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Via Electronic Mail to e-ORI@dol.gov

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

Re: **Request for Information Regarding DOL's Regulation Defining the Term "Fiduciary" and Related Prohibited Transaction Exemptions (RIN 1210-AB82)**

Dear Sir or Madam:

PFS Investments Inc. ("PFSI" or "we"), a registered broker-dealer and an indirect wholly-owned subsidiary of Primerica, Inc. ("Primerica")¹, appreciate the opportunity to comment on questions raised in the Department of Labor's ("Department") request for information published on July 6, 2017 ("RFI")². This letter addresses the first question of the RFI, which solicits comments regarding a delay of conditions set to become applicable on January 1, 2018 (the "Full Applicability Date") of the prohibited transaction exemptions to the regulation defining who is a "fiduciary" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and section 4975 of the

¹Primerica is a leading distributor of basic savings and investment products to U.S. middle-income households. Our clients earn, on average, between \$30,000 and \$100,000 in household income, a category that represents approximately 50% of all U.S. households. Approximately 70% of our accounts are IRAs. Our business model allows our representatives to accept the smaller-sized transactions typical of middle-income consumers and to provide clients with personal services that ordinarily would be out of reach to middle-income investors with smaller account balances. We will open an IRA for an individual with as little as \$250 to invest, or for \$50 per month. We know first-hand that individuals with access to a financial representative accumulate greater and more balanced retirement assets than those without, a fact that is supported by numerous studies.

²Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278, available at <https://www.federalregister.gov/documents/2017/07/06/2017-14101/request-for-information-regarding-the-fiduciary-rule-and-prohibited-transaction-exemptions>.

Internal Revenue Code of 1975, as amended (“Code”) (the final regulation and related prohibited transaction exemptions, together, the “Rule”).³

We strongly urge the Department to delay the Full Applicability Date for a period of at least 24 months. This period of time is needed to allow for a proper reexamination of the Rule, and to afford time for the Department to make adjustments necessitated by the harmful effects of the original rulemaking. Additionally, concurrent with delay of the January 1, 2018 applicability date, the Department should implement a corresponding extension of the temporary enforcement policy provided in Field Assistance Bulletin (“FAB”) 2017-12.

As we forewarned the Department in our prior comments,⁴ it has become apparent that the effect of the Rule now in force is to limit access to services, products, and information needed for Americans to save for retirement in Individual Retirement Accounts (“IRAs”). Thousands of comments predicted this result. The \$17 billion benefit estimate from the prior Administration’s Council of Economic Advisers’ (“CEA”) report failed to take into consideration the cost of withdrawing advice from investors with small or modest size account balances, among other issues with the CEA report.⁵ The evidence is that firms are choosing to abandon these households rather than accept the heightened legal and regulatory risks of serving them.⁶ Neither industry’s response to the Rule pushed through on June 9, 2017 (the “Transition Rule”)⁷, nor evident preparations for the Full Applicability Date still scheduled for January 1, 2018, are

³ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016–02); Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128.; RIN 1210-AB79 Final rule; extension of applicability date, 82 Fed. Reg. 16,902.

⁴ We incorporate by reference our Comment Letters. Our Comment Letters are supported by independent economic studies predictive of the Rule’s adverse impacts. We respectfully request the Department further consider this work. *See, e.g.* PFS Investments, Inc. Primerica, Inc., Comment Letter, April 17, 2017, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03099.pdf>.

⁵ *The Effects of Conflicted Investment Advice on Retirement Savings*, White House Council of Economic Advisers (Feb 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf; *See also, Review of the White House Report Titled “The Effects of Conflicted Investment Advice on Retirement Savings*, NERA Economic Consulting (March 15, 2017), available at http://www.nera.com/content/dam/nera/publications/2015/PUB_WH_Report_Conflicted_Advice_Retirement_Savings_0315.pdf (stating, “While the Report points to academic literature to support these aggregate cost estimates (a baseline number of \$17 billion), the estimates are not directly found in academic literature. Instead, the aggregate costs are calculated by the authors of the Report themselves, who make generalizations and extrapolations which they often do not fully support); Brian Reid, Investment Company Institute, *Getting the Numbers Right on Investment Advice for Retirement Savers*, February 26, 2015, available at https://www.ici.org/viewpoints/view_15_fiduciary_data).

⁶ *See, e.g., The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers*, U.S. Chamber of Commerce (Spring 2017), available at https://www.uschamber.com/sites/default/files/ccmc_fiduciaryrule_harms_smallbusiness.pdf.

⁷ *Supra*, note 3.

what the Department predicted would occur in its Regulatory Impact Analysis (“RIA”)⁸. Instead, the Department believed, we think naively, that industry would adjust by creating a new paradigm. It has: the new paradigm is a wholesale shift to fee-based advisory accounts, which bring minimums beyond the reach of ordinary households.

The Department hopes that robo-advisory systems will proliferate to fill this gap, but the outcome of that direction is a vast unknown. The reality is that the Department’s favored robo-solutions have failed to gain significant market share (unsurprisingly, as Main Street families need human assistance to be encouraged to save).⁹ Those same FinTech providers who held themselves out at the behest of the Department as the answer to the advice gap caused by the Rule, have account minimums as high as \$100,000.¹⁰

The negative impact of the fundamental restructuring taking place is a compelling admonition that more time is needed for a better understanding of the Rule’s consequences and to give time for regulatory adjustments. A slow-down is in order.

There is no question that the Rule will impede the ability of middle-income families to save and invest for retirement. As we discuss below, firms are taking steps to insulate themselves from the liability risk of the Best Interest Contract Exemption (“BICE”), the exemption designed to preserve commission-based brokerage platforms. Instead of using BICE, firms are exploring share classes and leveled compensation systems. While on their face, these shifts appear “innovative,” they simply reflect the government’s preference for different conflicts rather than consumers’ desires and needs. The losers are investors whose transaction sizes no longer can be supported by one-on-one personal financial guidance.

⁸ *Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, April 2016, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf>.

⁹ See, e.g., *The Role of Financial Advisors in the US Retirement Market*, at 17, OLIVER WYMAN (July 10, 2015), available at <http://fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf>. Oliver Wyman found that, on average, individuals that use a financial representative have more assets than nonadvised individuals across all the age and income levels examined and that the differences are meaningful; *The 2015 Retirement Confidence Survey*, Employee Benefit Research Institute, (2015), available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_413_Apr15_RCS-2015.pdf, at 24 (stating, “...just 4 percent of workers report being very interested in obtaining investment education and advice online.”); *Robo-Advisors Will Need Humans – Yes, Humans – to Grow Business: Cerulli*, available at <http://www.thinkadvisor.com/2015/08/12/robo-advisors-will-need-humans-yes-humans-to-grow?shretun=1500648614> (stating, “Despite all of the technological advances over the past four years, the number of self-directed investors ... dropped by nearly 12 percentage points from 2010 to 2014 Meanwhile the number of households that consult with an advisor, whether intermittently or regularly, jumped by nearly 10% over the last four years.”).

¹⁰ See, e.g. *Rebalance USA*, available at <https://www.rebalance-ira.com/faq/>, (“What is the minimum size portfolio I need to get started? The minimum size portfolio that you need to get started is \$100,000.”).

We are concerned that government is playing Russian roulette with the average American retirement investor. Governments need to be extraordinarily careful when they upend an established industry, dictate winners and losers, and manipulate free-market forces. Consequences of those regulations need to be plain and fully understood.

Our fundamental issue with the Department's rulemaking never has been with its laudable objectives: to raise the standard for providing advice to investors. Rather, our issue has been that the Department – confined by an absence of authority and limited tools since it only can define who is a fiduciary for plans under ERISA – has used its *exemptive* authority to impose a complex, artificial, sweeping new regulatory scheme on the individual market place, one that overlaps and conflicts with the regulatory paradigm Congress designed for the SEC to administer.

That scheme forces firms to balance an increase in monitoring costs and legal expenses associated with using a commission-based compensation system against the revenue associated with serving more modest investors. However firms strike that balance, it is a given that the cost and risk of engaging in the brokerage business is now greater, changing the risk/reward equation.

History has shown, repeatedly, that individual middle and lower income households often bear the brunt of regulation intended to protect them. In particular, consumer-protection regulations are strongly associated with higher prices.¹¹ As one example, credit card companies, who, under the CARD Act, could no longer charge riskier borrowers more, raised credit card rates to the highest in decades.¹² Rules likewise often have unintended consequences of harming those they were intended to help. For example, Dodd-Frank financial regulations, meant to protect Main Street over Wall Street, resulted in the number of community banks falling by 40 percent, and shrunk their share of U.S. banking assets by more than half¹³. Research from the Mercatus Center at George Mason University indicates that “protective” regulation has disproportionately disadvantaged unskilled workers and low-income households, and that such rules often “cost as much as six to eight times more as a share of income for low-income households

¹¹ Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, *Regulatory Accumulation and its Costs*, Mercatus Center at George Mason University, available at <https://www.mercatus.org/system/files/McLaughlin-Reg-Accumulation-EP-v3.pdf>.

¹² Michael Dolen, *Is More Credit Card Regulation Hurting Consumers?* American Thinker (Sept. 3, 2013), available at http://www.americanthinker.com/articles/2013/09/is_more_credit_card_regulation_hurting_consumers.html.

¹³ Carrie Sheffield, *Dodd-Frank is Killing Community Banks*, Forbes (Feb 9, 2015), available at <https://www.forbes.com/sites/carriesheffield/2015/02/09/dodd-frank-is-killing-community-banks/#230e039373a7>.

than for high-income households.”¹⁴ Independent experts have stated the same effect seen in these cases will likely occur with the Department’s Rule.¹⁵

Given these uncertainties, the Department should delay the January 1, 2018, Full Applicability Date through a single regulatory action for at 24 months until it fully understands the actual consequences of the Rule with regard to brokerage accounts, and then should allow for an implementation period for firms to adjust to any new rulemaking. Specifically, and in summary of the points below, a delay would permit the Department to:

1. Adequately respond to the reexamination of the Rule required by the Presidential Memorandum;
2. Prevent further fundamental, and potentially irreversible, changes to market structures driven in response to regulation rather than by investor desires and needs, that will result in increased costs, confusion and loss of access to retirement savings advice for millions of middle-income American individuals and households;
3. Work and coordinate with the Securities Exchange Commission (“SEC”), which is the primary prudential regulator of broker-dealers and of standards of conduct governing individual investment accounts like IRAs; and
4. Allow time for firms – including for us – to develop and become oriented to the new products, technology, supervision systems, policies and procedures needed to operationally comply with the Transition Rule and understand better what the new fiduciary requirements will entail. The Department will benefit from this experience and will be able to observe any change in the litigation climate as a result of bringing broker-dealers into an ERISA world.

We discuss each of these grounds for a delay below.

I. Delay is Needed to Complete the Review Required by the Presidential Memorandum

Once changes occur in the industry, any consumer harm will be impossible to undo. The Department should initially delay the January 1, 2018, Full Applicability Date, through one regulatory action, for at

¹⁴ Supra, note 11.

¹⁵ John Manganaro, *Broker/Dealer Evolution Ahead of the Fiduciary Rule*, planadvisor, December 12, 2016, available at <http://www.planadvisor.com/Broker-Dealer-Evolution-Ahead-of-Fiduciary-Rule/> (stating that “Small B/Ds without scale are at high risk under the DOL Rule. It is likely that some of these boutique firms will be unable to support new regulatory costs, resulting in an increase in firm consolidations.”)

least 24 months in order for it to complete its examination and notify stakeholders of the changes it intends to make as a result.

As part of its reconsideration of the applicability date of the final rule, it is essential that the Department undertake a new and more comprehensive cost-benefit analysis as demanded by the President's Memorandum of February 3, 2017.¹⁶ This time would also permit the Department to make the material regulatory adjustments to the Rule that the President ordered.

The cost-benefit analysis conducted prior to the issuance of the final rule has received significant criticism, much of which is focused on the Department's attempt to quantify the intended benefits of a new rule without considering reasonable alternatives.¹⁷ The Department should consider adhering to the same standards that the SEC uses to perform economic analyses,¹⁸ which provides a set of best practices that are designed to conform to Executive Order 13579.¹⁹ At a minimum, a robust economic analysis would include a complete characterization of the Rule's costs and benefits and an analysis of reasonable alternatives. In our recent consultations with renowned and respected economists, we have learned that such an analysis cannot be performed before January 1, 2018. An extension of the applicability date is necessary to allow sufficient time to perform a comprehensive analysis that takes into account all of the relevant factors.

The Department's current analysis fails on a number of important dimensions. Commenters on the Rule have observed that the analysis that quantifies the benefits is significantly overstated. While in the same analysis, it dismisses a number of significant economic costs, which include the potential loss of access to personal investment advice, the inflationary cost associated with class action litigation, and increased compliance costs arising from potentially conflicting regulatory requirements, if and when the SEC adopts its own fiduciary standards. Another problematic aspect of the Department's cost-benefit analysis

¹⁶ Memorandum of February 3, 2017 for the Secretary of Labor re: Fiduciary Duty Rule, 82 Fed. Reg. 9675.

¹⁷ See, Letter from SIFMA Managing Director and Associate General Counsel Lisa Bleier to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Apr. 17, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01396.pdf>; Letter from Financial Services Institute Executive Vice President and General Counsel to Acting Secretary Edward Hugler, U.S. Department of Labor (Apr. 17, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01398.pdf>; Letter from ACLI Vice President Howard Bard and Vice President James Szostek to Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor (Apr. 17, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01404.pdf>.

¹⁸ See, U.S. Securities and Exchange Commission, *Use of the Current Guidance on Economic Analysis in SEC Rulemakings*, (June 6, 2013), available at <https://www.sec.gov/files/518.pdf>.

¹⁹ 76 Fed. Reg. 41587 (Jul. 14, 2011) (encouraging independent regulatory agencies to conduct retrospective analyses of rules that may be excessively burdensome or ineffective, set forth in Executive Order 13563).

is its failure to adequately consider reasonable alternatives. One of the primary reasons rules require a public comment period is to give interested parties an opportunity to suggest possible alternatives that achieve the same goal in a more efficient manner. A robust economic analysis will not only discuss such alternatives but provide an explanation for why they were rejected.

Once a fulsome analysis is completed, the Department will require time to assess the alternatives and make proposals for review and consideration by the Office of Management and Budget (“OMB”). The ensuing process will include a period for comments and issuance of final regulations, and final OMB clearance. Whatever the outcome, the regulations must embed time for industry to adapt to the rulemaking over a period long enough to build out compliant operational systems, develop and obtain approval from the SEC and other regulators for new products, accrue consensus that the products fit consumer needs and not merely regulators’ demands, and minimize consumer confusion.

Even with an accelerated rulemaking schedule, this necessitates a delay of the Full Applicability Date at least until the end of 2019. Anything less will signal that the Department intends for no meaningful review or material changes to take place, leaving no options but for the disruptive changes and consumer harm brought on by BICE to take place during the final months of the Transition Rule. A series of shorter delays will have the same negative effect. There is no doubt that the result will be a shrinking of tax-qualified savings options demanded by a government regulation that favors certain types of financial services, products, and providers over others. Worse, more middle-income savers with smaller-size amounts to invest for retirement will be abandoned.

II. Delay is Needed to Halt the Market Restructurings that are Harming Retirement Savers

In our comments to the Department on July 21, 2015, September 24, 2015, March 10, 2017, and April 17, 2017, we warned of the overwhelmingly negative impact that the Rule would have on middle-income individuals’ and families’ ability to save for retirement through IRAs.²⁰ We anticipated that the effect of the Rule would be to place retirement assistance beyond the reach of millions of middle-income households, a reduction in investor choices, and ultimately, lost opportunities to accumulate meaningful savings for millions of hard-working Americans in the middle-income market.²¹

²⁰ *Supra*, note 4.

²¹ PFS Investment Inc. Primerica, Inc., Comment Letter, July 21, 2015, at 9: “[W]e are deeply concerned that the Proposed Rule will have the unintended effect of depriving middle-income consumers of desperately-needed retirement guidance from SEC- and FINRA-regulated financial professionals. We anticipate the result will be an industry-wide movement to further abandon the

In order to comply with the Department's June 9, 2017 implementation date, firms have begun to restructure their IRA businesses in a manner that shifts away the risks of carrying the smaller-size accounts of more moderate savers, families and small independent businesses. In response to the Rule, companies have publicly stated that they will eliminate commission brokerage for IRAs, limit small accounts to robo-advice only or no face-to-face service, establish higher minimums for brokerage accounts, reduce products available to qualified savings accounts, and sell brokerage businesses.²² Reports abound of consumers confused or distraught by notices from their brokers informing them that accounts now must be moved to advisory platforms or deprived of assistance.²³ This restructuring reflects a movement toward fee-based advisory accounts for the wealthy and abandons those who cannot meet higher minimum account balances and fees to fend for themselves online. What is perhaps most striking about these developments is that they evidence that through its regulation, the Labor Department – which is not the prudential regulator of individual investment accounts -- is denying Americans the freedom to make their own investment choices. Instead, a historically free-market that always has innovated to meet

middle-market and focus on affluent clients. The “haves” will be afforded personal services, while the “have-nots” will be left without personal assistance to fend for themselves online, or will be steered away from tax-advantaged IRAs entirely.”

²² Michael Wursthorn, *Merrill Lynch to End Commission-Based Options for Retirement Savers*, The Wall Street Journal, October 6, 2016, available at <https://www.wsj.com/articles/merrill-lynch-to-end-commission-based-options-for-retirement-savers-1475784928>; Michael Wursthorn, *Merrill's Fiduciary Alternative Would Affect Limited Number of Clients*, The Wall Street Journal, March 10, 2017 (While Merrill Lynch is *considering* offering an alternative product, such a product would “carry heavy restrictions. ... The people familiar added that there is no guarantee an alternative product will be created.”); Michael Wursthorn, *J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs*, The Wall Street Journal, March 13, 2017, available at <https://www.wsj.com/articles/j-p-morgan-moves-ahead-with-plan-to-drop-commissions-in-iras-1489420979>; Grete Suarez, *Capital One will eliminate commissions on IRAs*, Investment News, November 16, 2016, available at <http://www.investmentnews.com/article/20161116/FREE/161119951/capital-one-will-eliminate-commissions-on-iras>; InvestmentNews Staff, *Commonwealth Financial eliminates commission-based retirement products in wake of DOL rule*, Investment News, October 24, 2016, available at <http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement>; Greg Iacurci, *State Farm, citing DOL fiduciary rule, cuts agents from mutual fund and variable annuity sales*, Investment News, September 12, 2016, available at <http://www.investmentnews.com/article/20160912/FREE/160919992/state-farm-citing-dol-fiduciary-rule-cuts-agents-from-mutual-fund?AID=%2F20160912%2FFREE%2F160919992>; Michael Wursthorn, *Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule*, The Wall Street Journal, August 17, 2016, available at <http://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692>; Kenneth Corbin, *Stifel's fiduciary solution for commissions*, OnWallStreet, November 3, 2016, available at <https://www.onwallstreet.com/news/stifels-fiduciary-solution-for-commissions>; ThinkAdvisor, January 28, 2016, available at <http://www.thinkadvisor.com/2016/01/28/aig-advisor-group-sale-fueled-by-dol-fiduciary-rul?slreturn=1492280745>; See Christine Idzelis, *MetLife is second major insurer to exit the brokerage business, in the sale of adviser unit to MassMutual*, February 29, 2016, available at <http://www.investmentnews.com/article/20160229/FREE/160229937/metlife-is-second-major-insurer-to-exit-the-brokerage-business-in>; Greg Iacurci, *LPL to roll out new mutual fund platform as DOL rule takes effect*, Investment News, July 13, 2017, <http://www.investmentnews.com/article/20170713/FREE/170719970/lpl-to-roll-out-new-mutual-fund-platform-as-dol-fiduciary-rule-takes>; Andrew Welsch, *Fiduciary rule forced Stifel's hand to sell IBD, CEO says*, OnWallStreet, August 3, 2016, available at <https://www.onwallstreet.com/news/fiduciary-rule-forced-stifels-hand-to-sell-ibd-ceo-says>.

²³ Jim Gallagher, *Edward Jones to Keep Commissions under 'fiduciary rule, (Clients with less than \$100,000 will be put into fee based accounts)* St. Louis Post-Dispatch, August 17, 2016, available at http://www.stltoday.com/business/local/edward-jones-to-keep-commissions-under-fiduciary-rule/article_d8d71458-3312-5195-b011-194588212eb3.html; Daisy Maxey and Veronica Dagher, *Meet the Retirement Savers Who Oppose the Fiduciary Rule*, The Wall Street Journal, February 15, 2017, available at <https://www.wsj.com/articles/meet-the-retirement-savers-who-oppose-the-fiduciary-rule-1487168986>.

consumers' needs and desires now is limiting and developing product in response to policy preferences of an Administration.

To put these changes in real terms David Knoch, President of 1st Global, recently testified before Congress on behalf of the Financial Services Institute about the impact the rule is having on small, independent brokerage firms. He stated:

In many cases, the least expensive method for clients to hold mutual funds is to custody them directly with the originating mutual fund company (often referred to as “direct business,” “direct-way business,” or “retail direct.”) Since the beginning of 2016, the number of accounts held by 1st Global clients directly with mutual funds companies has declined nearly 10 percent and the number of new accounts established dropped 19 percent during the first six months of 2017. *We expect this trend to increase and by the end of this year anticipate that the total number of accounts held in these programs will drop 35 percent from 2016 levels* (emphasis added).

In contrast, we have seen a 123 percent increase in new accounts established using our “level-fee” advisory programs since the beginning of the year. These are accounts offered through our Registered Investment Adviser (RIA), held to a fiduciary standard, supervised by the SEC, and expected to qualify for the level-fee exemption offered by the DOL Rule. There are two key drivers behind this trend and both are derived from compliance with the DOL Rule. The first driver is our affiliated financial advisors moving the accounts of our fee-based advisory platform where the onerous requirements and legal risks of relying on the Best Interest Contract Exemption (BICE) are eliminated, and supervision of advice and aggregation of clients' assets is more manageable. The second is related to policy actions that 1st Global has enacted in response to both the DOL Rule and a need to modernize our firm.²⁴

Ultimately, the Rule changes the economics and risks underlying the provision of personalized advice to modest savers. The changes underway are in reaction to the new economics, demonstrating what we have long known – companies are resilient. A recent study from A.T. Kearney guides industry to make aggressive changes to protect revenues, including the “dropping of undersized accounts.”²⁵ The report states, “[a]s firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advisory and self-directed.”²⁶ An independent survey performed by CoreData Research (“CoreData”) confirms this reaction: the Rule will force a majority of

²⁴ David Knoch, CIMA, President, 1st Global and Member, Board of Directors, Financial Services Institute, Congressional Testimony, the United States House of Representatives Committee on Financial Services Subcommittee on Capital Market, Securities, and Investment, *Impact of the DOL Fiduciary Rule on the Capital Markets*, July 13, 2017, available at <https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-dknoch-20170713.pdf>.

²⁵ A.T. Kearney study: *The \$20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, A. T. KEARNEY (Oct. 2016), <https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69>

²⁶ *Id.*

firms to abandon the U.S. middle-income market.²⁷ Likewise, nearly every distributor of mutual funds is intending to eliminate or reduce the number of fund products it offers to retail retirement investors. This narrowing is necessary to avoid the Rule's otherwise impossible or prohibitively expensive demand that conflicts be further "mitigated" across multiple fund companies and share-class offerings. Contrary to regulators' predictions or hopes, consumers will not benefit from this forced levelization. Fees will be designed and collected in another format. Brokerage-based retirement investors are likely to face not lower, but *increased* costs reflective of the risk and expense of increased litigation and class action lawsuits.²⁸ When person-to-person advice becomes more expensive and riskier to deliver, financial services firms will demur on helping lower balance clients in favor of solutions that preserve revenues.

Without assistance, abandoned households will save less, magnifying the retirement savings crisis already engulfing the middle-income segment of our country. Studies show that the presence of a financial professional in the lives of a family significantly increases the amount saved for retirement by as much as 50%.²⁹ Yet the RIA ignored the cost of lost savings from lack of advice, and the Department instead expressed its view that "innovation" such as robo-advisers would fill the gap. Independent online advice providers are found to be among the lowest preferred sources of advice in the Employee Benefit Research Institute's 2017 Retirement Confidence Survey,³⁰ and these robo-platforms are used by fewer than 1 in 10 consumers.³¹ In favoring a national policy that empowers robo-advisers over human advisers, the Rule misses the real conflict confronting America's middle class – spending versus saving. The clear result will be decreased savings. Economists have shown that during a market downturn, investors could lose close to \$80 billion without help, or twice the Department's claimed ten-year benefits of the Rule.³²

²⁷ *Fiduciary Rule To Leave Us Mass-market Investors Stranded, Study Shows*, CoreData Research, November 2016, available at <http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf>.

²⁸ *An Evaluation of the Department' Impact Analysis of Proposed Rules Relating to Investment Advisor Fiduciary Status*, Compass Lexecon (July 20, 2015), (Higher costs of operating in the industry because of the Rule can lead firms to exit certain segments of the industry, leading to weakening competition that could otherwise drive down fees. As there likely will be less competition for IRA investors with account balances below \$25,000, fees to these customers may increase.)

²⁹ *The Role of Financial Advisors in the US Retirement Market*, at 17 Oliver Wyman (July 10, 2015) (On average, individuals who employ the services of an investment professional, like a broker, have had "at least 50% more" in total invested assets than others since at least 2006, the first year of the dataset.); see also *Supra*, note 25, (advised investors have a threefold increase in the amount saved for retirement).

³⁰ *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparation*, Employee Benefit Research Institute (2017), available at https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS_21Mar17.pdf.

³¹ *Robo-Advice: Today and Into the Future* LIMRA, 2017; Financial Advice Market Review, 2016.

³² Robert Litan and Hal Singer, *Good Intentions Gone Wrong: The Yet-To-Be Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, at 19, July 2015, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00517.pdf>.

Nonetheless, with the Rule now partially in effect and a short time until the Full Applicability Date, companies have no choice but to restructure. Without a prolonged delay indicating an openness to reexamine the Rule, the changes already announced by firms, and more yet-to-be announced, will continue to be implemented, and quickly will become irreversible. To halt this outcome, the Department should promptly extend the Full Applicability Date to allow for a serious review and reconsideration of the Rule.

III. Delay is Needed to Coordinate with the SEC, the Primary Regulator of Brokers and Individual Investment Accounts

In pursuing its policy objectives to fundamentally change the regulation of the financial markets, the Department acted alone. The Department justified the Rule without mention of financial institutions' primary regulators -- SEC, Financial Industry Regulatory Authority ("FINRA"), state securities and insurance regulators, and federal and state banking regulators -- nor the extensive regulations and enforcement policies governing financial professionals developed by them. The rulemaking showed little regard for the fact that the Rule would be discordant with those regulations. United States Senator Ron Johnson confirmed this omission in a 2016 investigative report following a year-long inquiry into the Department's rulemaking process. The report, which was based on documents and correspondence from the Department, SEC, OMB, FINRA, and the Treasury Department, found that SEC, OMB, and Treasury "expressed numerous concerns" to DOL about its proposed rule, but that officials at DOL "disregarded many of these concerns and declined to implement recommendations."³³ The report made the following observations:

- "The majority staff found that the Labor Department frequently prioritized the expeditious completion of the rulemaking process at the expense of thoughtful deliberation."
- "The majority staff found indications that political appointees at the White House played a key role in driving the rulemaking process at the inception of the redrafting effort."
- In response to eight recommendations, DOL "declined to edit the operative language of the proposal, and instead merely modified or added language in the proposal's preamble. The Labor

³³ *The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers*, Committee on Homeland Security and Governmental Affairs, United States Senate, Senator Ron Johnson, Chairman, February 24, 2016, available at <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-flawed-department-of-labor-process-that-could-hurt-retirement-savers>.

Department outright rejected the SEC's two recommendations related to providing a quantitative cost-benefit analysis of considered alternatives to the rule."

Former SEC Commissioner Gallagher drew the same conclusion. In a comment addressed to former Labor Secretary Tomas Perez, Commissioner Gallagher stated "It is clear to me that the DOL rulemaking is a fait accompli and that the comment process is merely perfunctory." Commissioner Gallagher further stated "I am convinced that the rule, when finalized, will harm investors and the U.S. capital markets."³⁴

Refreshingly, Secretary Acosta has stated his desire that the Department and the SEC work constructively together to analyze the standards of conduct applicable to investment advisers and broker-dealers when they provide investment advice to retail investors. In June, 2017, SEC Chairman Jay Clayton welcomed this outreach. In so doing, Chairman Clayton made clear his view that the Rule may have significant effects on retail investors and entities regulated by the SEC, and on the capital markets. He left no doubt that the SEC believes this to be a complex issue, and that any attempt to regulate the advice standard must take account of the "fast-changing nature of our markets".³⁵

We welcome this new desire by both the Department and the SEC to work constructively on this issue. Time is critical in order for the Department and the SEC to have the flexibility to develop a coordinated approach that reduces confusion and protects investors.

IV. Delay is Needed for Firms to Adapt to the Transition Rule and for the Department to Understand Marketplace Changes

Comments to the Department repeatedly have expressed consternation over the heavy-handed government intrusion in the retirement-savings space. The Transition Rule is itself a radical change with its sweep of all transactions into a "fiduciary" world and its imposition of the Impartial Conduct Standards. An unknown is how firms will react to the Transition Rule and whether private litigation will begin to force additional modifications.

³⁴ See Commissioner Daniel M. Gallagher (Retired), *Comment Letter*, July 21, 2015, available at <https://www.sec.gov/news/speech/2015/gallagher-dol-comment-ttr-7-21-15.pdf>.

³⁵ Chairman Jay Clayton, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers*, June 1, 2017, available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

It is possible that the Transition Rule is enough; that it reduces conflicts, raises standards, and achieves the desirable amount of change. We are deeply concerned that absent a delay – including of the BICE and other exemptions – marketplace restructuring will go too far.

Primerica is an example. At our firm, in response to the movement towards a fiduciary regime, we have added disclosures on top of those required by our prudential regulator; we have imposed new policies and procedures; we have restructured our supervision; we have increased the minimums for the variable annuities products we distribute; we have retrained our sales force on their legal obligations and sales process; we have revamped our client communications; we have begun a dialogue with our product providers over access to our platform; we have changed our sales incentives; we have sunset a mutual fund wrap program; we have created a more sophisticated fee-based managed account alternative with a \$25,000 minimum; and we have deployed substantial resources into driving growth from more upscale clientele.

Our new emphasis on managed accounts is not surprising, given industry's shift of retirement investors to advisory platforms. This industry-shift is just as predicted by Oliver Wyman in its original 2011 assessment of the impact of the Rule on IRA consumers.³⁶ The Oliver Wyman study projected that the Rule would reduce access to brokerage accounts for retirement savers – particularly those in brokerage relationships, which represents 98% of investor accounts with less than \$25,000 – and would increase costs by between 75% and 195% for IRA investors who could be served in an advisory model.³⁷

The changes made for the onset of the Transition Rule are only the start. We are faced with a Rule that has deputized the plaintiffs' bar as the primary enforcement mechanism for a governmental act. This is encouragement of private litigation -- designed by the former Administration to tip the scale in favor of plaintiffs against the financial services industry -- bodes poorly for acceptable average-investor outcomes, as trial attorneys pursue their own agenda. The Department would be mistaken to believe that the tremendous resources required to absorb this risk and comply with the Rule will not be passed on to consumers.

We cannot be certain how the industry restructuring ultimately will impact our ability to help Main Street families save for retirement. What makes sense is to allow time for firms and the Department to

³⁶ *Assessment of the impact of the Department of Labor's proposed "fiduciary definition on IRA consumers*, Oliver Wyman (April 12, 2011).

³⁷ *Id.*

understand the impact of the new standard, evaluate the studies already performed, commission new studies of the impact of the Transition Rule, and, once modifications are made, give us another opportunity to comment. Through this process, the Department should be mindful that the new product, systems, and technology demanded by the Rule may take years, not months, to fully develop.

* * * * *

More time is needed for the Department to carefully assess, in accordance with the President's Memorandum, whether the Rule is poised to cause greater harm than benefit to middle-income consumers' retirement savings success. More time is needed in order to halt wholesale marketplace restructuring in a disruptive manner that may not inure to the "best interests" of savers, and that may particularly disadvantage American families with modest amounts to invest. More time is needed for the Department to benefit from its new willingness to truly coordinate with the SEC. And more time is needed for companies, in the face of complex and demanding conditions coupled with persistent regulatory uncertainty, to understand, implement and adjust to new products, systems, technology, supervision, policies and procedures as they strive to minimize the upheaval caused by the Rule.

For these reasons, we respectfully request that the Department delay the Full Applicability Date for a period of at least 24 months, to allow time for the Department to complete its examination of the original rulemaking, to engage in further rulemaking. Additionally, concurrent with delay of the January 1, 2018 applicability date, the Department should implement a corresponding extension of the temporary enforcement policy provided in FAB 2017-12.

We thank the Department for its efforts in this matter and we appreciate the opportunity to share our thoughts in this critical rulemaking.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kam Su". The signature is fluid and cursive, with a small flourish at the end.