and our clients often start with a small monthly investment. As a result, in just about any given year, approximately half of all accounts opened by PFSI are individual retirement accounts whereby our customers begin or continue the important task of saving for retirement. In fact, approximately 56% of our customer accounts' assets are held in IRAs. PFSI and our representatives are committed to helping middle-income consumers recognize the urgent need to begin saving and investing for their long-term retirement security.

Our concern with the proposed rule is that with respect to broker-dealers, the proposal materially modifies elements of establishing a fiduciary relationship with their traditional clients for purposes of IRC § 4975. The effects of this, as discussed more fully below, are that if the broker-dealer is deemed to be a fiduciary, under IRC § 4975, with respect to an IRA customer, the broker-dealer is prohibited, absent an applicable exemption,[4] from receiving non-levelized compensation based on product sales. It is for this reason that firms such as PFSI structure their owner-direct IRA businesses in a manner intended to keep the firm and its representatives from becoming a "fiduciary." Based on the Department's current rules and guidance, firms generally limit their role to making investment products (such as mutual funds and variable annuities) available to their IRA customers, and providing investment education to help these customers

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[2] Because we offer only the basic investment products noted above, PFSI representatives are required to hold only Series 6 and 63 FINRA registrations. If PFSI was required to change its existing commission based IRAs to fee-based IRAs, then our representatives that continue to service IRA customers would be required to incur the burden of an additional licensing regime. This would likely limit the number of part-time representatives that would be willing to continue to provide services to IRA customers.

[3] PSS's minimums for individual retirement accounts are as follows: minimum initial purchase - $250; minimum subsequent purchase - $50; and minimum preauthorized check-draft - $25.

[4] We note that although Prohibited Transaction Exemptions 75-1(II), 86-128 and 84-24 may provide some limited relief for these issues, there are a number of open questions regarding their application to our core business, including their availability in the context of non-discretionary advice and types of compensation and payment methods covered.

understand their savings needs and how best to meet their retirement savings goals. Under this structure, firms that serve the middle-income market are able to maintain low minimum investment thresholds and minimize their charges to IRAs, by relying on revenue from transaction-based compensation and other payments from product providers. In short, these sources of revenue help the firms offset the high costs associated with maintaining a large number of small accounts. Therefore, causing these firms to become "fiduciaries" under the revised rules would severely impact their current business models, with the negative impacts described below.

PFSI and Similar Firms Could be Deemed a Fiduciary Under the Proposal

IRC §4975(e)(3) defines the term "fiduciary" for purposes of IRC §4975, and includes any person who ". . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . ." Shortly after Section 4975 was enacted, the Department issued the current regulation that essentially limits the circumstances when one providing investment advice, without discretionary authority, would be considered a "fiduciary." The current regulation requires that the advice be rendered "on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise . . . that such services will serve as a primary basis for investment decisions with respect to plan assets." [5] The proposed amendment does away with the foregoing requirements and defines "fiduciary" merely as one providing investment advice regarding securities ". . . pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan . . . that such advice may be considered in connection with making investment . . . decisions with respect to plan assets, and will be individualized to the needs of the plan . . ."

The proposed changes to this definition would, at a minimum, create uncertainty as to whether (or more to the point when) the business of providing the above-described brokerage and related services to middle-income consumers regarding their IRA assets would cause the firm to be deemed a "fiduciary" under the proposal for purposes of Section 4975. Specifically, by removing the "regular basis" and "mutual understanding" elements of the current regulation, the proposal would put the firm at risk that an IRA owner unilaterally believes (regardless of what the firm intends or what is agreed to in the account documentation) that it is in a fiduciary relationship with the firm and, therefore, the prohibited transactions provisions may apply.

Also, as you are aware, the staff of the SEC has recently completed the study required by section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection

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[5] The existing definition is found in Department of Treasury Regulation 26 CFR 54-4975-9(c) Definition of "fiduciary".

Act of 2010 ("Dodd-Frank"). Dodd-Frank directed the Commission to study the effects of subjecting broker-dealers and investment advisers to a uniform standard of care that requires them to act in the best interests of retail customers, while protecting a broker-dealer's ability to receive commission based compensation. In light of Congressional intent and the SEC staff's recommendation to consider implementation of a uniform standard of care for both broker-dealers and investment advisers providing personalized investment advice about securities to retail customers, we ask that the Department reevaluate its proposal. Moreover, as IRA's comprise such a large percentage of the retail market for personalized advice, we request that the Department coordinate its efforts with the SEC before adopting a rule that has such enormous potential to cause confusion and widespread disruption in the IRA marketplace.

Effects of Causing Brokerage Firms to be Fiduciaries to IRAs

IRC §4975(c)(1)(F) prohibits "the receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan." Under the Department's interpretations of this rule (and the parallel provision in ERISA), if a firm like PFSI is considered a fiduciary to an IRA account and is treated as advising on an investment in an unaffiliated product, its receipt and retention of a dealer reallowance or other compensation from the third-party provider of that product or its affiliate would be a prohibited transaction.

If this is the case, the result would be to upend a large segment of the retail broker-dealer industry by cutting off the compensation that enables such firms to reasonably price brokerage services for middle-income IRA consumers, thereby forcing such clients to deal only with "fee only" registered investment advisors, which are generally compensated on a level asset-based fee. The Department has provided no justification for such a drastic result. Moreover, such a result would be inconsistent with the most recent expression of Congressional intent, as set forth in Dodd-Frank. As noted in the SEC study cited above, Section 913 of the legislation specifically states that the receipt of "commission compensation" is not to be considered a violation of the new uniform standard of care that the SEC is authorized to impose on both broker-dealers and investment advisers requiring them to act in the best interests of customers.

Requiring beneficial owners of IRAs to deal only with "fee only" investment advisers would have an immediate, adverse impact on middle-income consumers. Investment adviser programs impose much higher required minimum investments, placing them beyond the reach of most lower-end investors.[6] If the Department puts an

[6] Recently, PFSI conducted an informal survey of wrap-fee mutual fund programs offered by registered investment advisers. The lowest required minimum investment identified by the study was $25,000. As of December 2010, PFSI served over 1.3 million individual retirement accounts with an average account balance of approximately $10,000.

end to the enormously popular commission-based IRA account, then where are these lower-end investors to obtain investment guidance and services? Furthermore, in the absence of the ability to receive revenues from product providers, firms that serve the middle-income market will have to substantially raise account fees, which will reduce investment returns. In short, limiting the access of middle-income consumers to investment services at a time when most middle-income families are continuing to struggle financially is completely contrary to what these families actually need. We are convinced that the proposed rule, as currently written, would hinder our ability to continue to deliver basic savings and investment services to the middle-income market that we endeavor to serve.

Suggested Steps to Address the Effects on IRAs

To avoid the problems described above and permit firms like PFSI to continue to serve the middle-income IRA market, we propose that either (1) the new rules not apply to IRAs, (2) the rules not be applied to IRAs until after a study of their effects on the IRA market can be conducted, or (3) the purchase and sale exception in the proposal be expanded to permit brokers to deal with IRAs subject to providing appropriate disclosure.

(1) *Not Applying New Rules to IRAs.* Congress and the Department have recognized in other contexts that the IRA market operates differently from the market for qualified retirement plans. In enacting an exemption for the provision of "investment advice" to plans in 2006 (ERISA § 408(b)(14) of ERISA and IRC § 4975(d)(17)), Congress required the Department to undertake a study of whether the "computer model" provisions of the exemption would be feasible for IRAs. More recently, in adopting new disclosure rules for plan service providers under ERISA § 408(b)(2), the Department did not apply the new rules to IRAs. Similar considerations should apply here.

In describing the reasons for proposing changes to the existing regulation on the definition of a fiduciary, the Department highlighted the shift from defined benefit plans to defined contribution plans, the increasing types and complexity of investment products and services, and problems it said the current regulation has created for its enforcement initiatives. In short, the stated reasons for these changes are not applicable to IRAs. First, the shift from defined benefit plans to defined contribution plans is not an issue for IRAs, because IRAs never took the form of defined benefit plans. Second, with respect to issues caused by increasing types and complexity of investment products and services, this is not an issue for middle-market IRAs, which generally invest in traditional retirement products such as mutual funds and variable annuities. Finally, as for the Department's enforcement initiatives, IRAs are outside the scope of the Department's enforcement authority and responsibility. Therefore, these reasons do not apply to the IRA market.

Also, it does not appear that the potential costs to IRAs that will likely result from the implementation of this proposal were taken into account as part of the Regulatory Impact Analysis. The focus of the Analysis is on the cost of compliance to the service providers, noting that the effects of higher fees, shrinkage of the service provider market and the modification of business practices would be too uncertain to estimate (see 75 Fed. Reg. at 65,275). As indicated above, we believe that there would be significant adverse effects on the middle-income IRA market. We further believe that those effects can be quantified by additional study.

For these reasons, the Department should carve out IRAs from the new rules. This will permit the Department to focus its efforts and limited recourses on those areas within the scope of its underlying concerns, without adversely affecting other areas as well.

(2) *Studying the Effects on IRAs Before Subjecting Them to the New Rules.* If the Department does not agree that the new rules should exclude coverage of IRAs, then the Department should, at the very least, conduct a comprehensive study (in connection with the SEC) of the potential effects of subjecting IRAs to the new rules. The study should include the consideration of the transition from commission based brokerage accounts to fee-only advisory accounts, the effects of pricing low balance accounts out of the marketplace, and the resulting effects on middle-income IRA investors attempting to save for retirement. We believe that such a study would allow the Department to better understand these issues as they relate to IRAs and, to the extent appropriate, to create special rules that would both achieve the Department's goals and preserve access for middle-income IRA investors to these types of traditional brokerage services.

(3) *Expanding the Purchase and Sale Exception.* Absent a full exclusion of IRAs from the new rule, one approach to preserving their access to traditional brokerage services would be to provide definitive rules for maintaining such relationships. We believe that the proposal's "purchasing and selling" limitation could be clarified for this purpose.

Under the proposal (subparagraph (2)(i)), a person will not be considered an investment advice fiduciary if the person "can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making a recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice." This provision is intended to reflect the Department's understanding that, in the context of selling investments to a purchaser, a seller's communications with the purchaser may involve advice or recommendations that could come under the definition in the proposal, but that ordinarily should not result in fiduciary status if the purchaser knows that the seller has not undertaken to act as an impartial adviser.

To permit dealings between broker-dealers and IRA beneficial owners of the type common in the middle-income market, the exception should be modified to cover a broker-dealer that delivers, at the point-of-sale, a plain-English disclosure to an IRA beneficial owner that describes the compensation that the broker-dealer would receive in connection with transactions for the account and any material conflicts that may exist, and explains that the broker-dealer is not acting as a "fiduciary" for purposes of IRC Section 4975. The standards used could be coordinated with any standards that are developed by the SEC for broker-dealers, as those would be designed to address the specific types of issues that arise in a brokerage relationship. This would be consistent with the nature of the exception as a disclosure-based limitation, making clear the nature of the relationship and what the IRA beneficial owner should reasonably expect in its dealings with the broker-dealer. Such an exception would, subject to the added disclosure, permit broker-dealers to continue delivering the same level of investment services to their middle-income IRA customers without raising costs or otherwise pricing such customers out of access to their services, thereby promoting their ability to save for retirement.

Conclusion

PFSI appreciates the Department's efforts to provide better protections for large pension plans that provide for the retirement interests of many hard-working Americans. The Department, however, should pause to reevaluate what its proposal is about to do to the retirement saving prospects of millions of middle-income Americans that are not covered by large pension plans. The proposed changes to the definition of "fiduciary" under ERISA will have wide-ranging, adverse consequences for those beneficial owners of IRAs that seek to access traditional brokerage services. The proposal may force broker-dealers to abandon the widely popular, existing IRA format or make fundamental and unprecedented changes to long-standing industry practices that have been deemed acceptable by federal and state securities regulators. The potential for harm to the public is enormous. Fewer broker-dealers operating in the IRA business means less access to investment products and services. Higher costs associated with complying with this proposal will result in higher fees, which in combination with higher account minimums, will further restrict access by pricing many middle-income IRA investors out of the market. Finally, IRA investors that are not deterred from seeking advice because of higher fees will ultimately discover that they have accumulated far less for retirement, because the increased fees necessitated by this proposal have substantially eroded their investment returns.

PFSI remains dedicated to educating middle-income families about the importance of saving for retirement and assisting those families with establishing retirement accounts. Therefore, we respectfully request that the proposal be amended to allow us to continue to serve our middle-income customers, in the cost-effective manner in which we now serve them.

We appreciate your consideration of these comments and hope to have the opportunity to participate in the hearing scheduled for March 1, 2011. Of course, we are also available to discuss any questions you might have regarding our concerns.

Very truly yours,

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