PRIMERICA®

Karen L. Sukin
EVP and Deputy General Counsel
Primerica, Inc.

General Counsel
PFS Investments, Inc.
Member FINRA

1 Primerica Parkway
Duluth, Georgia 30099-0001

(470) 564-6580 Phone
(470) 564- 7174 Fax

Via Electronic Mail to e-ORI@dol.gov

September 24, 2015

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

Re: Conflicts of Interest Proposed Rule
Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice (RIN 1210-AB32)

Ladies and Gentlemen:

PFS Investments Inc. ("PFSI"), a registered broker-dealer and an indirect wholly-owned subsidiary of Primerica, Inc. ("Primerica"), is pleased to submit this Supplementary Comment Letter on the proposed Conflicts of Interest Rule ("Proposed Rule" or "Rule") that would more broadly define the term "fiduciary" under Internal Revenue Code ("IRC") Section 4975. We focus our comments on the Proposed Rule's impact on the middle-income savers and investors who we have diligently and successfully served for over 30 years.

As we set forth in our comments to the Department as of July 21, 2015 ("Comment Letter"), we continue to respectfully submit that the Proposed Rule will cause significant harm to middle-income individuals and families by restricting their ability to save for retirement through Individual Retirement Accounts ("IRAs"). In the Proposed Rule, the U.S. Department of Labor (the "Department") has so greatly expanded the definition of fiduciary that nearly every transaction effected in connection with a financial professional's assistance will be subject to reversal and penalties under the IRC prohibited transaction rules unless it falls within a prohibited transaction exemption. As our Comment Letter makes clear, we regrettably find the Department's proposed exemption intended to preserve commission-based transactions, the Best Interest Contract Exemption "(BIC Exemption"), to be so complex and burdensome that it is not administratively or operationally feasible. Firms will not use it. Instead, the Proposed Rule will require broker-dealers to fundamentally restructure their IRA businesses, resulting in higher minimum account balances beyond the reach of millions of middle-income households, reduced access to financial professionals, reduced investor choices, and ultimately, lost opportunities to accumulate meaningful retirement savings on a tax-deferred basis for millions of hard-working Americans in the middle-income market.

PFSI respectfully submits that for the Department to ensure that its efforts to protect American families do not have the unintended effect of harming the very constituencies the Rule was designed to protect, significant changes must be made to the Proposed Rule and the BIC Exemption. This Supplemental Comment highlights certain of those changes that are imperative, and proposes solutions. We specifically address that the Department should provide (i) an exception to the Rule for non-fiduciaries so as not to inhibit investors from obtaining assistance, (ii) clarification of the Rule for financial institutions and their representatives to meaningfully discuss the products and services they offer, and (iii) a broader grandfathering of relief for existing clients with respect to recommendations made to buy, sell or hold within pre-existing mutual fund families and annuity subaccounts. In addition, we address necessary changes to the BIC Exemption so that financial institutions may use it. Specifically, we submit that a workable BIC Exemption should have only three requirements:

1. A unilateral and binding commitment that advisers and financial institutions act in their customers' "best interest";
2. A requirement that compensation they receive for their services is reasonable, and
3. A requirement that financial institutions have in place policies and procedures reasonably designed to mitigate conflicts.

Given the breadth of the needed changes, and the significant harm that will result to millions of retirement investors if any final rule is not substantially altered, we respectfully request that the Department submit its proposed changes to the public for additional public comments before it proceeds to any final regulation.

I. Proposed Modifications to the Rule

A. Disclosure and Exemption for Non-Fiduciaries

A serious problem with the Department's proposal is that it defines "fiduciary" so broadly that, in effect, there is no such thing as a financial representative who sells a retirement-related investment product to an individual or small plan and is not a fiduciary. Plainly, however, not everyone who sells retirement-related investment products is in a fiduciary relationship, which is a special relationship of heightened trust and confidence. *See* Comment of Gibson Dunn & Crutcher at 3-9 (July 20, 2015). To be sure, a person who is making a sale often makes statements that could be understood as advice, but the Department has it precisely backwards when it concludes from this[1] that all sales relationships are therefore fiduciary in nature. As a matter of law that simply is not so, and accordingly any legitimate definition of fiduciary cannot include persons who are being paid for selling a financial product rather than for providing investment advice.

We believe that the proper resolution of this problem is for the Department to leave in place the current definition of fiduciary, which has worked effectively for 40 years. As an alternative, however, the Department should exclude from its new definition of fiduciary a person who accurately makes the following disclosure to a client:

1

DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Conflict of Interest Proposed Rule Public Hearing* (August 10-13, 2015), *available at* http://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html.
3 DEP'T , at 151.

> I would like to be clear about the nature of our relationship. I am a salesperson, interested in selling you financial products. I am not what is called a "fiduciary," which is an advisor who owes undivided loyalty to you. Rather, we have a conflict of interest because I will receive compensation if you agree to purchase the products we are discussing, and I may receive more compensation from some of those products than from others. I will make recommendations to you, but please understand that you are buying financial products from me.

When a relationship is accurately described in this manner, there can be no question that it is not a fiduciary relationship. Moreover, there simply is no basis for contending that a person capable of understanding the disclosures required by the Department's Proposed Rule and exemptions would be unable to understand this disclosure: It is a simple, clear statement that the representative is a salesperson rather than a fiduciary, and even alerts the customer to the conflict of interest that exists.

B. Discussing Products and Services

Absent formal clarification or revision by the Department, the practical effect of the proposed rule will be to severely limit a financial professional's ability to discuss and offer various otherwise appropriate savings and investment products to middle-income savers who are considering how best to allocate their limited retirement assets. The concern arises because the Department has not clearly described how its various exemptions and previously issued guidance are intended to operate in actual conversations with customers.

For example, a limited offering of mutual funds may be made available under a level-fee approach as contemplated by ERISA section 408(g), or Field Assistance Bulletin 2007-01. At the same time, discretionary advisory programs can be offered pursuant to a single asset-based fee under Advisory Opinion 97-15A ("Frost Letter") and Advisory Opinion 2005-10A ("Country Trust Letter"). Further, variable annuities may be offered in manner consistent with either Prohibited Transaction Exemption 84-24, or the new BIC Exemption. Each of these products may serve as an integral part of a retirement saver's overall asset allocation, and each may be covered separately by an applicable exemption or other guidance. Yet, it is unclear, under the proposal, how a financial professional can assist a customer in allocating and rebalancing his or her portfolio among these separate products where the costs of the products vary. Thus, because the compensation structures used, and amounts charged, under the various exemptions and guidance may differ, any recommendation about the advisability of allocating retirement assets among the different products could be viewed as triggering a prohibited transaction—even when each of the classes of products is offered in a manner compliant with the Department's various regulatory approaches.

This result is particularly troubling when Congress and the Department have recognized the need to offer retirement savers products other than mutual funds, such as annuities and other products that provide lifetime income guarantees. Retirement savers will have fewer choices and less access to information about available products if financial professionals are unable to discuss and assist savers in allocating amongst the various products. For example, financial institutions and their representatives may decide that, under these rules, they will only be able to offer mutual funds to certain segments of their customer base, even though these customers may benefit from investing a portion of their assets in a product that provides a lifetime income guarantee. In these cases, retirement savers will be left on their own, without the assistance of a financial professional, with respect to both finding a suitable lifetime income product at another firm, and determining the amount to allocate to it. We believe that this is a bad outcome and may be an unintended consequence of the proposal.

We ask the Department to formally clarify or revise the Proposed Rule and its related guidance to provide a clear path for financial professionals to offer and discuss different types of products under different exemptions and guidance (with necessarily different compensation structures) without potentially triggering a prohibited transaction. Alternatively, Primerica suggests meaningfully modifying the proposed rule's narrowly-drawn investment education carve-out to cover discussions with retirement savers (including those who are saving through an IRA about different types of products and services and allocations thereto, even when such discussions reference specific investment products. An adequate change to the carve-out would allow financial professionals to introduce our customers to the well-accepted retirement investment concepts that the Department has recognized as important, while identifying the specific products that a saver may use to implement these concepts. We believe that these changes will allow retirement savers to choose the types of products and services that are best suited to meeting their personal retirement savings goals and to continue to view their retirement savings holistically.

C. Grandfathering Under the Proposed Rule

We likewise are greatly concerned that the Proposed Rule will significantly disrupt the 1.2 million middle-income Americans with whom we have already established relationships and retirement accounts, and likely the 20 million Americans with existing IRAs across the industry. While a limited transition rule is provided for those firms, if any, who choose to utilize the BIC Exemption,[2] the Proposed Rule itself does not provide for grandfathering of clients, assets or accounts. In short, for clients who may be served under exemptions outside of the BIC Exemption, the Department has provided no explicit grandfathering or transition relief.

When a representative becomes a fiduciary under the Proposed Rule, the Rule may be interpreted such that in most instances that representative will no longer be able to assist her former clients with respect to their existing assets under their current agreements. This would mean – if not clarified by the Department - that the representative may no longer be able to (i) encourage clients to make their annual IRA contributions, (ii) assist clients with their monthly or periodic contributions to their retirement accounts, or (iii) advise clients to stay the course during periods of market turmoil. Moreover, as the Department is aware from the thousands of comments it has received, the Proposed Rule is expected to significantly disrupt the types of assets and distribution models available to retirement plans. It is almost certain that as firms adapt to the rigorous requirements of the Proposal, the same mutual funds or annuities, for example, currently held by retirement savers may not be available to IRAs following implementation of the Proposed Rule. Ongoing periodic contributions are likely to be curtailed when clients are told they cannot add to their existing investment selections or to other privileged share selections by the same issuer when they have already paid the sales load. The repercussions

[2] The BIC Exemption transition rule is discussed in more detail below.

are likely to be costly for clients when, for example, clients have no choice but to purchase new assets, and incur new sales charges, even though they desire to reposition their retirement portfolios within the same family of funds. For middle-income Americans, the loss in retirement savings could be great.

The Department can prevent this result by explicitly providing a grandfather provision to the Proposed Rule itself. The Department should grandfather under current rules any buy, hold or sell recommendations made to a pre-Rule client after the applicability date (i) with respect to the same fund family held in a client's account as of the applicability date and, (ii) with respect to any annuity subaccount held by a client as of the applicability date that the issuer makes available to the policyholder.

The Department has suggested to us that after the Rule is implemented, financial institutions that do not use the BIC Exemption could simply provide "conflict free" advice to existing clients, which the Department suggested would be advice compensated by an hourly fee or fixed fee based on assets-under-management. However, 83% of Main Street families cannot afford to save more than $250 per month.[3] "Hourly" advisers typically charge $250-$500 per hour and overall fees often range from $3,000 - $5,000, making hourly fees unfeasible for these savers, and also more expensive for small savers than commissions.[4] Other "fiduciary" advisers are usually the most expensive choice and often require at least $50,000 upfront to invest, an amount too high for many workers.[5] Likewise, middle-income savers are not attractive to flat-fee advisers, who can only serve a limited number of clients. In addition, the Department should be aware that advisers are required to hold a FINRA Series 65 license in order to receive hourly and asset-based compensation charged specially in exchange for investment advice, as opposed to sales-based compensation. Approximately 370,000 representatives in the United States are licensed only as Series 6 registered representatives, and not as Series 65 as investment adviser representatives. Series 6 representatives are allowed to give "investment advice" ***only*** pursuant to the broker-dealer exemption in the Investment Advisers Act of 1940. That exemption excludes from the definition of "investment adviser" any broker or dealer: (i) whose performance of its investment advisory services is "solely incidental to" the conduct of its business as a broker or dealer; and (ii) who receives no "special compensation" for its advisory services. The broker-dealer exemption was recently interpreted by the U.S. Tenth Circuit Court of Appeals in *Thomas v.Metropolitan Life Insurance Company and MetLife Securities, Inc.*, 631 F.3d 1153 (February 2, 2011). In that case, the Tenth Circuit confirmed that compensation received by a broker-dealer is "special" when it is received specifically in exchange for giving investment advice and takes a form other than commission-based compensation resulting from the sale of a product.[6] Accordingly, it is understood that Series 6 representatives are not permitted to accept a check from a client for an hourly fee as the advice would not be rendered "solely incidental to" the sale of a product, and the fee would not be commission-based compensation, but "special compensation" received specifically for giving investment advice.

---

[3] NAIFA, Fiduciary Standards: The best choice for Main Street investors? (Revised Aug. 2011).
[4] Light, Larry, "How Much Do Advisors Cost?," Forbes (July 26, 2012).
[5] Id, Supra note 6.
[6] *Id. at 1165*

II. Concerns with the BIC Exemption

A. Transition Rule, Disclosures, Data and Recordkeeping

As we set forth in our Comment Letter, we find the requirements of the BIC Exemption so burdensome that it is not administratively or operationally feasible for our firm to use it. Likewise, we know of no other financial institution that is planning to use the BIC Exemption as proposed. However, we agree with the Department that firms and their representatives should always act in their clients' best interests and we believe that acting in clients' best interests is critical to our business' long-term success. Given our fundamental agreement and desire to best serve our clients, we believe that the Department should strive to streamline and simplify the BIC Exemption to make it workable. As noted earlier, a streamlined exemption should be limited to three elements: (i) a commitment to act in client's best interests, (ii) a requirement that fees be reasonable, and (iii) a requirement that firms have in place policies and procedures designed to mitigate conflicts. Those three requirements make redundant and unnecessary the enhanced requirements in the BIC Exemption as drafted. Nonetheless, if the BIC Exemption is not so streamlined, we submit that each of the issues set forth below must be addressed and modifications made in order for firms to consider relying on the BIC Exemption.

1. BIC Exemption Transition Rule

Issue: Section VII of the BIC Exemption provides a limited exception for transactions that occurred prior to the applicability date of the rule. This transition rule is too narrow and will result in significant loss of retirement savings for Main Street households.

Proposal: As in the Rule itself, the Department should clarify the BIC transition relief such that buy hold and sell recommendations are treated under current rules, and not subject to the conditions of the BIC Exemption, if made to a pre-Rule client after the applicability date (i) with respect to the same fund family held in a client's account as of the applicability date and, (ii) with respect to any annuity subaccount held by a client as of the applicability date that the issuer makes available to the policyholder.

Comment: As discussed above, without true grandfathering, the BIC Exemption stands to cause significant disruption and harm to 20 million existing retirement savers. Many have worked with representatives to establish well-thought out retirement investment and savings strategies and are in the process of executing those strategies, which execution may take years. Even though products currently held by these savers were sold prior to the Rule going into effect, it is unclear whether these transactions would be ineligible for transition relief when clients make regular contributions or otherwise interact with their representatives after the applicability date. Without relief, many of these retirement savers are likely to be left with no service, particularly those with smaller amounts to invest. As discussed in our Comment Letter, robo-advisers will not adequately fill the gap. The loss in retirement savings will be great.

For those who have more to invest, firms operating under the BIC Exemption, if any, would expect to have to limit their IRA product offering to those designed to meet the BIC requirements. Accordingly, some products clients currently hold may be unavailable after the rule goes into effect, preventing these clients from receiving the full benefit of their prior investment. Our concerns are focused on Class A mutual fund shares and deferred variable annuities, which are further discussed below.

Class A Mutual Funds– We have tens of thousands of clients that are saving for retirement by making periodic investments into a high-quality mutual fund IRA portfolio over time. Many of these clients make small, periodic investments of only $50 or $100 per month by pre-authorized bank draft. Others make annual IRA contributions before April 15th of each year. Once the Rule goes into effect, if we are unable to offer the same Class A mutual fund investment that they currently own, the Rule may force clients into other investments, and cause them to forgo significant benefits that Class A shares offer to loyal investors. These benefits are as follows:

(i) *Letters of Intent* whereby a client commits to making a minimum investment over a 13-month period to obtain a discounted sales charge, but if the agreement is not fulfilled the discount is revoked at the end of the period;
(ii) *Rights of Accumulation* that allow a client to combine the value of previous purchases within the same fund family, to the value of a current purchase, to obtain a *breakpoint discount* to the sales charge; and
(iii) *Exchange Privileges* whereby a client may exchange into another fund within the same fund family for no additional sales charge. leakage

It would be detrimental to Class A share clients if the Rule caused investors to lose access to these meaningful benefits by forcing their future investments into other fund families or investments.

Deferred variable annuities with Living Benefit Riders – Many of our clients have chosen to use variable annuities with living benefit riders to shift some of the market risk of investing for retirement to the issuing insurance company and obtain guaranteed income for the rest of their lives. These are long-term investments, and many of these clients will continue to make additional deposits into previously established contracts. These subsequent deposits, which will generate additional commissions, are often the result of long-term retirement planning to achieve a higher payout under the rider's guarantees. Likewise, our representatives provide other ongoing assistance to clients that own these products, such as help to rebalance or reallocate investments (i.e., "subaccounts') or continuing education on the living benefit rider. These interactions may or may not be tied to additional deposits, and therefore, may or may not generate new commissions. Even when not tied to an additional deposit, however, it is unclear whether these conversations will constitute "advice" under the Rule, as these products pay ongoing trail commissions.[7] As discussed, once the rule goes into effect, we expect to have to restructure our variable annuity offering to IRAs to only those we can sell on a "conflict free" basis. Accordingly, if a client's variable annuity product is no longer offered to IRAs, the Rule will have interrupted an existing relationship and prevented a client from receiving ongoing assistance with respect to a long-term investment product. Existing clients would unnecessarily incur the additional administrative fees of a second product, and likely pay significantly more for another living benefit rider, most of which became more expensive after the 2008-09 financial crisis. We believe that these are unnecessary results that can and should be avoided by

[7] The only transition provision that is currently available (Section VII in the BIC Exemption) is predicated on no advice being given after the applicability date.

grandfathering these long-term assets and allowing clients to maintain their existing retirement plans.

2. *Individual Transaction Disclosure*

Issue: Prior to the execution of a purchase, the BIC Exemption requires the delivery of a transaction disclosure that provides the total cost of owning the investment over 1, 5 and 10 year periods. The disclosure must be tailored to the dollar amount of each individual's proposed investment, factoring in reasonable assumptions about performance over the time periods involved.

Proposal: The Department should provide that this transaction disclosure can be satisfied by the delivery, at the point-of-sale, of a summary prospectus for a mutual fund investment, and of a statutory prospectus for a variable annuity investment. In addition, the Department could require a standardized, rather than individualized, disclosure at point-of-sale that explains how the financial institution and its representatives are compensated.

Comment: We agree that a financial representative should provide and review a disclosure for each investment that would illustrate fees and expenses of a set investment amount over a period of time. However, the BIC Exemption disclosure is excessively burdensome and duplicative of SEC-required disclosures. With respect to mutual funds and annuities, the majority of data required by the BIC Exemption Individual Transaction Disclosure is held electronically at the individual fund or at the annuity company. The distributor only has this information on paper or in non-machine readable digital format. To replicate this data electronically on the distributor's systems, the product providers would have to agree to make the electronic data available in a common file format and deliver this to distributors on a daily basis. This is not a contractual right. If this could be agreed upon and accomplished, the distributor's systems would require extensive enhancements to accept and process this data. With more than a dozen data elements needed for thousands of funds offered, a very large number of data points would need to be maintained on a real-time basis to attempt an accurate disclosure. If this requirement is implemented as proposed, the result would be to limit investment alternatives to clients to a limited number of product providers.

We believe the Department can achieve its desired objective by instead requiring issuer-created documents to serve as a safe harbor, making efficient use of the already existing disclosure regime and greatly reducing the compliance burden. A mutual fund's summary prospectus, which our representatives are required to deliver at the point-of-sale, contains a table showing the total cost of owning the fund over a 1, 3, 5 and 10 year period. The table is based on a reasonable set of assumptions that promote the comparison of the costs of owning the fund in question with other mutual funds. These assumptions, which are clearly disclosed and uniformly mandated by the SEC, are as follows: (i) that the investor makes a $10,000 investment for the time period indicated, (ii) that the investment earns a 5% return each year while the fund's operating expenses remain the same, and (iii) that the investor reinvests all distributions and dividends without a sales charge.[8] This information is almost identical to the transaction

[8] Moreover, the summary prospectus contains other valuable information that is helpful to investors, such as: shareholder fees paid directly from the investment; annual fund operating expenses; an explanation of principal

disclosure required by the BIC Exemption, with the primary difference being that it is not individualized to the dollar amount of the investment being proposed by the investor. Though variable annuities are not sold using a summary prospectus, the statutory contract prospectus, which is delivered at the point-of-sale, contains similar information showing total costs of owning the product over the same periods using identical assumptions.

The assumption of a $10,000 investment provides an effective baseline for investors to compare and contrast expenses, and makes it easy to determine the relative cost of owning different funds. Moreover, it relieves firms from having to build out elaborate and expensive systems to achieve the point-of-sale delivery of a disclosure tailored to the individual's proposed investment amount, which, in our opinion, is a requirement that provides only marginal benefit but results in enormous costs that will eventually end up being passed through to investors.

In addition to fee disclosures, our representatives provide standardized disclosures at point-of-sale that explain in plain terms how the firm and its representatives are compensated when the client makes a purchase. For mutual funds, for example, this disclosure clearly states that the amount of the compensation depends upon the fund purchased, the amount invested, and the share class selected. It explains the differences in fees and deferred sales charges among share classes. It also explains that the firm receives periodic "trail" payments, recordkeeping and custodial fees as long as the investor retains the shares. It further explains that representatives may participate in awards and incentive programs. The disclosure likewise discusses revenue sharing payments. We feel this compensation disclosure is an important disclosure and is not an excessive burden. Other distributors make similar disclosures. We believe this type of standardized disclosure is appropriately made to retirement investors at point-of-sale.

Finally, we note that to the extent a distributor could provide the required disclosures, the Department's requirements would be very costly to implement. The resultant increase in transaction costs per investor will generally be passed on to clients, and may ultimately have the effect of shutting out small transactions from access to IRAs.

3. *Annual Disclosure*

Issue: The BIC Exemption requires the delivery of an annual disclosure, which must include (i) a list identifying each asset purchased or sold during the year, and the price at which the asset was purchased or sold; (ii) the total dollar amount of all fees and expenses paid by the Plan during the year, with respect to each asset owned, and (iii) the total dollar amount of compensation received by the Advisor and the Financial Institution as a result of each asset owned during the year.

Proposal: The Department should allow a client's annual or periodic statements that are already generated and delivered by the issuer of a mutual fund or variable annuity to serve as a safe harbor for this requirement and should otherwise rely on the Individual Transaction Disclosure as discussed above.

---

investment strategies; a discussion of the principal risks of investing in the fund; an easy to read bar chart showing changes in the fund's performance from year to year for Class A shares over the last 10 year period; and a table that shows the average annual returns of each share class of the fund for 1, 5 and 10 year periods, and then compares those returns to the fund's benchmark.

Comment: The annual disclosure, as described in the BIC Exemption, proposes enormous problems for our firm, which is solely a distributor of other companies' products, and none of our own. The information and systems necessary to track direct and indirect fees and expenses of a packaged product such as a mutual fund or variable annuity are maintained by the product providers, who would consider the information to be proprietary and, as a distributor, we have no right to such information. Even then, the fund companies may not themselves be able to produce the required account-level data, as much of these costs are reflected in the NAV and not susceptible to the level of detail required by the Department. Moreover, even if the product providers were inclined to allow us access to that information, the enormous task of building a system to index and warehouse that information in order to annually generate these disclosures is enough to deter any distributor from using the BIC Exemption. Here again, we recommend taking advantage of the existing reporting regime to relieve some of the compliance burdens presented by the BIC Exemption.

In order for firms to consider relying on the BIC Exemption, we recommend that the Department allow the annual or periodic statements provided by the mutual fund or variable annuity issuer to serve as a safe harbor for this requirement. These statements already list each asset purchased or sold during the year, and the price at which the asset was purchased or sold. The requirement that the annual disclosure include the total dollar amount of fees and expenses paid by each asset owned during the year is too similar to the total cost disclosures in the summary prospectus and of marginal benefit. We believe that the total cost information, which appears in the summary prospectus as a percentage of the investment and is set forth in the fee table, is much more valuable because it allows the investor to readily compare the fund's rate of return against the expense ratio, and to understand how much of the return was taken up by fund expenses. Finally, the total compensation associated with each asset owned during the year is information that is not reported under current industry practices. Again, this would require a distributor, such as our firm, to obtain this information from the providers of each of the assets, and then build systems to warehouse the data and generate the disclosures. The rate of compensation to be earned with respect to each asset, delivered prior to the purchase, is more useful and timely than total dollar amount of compensation delivered annually after the sale.

4. Public Webpage

Issue: The BIC Exemption requires a firm to maintain a webpage, open to the public and in machine readable format, which provides any direct and indirect compensation payable to the firm, each financial representative and any affiliate, for each asset that is offered to an IRA. This would require public disclosure of our sensitive business information, and cause harm to our firm and affiliates, and to competition.

Proposal: The requirement to maintain this webpage should be eliminated.

Comment: This requirement would be extremely onerous and would prevent firms from using the BIC Exemption. Our firm, for example, would need to identify and keep accurate thousands of data points, many of which are known to the fund companies but are not currently available in electronic format to the distributors. We submit that the Individual Transaction Disclosure discussed above will satisfy the Department's objectives. The point-of-sale information is supplemented by us through our company website, which currently lists our providers, makes summary prospectus' available, and provides information about how we and our representatives are compensated.

Moreover, we believe the Department's webpage disclosure requirement would not withstand legal scrutiny. The Department requires disclosure of various aspects of Primerica's arrangements with mutual fund and annuity providers, including the terms on which those providers compensate Primerica for marketing and distribution services. These contractual terms are often the result of intense negotiations between Primerica and its product providers, and vary in their structure and pricing. For example, some of Primerica's contracts with fund and annuity providers specify the compensation to Primerica as a share of revenue, while others include marketing and support payments. Both the negotiations of these contracts and their terms are confidential, and are treated by Primerica and the providers as highly sensitive. The contracts include express confidentiality provisions.

Primerica and its providers maintain the confidentiality of these negotiations and contract terms in order to facilitate Primerica's ability to obtain—and the providers' ability to extend—contract terms that are different and in some cases more attractive than Primerica may have with other providers, or that the providers may have with other broker-dealers. Simply, confidentiality makes it easier for parties to agree on terms that they might be unable or unwilling to offer all their various counterparties. Absent confidentiality protections, Primerica's fund and annuity providers would undoubtedly discover Primerica's terms with their competitors and insist during negotiations with Primerica on terms that are at least as favorable. That would cause Primerica substantial competitive harm.[9] It would also harm consumers and competition: if Primerica faces reduced revenues from fund and annuity providers, it may be forced to decrease the level of service it provides and to raise its prices to customers.

For these reasons, the federal agencies responsible for antitrust enforcement--the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")--have repeatedly recognized that laws and regulations that mandate disclosure of confidential, competitively sensitive pricing terms are anticompetitive. In 2014, for instance, the FTC's Office of Policy and Planning advised the Department's ERISA Advisory Council of its "concerns" that mandated disclosure of "compensation" arrangements between pharmacy benefits managers ("PBMs") and plan administrators would result in "less aggressive pricing" from PBMs to plan administrators.[10]

The FTC explained that it had considered this issue in depth while analyzing "a number of state legislative proposals involving mandatory transparency requirements and their likely effects on

---

[9] Primerica is particularly concerned about the BIC disclosure requirements because Primerica's business model, which focuses on middle-income consumers, would cause the disclosure requirements to affect Primerica to a far greater extent than many of its competitors. The great majority of Primerica's customer service representatives are not licensed as investment advisors, and thus Primerica has far less ability to adopt a compliance strategy that does not involve invoking the BIC exception relative to other broker dealers whose representatives generally maintain investment advisor licensure. Accordingly, unless the BIC exception's disclosure requirements are eliminated or amended, a collateral consequence of the Proposed Rule will be that Primerica will be subject to disclosure requirements that do not apply to many of its competitors. Primerica's competitive position would be harmed. Tilting the competitive playing field in this manner would be unfair, and constitutes yet another flaw in the BIC exception's disclosure requirements.

[10] *See* Letter from Andrew I. Gavil, Director, Office of Policy Planning, Federal Trade Commission, to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, August 19, 2014, pp. 2-3, *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-erisa-advisory-council-u.s.department-labor-regarding-pharmacy-benefit-manager-compensation-fee-disclosure/140821erisaadvisory.pdf.

competition."[11] The FTC "urge[d] the Council to consider how mandatory disclosure requirements might be tailored narrowly" to mitigate "the risk of competitive harm."[12]

The information addressed in the FTC's 2014 letter is remarkably similar to the information that would be made public by the BIC Exemption to the Proposed Rule. In both cases, the information comprises confidential commercial terms specifying the amount, type, and structure of compensation. Moreover, in a recent blog post, members of the FTC's Office of Policy Planning made clear that the Commission's concerns are not confined to PBMs, since "[t]oo much transparency can harm competition in any industry."[13] The Office emphasized that "when providers know who the other bidders are and what they have bid in the past, they may bid less aggressively, leading to higher overall prices."[14] The Office also stated that it was "especially concerned when information disclosures allow competitors to figure out what their rivals are charging." This is precisely Primerica's concern—that if its fund and annuity providers become aware of the terms that Primerica offers their competitors, the providers that previously offered relatively favorable terms will be less likely to do so in future negotiations.[15]

In sum, the federal antitrust enforcement agencies have repeatedly emphasized to state lawmakers, federal agencies, and others that significant competitive harm can result from disclosing precisely the sort of confidential information regarding contract terms and prices that would be mandated by the BIC Exemption. The requirement to maintain this webpage should be eliminated.

5. *Data Request*

Issue: Section IX of the BIC Exemption requires the Financial Institution to maintain an enormous amount of information regarding customer transactions for six years and be able to produce such information to the Department upon its request.

Proposal: Financial institutions should be permitted to maintain records for the Department to review in the manner prescribed by the SEC and FINRA. The cost to build and maintain the systems to collect and maintain the proposed information would be prohibitive and, in certain respects, impossible.

---

[11] *Id.*

[12] *Id.* at 5.

[13] Tara Isa Koslov & Elizabeth Jex, Price Transparency or TMI?, Office of Policy Planning, FTC (July 2, 2015), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/price-transparency-or-tmi .

[14] *Id.*

[15] The DOJ has similarly expressed concern that if competitors become aware of one another's confidential, competitively sensitive information, reduced competition may result. Specifically, in policy statements addressing joint ventures and information exchanges among competitors, the DOJ has stated that harm to competition can result from disclosure of such information, and cautioned market participants that the exchange of such information can violate the antitrust laws. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 15 (2000), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, Statement 6 (1996), p. 49, *available at* https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf . Although these policy statements address competitors sharing information rather than a law or rule requiring the information to be shared, the practical effect is identical, and the same concerns are therefore presented.

Comment: PFSI functions as an introducing broker-dealer and does not hold its customer's funds or securities. It offers only the products of third-party providers, each of whom holds the assets and securities of PFSI's clients, and maintains their accounts and related transaction data. In short, introducing broker-dealers receive the funds, while custodians process the inflows and outflows. Our records do not contain many forms of the required transaction data and would therefore be incomplete. To replicate necessary custodian data electronically on the distributor's systems, the custodians would first have to agree to make the electronic data available in a common file format and deliver this to distributors. Securing this data is not a contractual right. If this could be agreed upon and accomplished, distributors would then be required to build a system to collect and store what would be a significant amount of data. The time to organize and index the different data elements (transactions, direct compensation, aggregate holdings, rates of return, etc.) would be monumental and the cost to build the system would be egregious. Balancing the data feeds would be prone to error and therefore risky. If implemented as proposed, the result would be to limit investment alternatives to clients to a limited number of product providers. The Department should not create a new books and records regime that is excessively costly and in some regards impossible.

6. Recordkeeping

Issue: Section V of the BIC Exemption requires financial institutions to make certain data available to various described persons, in order for those persons to assess whether the Financial Institution has met the conditions of the exemption.

Proposal: Financial institutions should be permitted to maintain records for the Department to review in the manner prescribed by the SEC and FINRA. The Department should revise Section V of the BIC Exemption to limit third parties' right of review to information regarding their own plans and accounts.

Comment: Another problematic aspect of the disclosures in the BIC Exemption is the broad opportunity they provide for the review of confidential and proprietary information. Section V of the exemption requires financial institutions to make certain data available to various described persons, in order for those persons to assess whether the firm has met the conditions of the exemption. In addition to representatives of the Department, the persons authorized to examine the records include fiduciaries of ERISA-covered plans that do business with the financial institution, employers who contributed to such plans, participants and beneficiaries of the plans, and IRA owners, as well as authorized representatives of those respective fiduciaries, contributing employers, participants/beneficiaries, and IRA owners. Except for the Department's representative, none of these persons are permitted to examine "privileged trade secrets, privileged commercial or financial information of the Financial Institution, or information identifying other individuals."

This provision is susceptible to being read broadly to permit, for example, an IRA owner to review records of the firm pertaining to an ERISA-covered plan in which she was never a participant, or to allow a plan participant to review records pertaining to other participants in the plan. Also, making the required data available to the authorized representatives of participants, beneficiaries or IRA owners has the potential to turn this section into yet another sea fishing trip of the plaintiff's bar. The result will be increased costs passed on to retirement investors. While review would not be permitted of records that actually identify those individuals, there still is no legitimate reason to permit persons to review information regarding other plans or persons; moreover, financial institutions should not have to bear the burden of adopting systems to shield the identify of participants and beneficiaries whose financial information is being reviewed by unrelated third parties. Finally, there is no reason to risk the inadvertent disclosures to unrelated third parties that inevitably would arise under this provision.

B. BIC Exemption Contract, Impartial Conduct and Other Requirements

Section II of the BIC Exemption, setting forth contractual requirements, Impartial Conduct Standards and warranties that must be satisfied in order for financial institutions and their representatives to rely on the exemption, goes far beyond what is necessary to achieve the Department's goal of best-interest advice. As we have stated, we believe the Department may achieve its objectives by streamlining the BIC Exemption to require firms to enter into an enforceable agreement to provide best interest advice, charge no more than reasonable fees, and adopt policies and procedures reasonably designed to mitigate conflicts. Nothing more is needed. Instead Section II of the BIC Exemption imposes an assortment of vague and ambiguous requirements on financial institutions and their advisers with potentially strict-liability penalty imposed by the Department and enforced by the plaintiffs' trial bar. The Department itself has made clear in the preamble to the proposed BIC Exemption that "[i]t is intended that the contract creates actionable obligations with respect to both the Impartial Conduct Standards and the warranties" and that "failure to satisfy the Impartial Conduct Standards will result in loss of the exemption." Potential consequences could be as dire as enforceability of the contract provisions through class action litigation and loss of the exemption. This could result in the requirement not just to pay damages (as would be required for a breach of ERISA's standard of care), but also the requirement to unwind transactions, disgorge profits, and pay excise taxes. As a result, we and others will likely be compelled to conclude that the BIC Exemption cannot be used. Without corrections, the potentially untenable litigation risk and uncertainty the BIC Exemption imposes may have the effect of causing those firms serving middle-income clients to limit brokerage services and move accounts with higher account balances to advisory services. Studies submitted to the Department have concluded that millions of existing small-balance IRA owners are likely to lose access to the financial professional of their choice, or any financial professional at all and that the majority of others will face higher costs as their accounts shift to advisory accounts, will experience lower savings rates as they increasingly cash out of 401(k)s due to lack of guidance, and will carry excess portfolio risk due to less diversification and less frequent re-balancing.[16]

The comments below are focused on identifying the specific conditions of the BIC contract and the Impartial Conduct Standards that may prevent the exemption from providing meaningful relief from prohibited transactions.

1. Contract Requirements

---

16 Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market*, at 3.

Issue: The timing for contract execution, the requirement for representatives to sign the contract, and the contract terms are too onerous.

Proposal: The Department should allow firms to commit to provide best-interest advice through a unilateral contract, and for existing clients by negative consent. The contract should not be required until account opening. A financial institution's individual representatives should not be required to sign the contract. The financial institution must have flexibility to define the contract terms to control its liability.

Comment: The Department has indicated in public statements that it is likely to revise the form and timing of the BIC Exemption contract. We believe the Department should also permit firms to expressly limit their fiduciary status to be transactional in nature. If commission-based representatives, who are providing one-time advice, have an ongoing duty to monitor clients' accounts, they will be driven to seek an upscale client-base. Middle-income retirement savers will be harmed.

2. *Impartial Conduct Standards*

Following are specific examples of problems with the existing Impartial Conduct Standards and proposed solutions to the problems:

a. Issue: The Impartial Conduct Standards require the adviser and financial institution to provide investment advice that is in the Best Interest of the Retirement Investor and "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." This language, which is inconsistent with existing ERISA fiduciary standards, appears to prohibit investment advice that takes into account compensation (or other interests) in any way, and positions advisers and financial institutions for a violation of the Impartial Conduct Standards and thus a loss of the exemption, in addition to potential litigation. Additionally, we are concerned that, without clarification, the "best interest" standard will not be interpreted consistently with ERISA's duty of care, but rather will be interpreted as a "best product" standard. Absent clarifications of the "best interest" standard, advisors and financial institutions could be held to a more absolute standard that is impossible to meet and thus could be exposed to significant litigation and prohibited transaction risks.

   Proposal: We request that the "without regard to" language in Section II(c)(1) be deleted and that the Department confirm that the best interest standard is to be interpreted consistently with the duty of care under ERISA, and is not a "best product" standard and as such requires an adviser or financial institution to apply its best judgment to recommendations.

b. Issue: The Impartial Conduct Standards prohibit the financial institution and its representatives from recommending an investment if the total amount of compensation "will exceed reasonable compensation in relation to the total services they provide to the Retirement Investor." The meaning of "reasonable" and what the compensation is compared to in order to determine reasonableness are unclear and undefined and expose us to class action litigation on our compensation practices as a whole and loss of the exemption.

Proposal: To achieve its stated objective, the Department should revise the BIC Exemption to use the same, well-understood standard that applies under IRC section 4975(c)(2). Specifically, no more than reasonable compensation may be paid for the services provided to the investor.

c. Issue: The Impartial Conduct Standards require that the financial institution and its representatives' statements about the investment, fees, material conflicts of interest and "any other matters" relevant to an investor's investment decisions not be misleading.

   Proposal: We request that the Department add both a materiality standard and a reasonableness standard such that to find a violation, statements must be materially misleading, not simply misleading, and that it require a reasonable belief on the part of the customer and the representative/financial institution.

3. Warranties

Section II's warranties, which the Department has made clear form the basis of "actionable obligations," too are vague and ambiguous and tantamount to potentially strict liability. As such, the warranties alone may cause us to conclude that, without changes, we cannot use BIC Exemption. As with the Impartial Conduct Standards, the untenable litigation risks created by the warranties would compel us to mitigate our exposure to these risks, which may have the effect of limiting tax-advantaged retirement products and services to modest retirement savers.

Following are specific examples of problems with the current language of the warranties and proposed solutions.

a. Issue: Financial institutions and their representatives are required to warrant in the contract that they "will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset." While we are, of course, in agreement, that we should comply with the law, this is a strict liability standard that is vague, ambiguous and impossible to satisfy. We face untenable litigation risk for missing a law that is interpreted after the fact as being included in the body of laws to which this warranty is speaking. Furthermore, this warranty does not, as far as we can tell, advance the Department's stated objective of minimizing the effects of conflicted advice.

   Proposal: We believe this warranty should be eliminated as not furthering the Department's stated objective of eliminating conflicted advice.

b. Issue: Financial Institutions and their representatives are required to warrant that they have "adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards." By requiring that firms "ensure" that advisers adhere to the Impartial Conduct Standards, which in and of themselves are fraught with ambiguities and issues, without some measure of reasonableness, firms are exposed to untenable litigation risk.

Proposal: We believe this warranty should be eliminated. The Department could require that firms adopt policies procedures reasonably designed to mitigate conflicts but should not make this a required contractual warranty.

c. Issue: Financial institutions are required to warrant that they have "specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards..." While we agree that firms should identify and mitigate issues caused by material conflicts of interest through policies and procedures reasonably designed to do so, we do not agree that this requirement should be imposed through a contractual warranty that potentially imposes a strict liability standard.

   Proposal: We believe this warranty should be eliminated. If firms and their representatives are required to provide best-interest advice, this requirement is not necessary. If it nonetheless desires firms to specifically identify material conflicts, the Department should impose a requirement that firms establish policies and procedures reasonably designed to identify and mitigate material conflicts of interest rather than require a contractual warranty to which firms and their representatives must agree to adhere.

d. Issue: Financial institutions are required to warrant that neither they nor their affiliates or any related entities use forms of compensation, including differential compensation, bonuses, contests or special awards, to the extent they "tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor"; however, differential compensation is, at least in theory, acceptable if it "would not encourage advice that runs counter to the Best Interest of the Retirement Investor," for example advice that is based on "neutral factors". This warranty has been interpreted to mean that only neutral, or entirely level, compensation is "safe," which seems contrary to the stated intent of the BIC Exemption. When the consequences for failure to comply are class action litigation based on our compensation practices and loss of the exemption, we may not be able to take the risk of misinterpreting this warranty. Paying entirely neutral compensation will be a massive change to the way the industry as a whole has always compensated advisers, and may be a standard that is impossible to meet, particularly given the short implementation period.

   Proposal: The Department should eliminate this warranty. If a firm and its representatives are required to provide best-interest advice, this differential copmensation requirement is unnecessary and confusing. Moreover, its mandate should not be in the form of a contractual warranty. We request that the Department provide clarification and guidance, including meaningful examples, regarding how and under what circumstances a firm and its representatives can receive variable compensation under the BIC Exemption. Specifically, we request that the Department clarify that variable commission-based fee arrangements are permitted, so long as the firm discloses the compensation to be received and any material conflicts of interest, and receives no more than reasonable compensation. In addition, the Department should recognize that sales incentives designed to encourage increased production are acceptable as long as one product is not favored over another.

4. *Prohibited Contractual Provisions*

Issue: Section II specifies provisions that financial institutions and their representatives cannot include in their contracts with customers, including those that are "exculpatory" and disclaim or limit liability for contract violations and those in which investors waive class action rights.

Proposal: These contractual prohibitions cause us concern that our rights to determine remedies by contract are being affected, and that they are a slippery slope toward, for instance, prohibiting firms from limiting remedies such as rights of rescission and punitive and consequential damages, and even banning mandatory arbitration. For this reason, we are opposed to these provisions and request clarification that firms' rights to determine remedies by contract are not affected and that mandatory arbitration is still permissible. If mandatory arbitration is not permitted under the BIC Exemption, we believe that no firms will use it.

5. *Ability To Cure*

Issue: The BIC Exemption does not require interested parties to provide notice of possible breaches of, or failures to comply with, the exemption, to financial institutions, prior to commencing formal legal action.

Proposal: The Department should provide that participants, beneficiaries, and other interested parties must provide reasonable notice of an alleged breach of, or failure to comply with, the BIC Exemption to the financial institution, prior to commending formal legal action.

Comment: As currently drafted, the BIC Exemption would permit parties to bring claims—and potentially class action litigation—over matters that the financial institution was not advised of beforehand, and therefore had no notice of or opportunity to correct. Plans and participants have no legitimate interest in this sort of "gotcha" litigation, however, which only leads to unnecessary legal costs. Rather, their interests are best served when any improper practice or disclosure is promptly identified and corrected.

Accordingly, the BIC Exemption should be revised to provide that before any participant or beneficiary of an ERISA-covered plan, or owner of an IRA (collectively "Retirement Investor") may institute an action in a court of competent jurisdiction, or make a demand for arbitration, the investor must provide the financial institution with notice of any alleged breach or failure to comply with the terms of the BIC Exemption. The financial institution should have a period of time, such as 30 days, from receipt of any such notice to cure the asserted breach of, or failure to comply with, the terms of the exemption. Upon such cure, within the time specified, the investor should not be allowed to institute any action in court or seek arbitration regarding the claimed breach or failure to comply with the terms of the BIC Exemption.

6. *De Minimis Exception*

Issue: The BIC Exemption does not protect against costly litigation over de minimis matters or inadvertent missteps. It does not set a materiality threshold.

Proposal: The Department should revise the BIC Exemption to provide for a "good faith" exception for inadvertent and immaterial failure to satisfy its requirements if the financial institution was acting in good faith. In addition, the BIC Exemption and proposed fiduciary definition should be revised to bar litigation, including class action litigation, over matters whose consequence is de minimis, which should include accounts with balances of $5,000 or less.

Comment: Firms and their representatives should not lose the exemption for de minimis non-compliance if the firm made good faith efforts to comply. In addition, the BIC Exemption should permit the parties to agree in advance to waive any claims or causes of action for breach of a condition of the BIC Exemption where the asserted loss to the investor is small. This would go a long way toward addressing one of the industry's principal concerns with the Department's proposals, namely, that the proposals will expose firms to frequent and costly litigation.

Finally, the fiduciary definition itself should include a carve-out for accounts with small balances, such as $5000 or less. (The carve-out could indicate that it would cease to apply to accounts whose balance exceeded $5000 for 12 consecutive months.) This revision would help address one of the principal concerns raised by the Department's proposal—that its requirements are too costly for small accounts.

* * * *

We remain deeply concerned that the Proposed Rule contains significant flaws that, if not corrected, would disrupt retirement services for 20 million existing IRA owners and result in in a substantial decrease in retirement savings by middle-income retirement investors. Without modifications to the Rule, the litigation risks and prohibited transaction penalty risks, along with excessive compliance costs, will lead financial institutions and representatives to limit the services they offer to middle-income investors. We emphasize that a failure to address any one of the issues raised herein and in our Comment Letter is likely to have the same negative result: firms will not rely on the BIC Exemption. Because significant changes to the Proposal Rule are necessary to avoid severe disruption to retirement savers, we believe the Department should seek public comment to its proposed modifications to the Rule prior to issuing any final rule. It is in the best interests of retirement savers for the Department to get the rule right.

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

Sincerely