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September 6, 2017

Via Electronic Mail to EBSA.FiduciaryRuleExamination@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], appreciates the opportunity to comment on questions raised in the Department of Labor's ("Department") request for information published on July 6, 2017 ("RFI")[2]. On July 21, we responded to Question 1 of the RFI, urging the Department to delay 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 ERISA and the Internal Revenue Code (the "Fiduciary Rule," together with the PTEs, the "Rule").[3] This letter addresses other questions of the

[1]Primerica 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 for $50 per month or $250 to invest. 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.

[2] Request 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.

[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.

RFI most applicable to us. We intend to comment separately on the Department's August 31, 2017 proposal to extend the transition period. Our view is that delay of the Full Applicability Date should be without conditions and should be a date-specific to provide needed certainty.

We ask the Department to include in its review of the record our prior comment letters ("Comment Letters") and the many serious economic studies and reports already submitted to the Department predicting unintended harmful consequences of the Rule.[4] Each noted significant errors made in the Regulatory Impact Analysis ("RIA")[5] and the Council of Economic Advisers' ("CEA") report.[6] Ours and experts' forecasts are borne out: the Rule is harming the ability of Americans to save for retirement in Individual Retirement Accounts ("IRAs") by limiting access to services, products, and needed savings information and by spurring a structural shift to fee-based advisory accounts. Industry's response to the Rule has not been what the Department expected would occur. Firms are abandoning Main Street households rather than accepting the heightened legal and regulatory risks of serving them.[7]

The Department should be wary of the so-called "innovations" being developed by the regulated community to comply with the Rule's strictures. These business adaptations are a pathway for firms to avoid the worst aspects of the Best Interest Contract Exemption ("BIC Exemption") but they do little to help the average American households that bear the brunt of this regulatory change. The changes being made are likely to disenfranchise those investors or relegate them to inferior service or less advice. As firms responsibly make rational business decisions and answer their shareholders in their sincere efforts to comply, the Rule is having the effect of driving away "broad-based investment advice" for the average household and, for those who are fortunate enough to retain access to brokerage assistance, narrowing products available.

The conditions of the Rule's prohibited transaction exemptions ("PTEs") are not alone in causing this effect; it is attributable to the entire paradigm established by the Rule. There is no question that the "incremental costs" of the additional exemption conditions will greatly exacerbate the problem. We respectfully believe it would be irresponsible of the Department to miss this opportunity to take a step back and evaluate the true impact of the entire Rule. It would be a mistake for the Department to limit its review to the additional conditions of the PTEs – rather than undertake an open-minded look at the goals and benefits of the Fiduciary Rule itself in contrast to the havoc and harm emerging on Main Street America. The negative consequences we now are seeing in this transition period are only the tip of the iceberg.

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[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 respectively 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] *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.

[6] *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)*.

[7] *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.

I. Summary of Our Recommendations to the Department

As we have stated in our previous Comment Letters, we believe that that the Rule is critically flawed and should be withdrawn. We expect that the Department will come to the same conclusion following its reexamination of the entire Rule. However, if the Rule is left in place, we continue to recommend that changes be made both to the Fiduciary Rule itself and to the PTEs. These changes are needed for commission-based brokerage to be viable for modest investors. They are also essential to allow for the Securities Exchange Commission ("SEC") to retain its role in regulating broker-dealers. The necessary revisions include the following:

- **Narrow the Definition of Fiduciary**. The definition of "fiduciary investment advice" should be narrowed to make it clear that fiduciary status is based upon a mutual understanding or agreement that advice is individualized to the advice recipient, and is intended for the recipient's material consideration.

- **Seller's Exception.** A meaningful seller's carve-out for retail investors should be added that preserves their access to non-fiduciary investment assistance and the commission-based brokerage model.

- **Investment Education.** An investment education carve-out should be added that:

    - Permits specific products to be identified so that useable and meaningful education and assistance can be provided to retail investors.

    - Incorporates FINRA guidance distinguishing recommendations from investment education within the context of rollovers and distributions.

- **Brokerage Exemption**. A straightforward "brokerage exemption" should be developed to preserve investor access to traditional commission-based brokerage services. It should be based on the Impartial Conduct Standards, requiring "best interest" advice, reasonable fees, and clear disclosures, with the following differences from the BIC Exemption:

    - The "best interest" standard should adhere to the FINRA formulation: the financial professional should provide recommendations that are in the "best interests" of the client and put the client's interest before his or her own –the "without regard to" language should be removed and the duty of loyalty should be satisfied by clear disclosure.

    - No private right of action should be compelled; no contract should be required.

    - Actual adherence to the Impartial Conduct Standards as a condition of the exemption should not be required.

    - The contractual warranty requirements should be eliminated.

    - The Department should make clear that levelized compensation is not a requirement of the rule by expressly providing that differential compensation, to the financial representative and to the firm, among products and asset classes, is permissible provided clear and conspicuous disclosures are made.

- Revenue sharing and other forms of third-party compensation should be permissible provided conflicts are mitigated and adequate disclosures are made: clear and objective guidance should be issued.

- Existing accounts and all prospective transactions within them should be grandfathered under the current definition of "fiduciary investment advice" rather than transitioning them to the exemption.

- Disclosures should require solely the information required in a summary prospectus.

- The website and data record keeping requirements should be eliminated.

- Parties should be permitted to waive class actions in connection with arbitration agreements.

- **Prudential Regulator Exemption**. Without imposing its own judgment by first requiring the SEC or other regulators to adopt new standards of conduct applicable to the provision of investment advice to retail investors, the Department should use its exemptive authority to create a "prudential regulator" exemption. The Department should consider whether IRAs should expressly be excluded.

Following are our responses to the Department's questions posed in the RFI.

II. General Questions

In Questions 2-4, the Department asks whether the PTEs "appropriately balance the interests of consumers," and to what extent the costs of the "additional conditions" of the PTEs exceed their benefits.

A. Review should extend to the full Fiduciary Rule and not be Limited to the PTEs

Respectfully, the Department is asking the wrong question -- whether the PTEs can be improved. Rather, the review should begin from the beginning. The Department should ask whether the Fiduciary Rule is the *right rule*. The Department must reexamine whether its sweeping definition of fiduciary will actually be in the "best interests" of the very consumers it set out to protect. It must consider whether protection from garden-variety "conflicts of interest" inherent in every sale of any product can justify the lost access to help or the market disruption its Rule will cause.

A related question is whether the Department is the right agency to cause a massive change in the retail brokerage industry. The Department is well-suited to oversee employer-sponsored plans since the funds are collected and administered by the employer. A tax-advantaged individual brokerage account for the benefit of one person and directed by one person bears little resemblance to pensions or 401(k)s. Serious thought should be given to whether the Department has the expertise to regulate the retail financial marketplace, or the tools and authority needed to command a massive restructuring of the financial products and assistance available to *individuals* – who save in their own accounts with discretion over their own investments. Our view is in alignment with the multiple court cases challenging the rule: the Fiduciary Rule – not simply the PTEs – should be withdrawn. If it determines to go forward, the Department should consider how the Rule addresses the real retirement savings issues confronting America: lack of both financial literacy and the will to save for retirement.

Since the Fiduciary Rule was first proposed in April 2015, multitudes of stakeholders have expressed concern regarding the Rule's detrimental effects on modest investors attempting to save for retirement.[8] The debate has never been about a fiduciary standard of care. We have been clear from the beginning about our objections: the Rule is so sweeping that it will harm the very consumers it was intended to protect.

At its core, the Fiduciary Rule greatly expands the scope of who is a fiduciary and when fiduciary status begins and ends. To do so, it eliminates the current "five-part test," and instead introduces vague and novel terminology that has the result of imposing fiduciary status on almost every interaction between a representative and a potential client. By removing the fundamental requirement that advice be provided pursuant to a "mutual understanding," fiduciary status ensues *even when there is no agreement, indication, or intention by either party at the time that the representative will act as a fiduciary*. It allows for an "understanding" that is not "mutual" to be unilaterally asserted after the fact, leaving no way for a representative to prove the contrary. The definition also lacks specificity regarding when the fiduciary relationship begins and ends. It hauls into its limitless net arms-length dealings without any of the traditional notions of a fiduciary relationship.

We recommend that the Department narrow the definition of "fiduciary investment advice". As written, it includes in its scope mere "suggestions". Instead, it should require a mutual agreement to enter into a fiduciary relationship. This reset would give back to the SEC and FINRA their role in regulating brokers who choose not to provide fiduciary advice.

More than eliminating essential parts of the five-factor fiduciary definition, the Fiduciary Rule lacks key components necessary to serve retirement investors. Importantly, it lacks a meaningful "seller's exception" for retail investors, reflecting a paternalistic policy over individual free choice to select among service alternatives; and it narrows the education exception, chilling financial education badly needed in middle class households.

The effect of making all interactions "fiduciary" is that the application of the prohibited transaction rules to IRAs prohibits a "fiduciary" from recommending products that pay differing compensation, or third-party compensation. The purchase of a retail mutual fund in a brokerage IRA violates both of these prohibitions. For example, Class A share mutual funds manufactured by different fund companies and sold by a broker-dealer generate slightly varying compensation (a broker-dealer distributing third-party funds has limited control over these revenue streams, and obtaining uniformity could strain anti-trust rules.). As a result, a financial representative's recommendation to purchase a mutual fund when it pays different amounts of compensation than another available fund results in a prohibited transaction, requiring the firm to comply with the terms of a PTE. Likewise, the issuing fund company assesses the sales charge against the amount invested and pays the compensation to the selling firm in the form of a commission, which is a payment from a third-party, and also prohibited.[9] In other words, the fiduciary definition necessitates use of a PTE by effectively prohibiting the commission-based brokerage model. The PTE intended to allow brokerage firms to offer ordinary commission-based brokerage IRA's is the BIC Exemption.

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[8] For example, see, e.g., Richard Foster, Senior Vice President and Senior Counsel for Regulatory and Legal Affairs, Financial Services Roundtable, July 21, 2015 at pgs. 7 – 11;; Jason K. Bortz, Michael J. Downer, Capital Group, July 20, 2015, at pgs. 4 – 7; Marcia E. Ascquith, Senior Vice President and Corporate Secretary, FINRA, July 17, 2015, at pgs. 5-6.

[9] This payment structure is particularly beneficial to small investors as it allows them to pay the sales charge out of the amounts contributed to the IRA, and receive a deduction for these costs, without having to come up with additional money to pay them separately.

If the Department nevertheless limits its review to the PTEs and not the Fiduciary Rule itself, we urge the Department to take its time to reconsider how the regulatory scheme will affect the average saver. Substantial revisions are necessary to preserve choice and access to financial and investment services for middle-income Americans.

Before the results of the Presidential election may have altered firms' plans to comply with the Rule, the industry was well on its way to curtailing commission-based business in IRAs.[10] This trend did not stop after the Transition Rule went into effect. Firms continue to move investors to fee-based accounts.

Over time, fee-based accounts are more expensive for investors, particularly for those who do not need the additional services offered by fee-based accounts, and are more profitable to firms.[11] For example, we estimate that an investment of $50,000 in a commission-based mutual fund rather than in a fee-based managed account would net less than one third of the revenues to a firm over a 10-year period, inclusive of associated fees and expenses.

Going forward under the Transition Rule, and more severely after the Full Applicability Date, brokerage investors who can meet the minimum investment required for a managed account will not lose access to advice, they will just have to pay more for it. But those modest investors who cannot meet the investment minimum for a managed account will be stranded without access to personal service. For these investors, which one study conservatively estimated to be over 7.2 million accounts[12], the Rule presents a risk to their retirement futures.

B. Rule's Preference for Robo-Advice for Small Investors Will Result in Lost Savings and Will Have a Discriminatory Effect

In its Questions 2-4, the Department also asks whether the Rule appropriately balances the interests of consumers while protecting them from conflicts, and whether the Rule effectively allows for a wide range of products that can meet investors' needs. To the contrary, we believe that the Fiduciary Rule and its PTEs do neither.

Secretary Acosta has stated that "[Americans] can be trusted to decide for themselves what is best for them." Yet the Rule fails to respect the individual by limiting their service options. It tips the balance towards business models that usually favor the mass affluent over the middle-income consumer. Essentially, the Department acknowledged this dilemma when it began touting online "robo" advisers.

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[10] See e.g., "Merrill Lynch to End Commission-Based Options for Retirement Savers", *WSJ* (October 6, 2016) (retirement savers will no longer have a commission-based account option and must instead use a fee-based account in order to continue receiving investment advice); "JP Morgan Nixes Commissions on Retirement Accounts, Possibly Signaling Fiduciary Rule's Staying Power", *Financial Planning* (November 10, 2016) (commissions to be eliminated on retirement accounts in April 2017; retirement clients will have option of a managed account or self-directed account without advice); "DOL Rule Casualty; Commonwealth Drops Commission Retirement Products", *Think Advisor* (October 24, 2016) (firm to stop offering commission-based products in IRAs and qualified plans); "Stifel's Fiduciary Solution for Commissions", *Financial Planning* (November 3, 2016) (due to requirements of BICE, firm will transition smaller retirement accounts to a fee-based model, while retaining commission accounts for larger clients); "State Farm, Citing DOL Fiduciary Rule, Cuts Agents from Mutual Fund and Variable Annuity Sales", *Investment News* (August 19, 2016) (Agent sales of mutual funds and variable annuities to be replaced by self-directed call center); "Edward Jones Revamps Retirement Offerings for DOL Rule", *Financial Advisor IQ* (August 19, 2016) (Mutual funds and ETFs will no longer be offered in commission-based IRAs, which will generally have a $100,000 minimum).

[11] *Study on Investment Advisers and Broker-Dealers*, Staff Study, Securities and Exchange Commission, p. 162 (Jan. 2011).

[12] See e.g., Oliver Wyman report: Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers (April 12, 2011). 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.

Specifically, before seeing the actual impact of the Rule, the prior Department hoped that technology would fill the gap. We now know more. Instead of fixing the Rule to allow brokerage firms to continue serving small investors in the way that they overwhelmingly prefer, through commission-based accounts, the Department began favoring a specific business model. As early as June 2015, the prior Administration's Department began promoting the benefits of technology as the solution for small savers.[13] In prepared testimony before the U. S. House of Representatives, during a hearing into whether the Rule restricted access to financial advice, former Labor Secretary Tom Perez cited technology as the answer for small savers:

> "Many of you have raised important questions about how this [Rule] may affect retirement savers with small balances, something we carefully considered while drafting. I simply don't believe the argument that small savers cannot be served by advice that is in their best interest, especially with the advent of new, technology-based and technology-assisted models."[14]

The following month in a Senate hearing focused on the Rule, the prior Department touted specific online "robo" advisor firms by name, and firms like them, as the solution for small investors that are left without access to traditional advice:[15] Throughout 2016, the prior Department continued to promote these "robo" advisors as the solution for small investors.[16]

In retrospect, promoting online "robo" advisers to save the Rule from criticism over its effect on modest investors fails to provide these investors with access to resources and choices they need to save for retirement. In reality, the Department's endorsement of "robo" advisers is a tacit admission that the Rule leaves no other option for small savers. Moreover, the endorsement was short-sighted. For at the same time, others in the Obama Administration were confronting the "digital divide" that still exists in America, where minorities and low-income Americans are beset by lower than average rates of internet access that threaten their economic opportunities and would, of course, leave many of them without access to online advice.

Unfortunately, though strides have been made in closing the digital divide in America, the most recently available data confirms that this divide remains, and that the Rule's solution for small investors disparately impacts Americans with lower levels of home broadband use, namely African American, Hispanic, lower income, and rural Americans, and those Americans ages 65 to 75 who are the recently retired. Further details on this divide are set out in a comment letter filed jointly by our African American Leadership Counsel and our Hispanic American Leadership Counsel. It is perplexing that the Department

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[13] See, e.g., Schoeff, "DOL Secretary Perez touts Wealthfront as paragon of low-cost, fiduciary advice", *Investment News* (June 19, 2015).

[14] Statement of Thomas E. Perez, Secretary U.S. Department of Labor, before the U.S. House of Representatives, Committee on Education and the Workforce, Health, Employment, Labor and Pensions Subcommittee, on "Restricting Access to Financial Advice: Evaluating the Costs and Consequences for Working Families and Retirees" (June 17, 2015), available by searching www.edworkforce.house.gov.

[15] Testimony of Thomas E. Perez, Secretary, U.S. Department of Labor, before the United States Senate, Committee on Health, Education, Labor and Pensions, Employment and Workforce Safety Subcommittee, on "Restricting Advice and Education: DOL's Unworkable Investment Proposal for American Families and Retirees" (July 21, 2015).

[16] See, e.g., Secretary Perez interviewed by David Westin of Bloomberg TV, where he stated that "technology is our ally for small savers", at www.youtube.com/watch?v=9Ru5Mj6Vu1g (April 6, 2016); Secretary Perez's speech to the National Press Club where he touted online advisor Wealthfront as being successful in providing services under a best interest standard, at www.mprnews.org/story/2016/06/22/mpr_news_presents (June 22, 2016).

and other organizations that support the Rule have recognized, and made allowances to deal with, the "digital divide" in other contexts, but not here.[17]

The prior Department's misguided preference for robo-advisors also discriminates against businesses and is an indication of the prescriptive direction the Rule has taken in favoring certain business models, or products, over others. This is not the proper role of government agencies. The reality is that more than a single, uniform business model is vital to serving the diversity of households in our country.

C. *Rule's Preference for Advisory Models Over Brokerage Models will Increase Costs and Leave Modest Investors without Assistance*

Today, the American public generally has three ways to receive help meeting financial challenges. They can (1) use online systems to educate and guide themselves without the assistance of a licensed representative (robo-advice, discussed above); (2) work on a transactional basis with a registered representative licensed under the Securities and Exchange Act of 1934 (brokerage); or (3) employ a full-time registered investment adviser licensed under the Investment Advisers Act of 1940 (advisory). These three choices offer different levels of service that provide individual investors the opportunity to pick the business model that best serves their diverse and unique interests.

Registered representatives are paid a transaction-based commission, whereas, investment advisers charge an ongoing advisory fee, normally based on the percentage of assets under management. Given this choice, only 12% of Americans choose fee-based investment advisers.[18] Another way to look at Americans' preferences is to look at IRA accounts. Over half of all IRA accounts hold less than $25,000. Ninety-eight percent (98%) of these accounts utilize commission-based brokerage for their IRAs.[19] According to a recent Brookings study by Martin Baily and Sarah Holmes,

> [Fee-based advisory] may seem to take less of the investor's fund, but that is not usually the case. … Regulations that push savers into [fee-based] accounts with wrap fees instead of [brokerage] loads may not be in their best interests. … High net worth clients can afford to pay for advice but a low-income family does not have a lot of money to put to work even though teaching them about investment options and good investment decisions may be quite time consuming.[20]

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[17] The Department and other organizations that support the Rule have cited the "digital divide" in advocating against internet based solutions to document delivery. See Statement of Paul Schott Stevens President & CEO, Investment Company Institute, Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Oversight, on "The Department of Labor's Proposed Fiduciary Rule" (September 30, 2015) at page 12: "It is particularly curious that many of the very same organizations that oppose efforts to make better use of the Internet for delivery of information to investors and plan participants, support the Department's rule proposal that seems intent on sending many retirement savers to robo advisers. In lobbying against Internet-based solutions to document delivery, such groups often cite the existence of an alleged "digital divide" in which individuals in certain ethnic groups, occupations, or income levels are less likely to have computers at home or access to the Internet. Yet, neither these organizations nor the Department offer any explanation as to why these very same people would not also be vulnerable to a shift to Internet-based advice services." Citing Letter from Barbara Roper, Consumer Federation of America, regarding SEC Proposal, Investment Company Reporting Modernization (July 29, 2015), available at www.sec.gov/comments/ s7-08-15/s70815-40.pdf; and Letter from AFL-CIO, Consumer Union, Pension Rights Center and others to Department of Labor Assistant Secretary Phyllis C. Borzi (April 19, 2012), available at www.pensionrights.org/sites/default/files/docs/120419_group_letter_and_memorandum_on_electronic_disclosure.pdf.

[18] *Supra, at 12.*

[19] *Assessment of the Impact of the Department of Labor's Proposed "Fiduciary" Definition Rule on IRA Customers*, Oliver Wyman, April 12, 2011, available at http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf at 2.

[20] Martin Neil Baily and Sarah E. Holmes, *Serving the Best Interest of Retirement Savers: Framing the Issues*, Economic Studies at Brookings, July 2015, available at https://www.brookings.edu/wp-content/uploads/2016/06/Download-the-full-paper-1.pdf.

The fact is that for most Main Street Americans, a fee-based adviser, if utilized, would be the most expensive way to get investment education and guidance because fee-based advisers are compensated to actively and continuously manage the invested assets.[21] Further, it is well-understood that advisers who charge fees for services only have time to service a limited number of clients because of their ongoing obligation to meet with each client and manage their assets. Recognizing this, most fee-based financial representatives exclusively seek out and prefer affluent individuals who are likely to be more worth their limited time. Because fees earned are based on assets under management, 80% of fee-based advisers aim to serve individuals with at least $250,000 in assets.[22] Those who do serve individuals with less assets often have high account minimums, such as $50,000 or higher.[23] In short, because of the Rule, families who should be starting out to save may no longer encounter a personal representative who will encourage them to do so. They will not have access to help.

In addition to leaning to robo-advisers as a solution, the Department has defended the removal of access to brokerage services for small clients by adducing the view of some of the Rule's most vocal "fee-based" or "fee-only" advisers who have said they can serve the "little guy" just as well. Unfortunately, the Department appears not to have fully examined the record of the specific firms cited as examples in its RIA. Many of these vocal supporters are least-inclined to help individuals with modest amounts to invest – and indeed will not. One cannot help but question whether their motivations were self-serving, rather than driven by a desire to protect investors. Below is a summary of our findings from reviewing these named firms' Form ADV Part 2A brochures on file with the SEC with respect to the services they are offering.[24]

Firm	Account Minimum	Fees
Firm 1	$250,000 generally	– 0.25%-1.5% depending on account size – $125 quarterly fee
Firm 2	None	– $120-$540 per hour for a Financial Planner
Firm 3	$1,000,000	– $2,000 initial fee; – $2,000 for delivery of Investment Policy – Management fees vary based on asset size
Firm 4	None	– $130 per hour
Firm 5	$500,000 household wealth	– $5,000 fixed fee for clients not seeking investment mgmt. services; – or $300 per hour
Firm 6	$500,000	– $4,950 annual fee; at least .99% on the first $500,000.

Notably, the two firms cited by the Department without minimums charge hourly fees that are beyond the reach of middle-income savers. Studies show that 83% of Main Street families cannot afford to save more than $250 per month.[25] The Department failed to recognize that the vast majority of Americans simply do not have enough saved to meet advisory minimums, nor can their smaller investment amounts support hourly fees.

Below are the average financial advisor fees for fiduciary accounts. These fees are exclusive of other expenses for investments held in the account, such as transactional fees and fees charged by mutual funds, index funds, or ETFs.

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[21] Supra, note 4.

[22] *Financial Planning for the Middle-Class*, Kiplinger, August 2011, available at http://www.kiplinger.com/article/retirement/T023-C000-S002-financial-planning-for-the-middle-class.html.

[23] Karen Damato, *3 Reasons to Pay Commissions, Not Fees, to a Financial Adviser*, The Wall Street Journal, February 18, 2015, available at, https://blogs.wsj.com/totalreturn/2015/02/18/3-reasons-to-pay-commissions-not-fees-to-a-financial-adviser/.

[24] See Investment Adviser Public Disclosure, Part 2 Brochures, U.S. Securities and Exchange Commission, available at https://www.adviserinfo.sec.gov/.

[25] NAIFA, Fiduciary Standards: The best choice for Main Street investors? (Revised Aug. 2011).

Average Financial Advisor Fees | 2017 Report[26]

Investment Amounts	Average Advisor Fees (%)	Annual Advisor Averages
$50,000	1.18%	$590
$100,000	1.12%	$1,120
$150,000	1.09%	$1,635
$250,000	1.07%	$2,675
$500,000	1.05%	$5,250
$1,000,000	**1.02%**	**$10,200**
$1,500,000	0.94%	$14,100
$2,000,000	0.91%	$18,200
$2,500,000	0.88%	$22,000
$5,000,000	0.84%	$42,000
$7,500,000	0.77%	$57,750
$10,000,000	0.69%	$69,000
$20,000,000	0.65%	$130,000
$30,000,000	0.59%	$177,000

As the information above illustrates, the less a saver has to invest, the higher the fee a registered investment adviser typically charges on an ongoing basis (often in excess of 1% annually for accounts under $100,000). The SEC's Office of Investor Education and Advocacy has warned that "Over time, even ongoing fees that are small can have a big impact on your investment portfolio." For example, they illustrate that an account earning a 4% return less a 1.00% annual fee will earn nearly $30,000 less than the same investment being charged a 0.25% 12b-1 fee as is more common in a transaction-based brokerage account.[27]

Additionally, the average fees for fixed-fee fiduciary advisers are as follows:

Average Fixed Fees (Annual Fees Per AUM)[28]

Investment Amounts	Average Fees (Annual)
$1 - $499,999	$7,500
$500,000 - $999,999	$11,000
$1,000,000 - $1,999,999	$12,500
$2,000,000 - $7,499,999	$37,500
Over $7,500,000	$55,000

[26] Supra, note 53.
[27] Investor Bulletin, *How Fees and Expenses Affect Your Investment Portfolio*, U.S. Securities and Exchange Commission Office of Investor and Education Advocacy, *available at*, https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf.
[28] *Id.*

The average hourly rate for fee-for services financial planning is $200 per hour for clients who do not seek an ongoing relationship. In addition to charging hourly fees, some firms charge an additional annual retainer ranging from $6,000-$11,000 per year depending on location.[29]

While the Department has stated that it "sought to preserve beneficial business models for delivery of investment advice ... that would broadly permit firms to continue common fee and compensation practices,"[30] the Rule instead favors registered investment advisors and online providers. *It places conditions on commission-based services that it does not impose across other models.* The result of this regulatory approach is to change the economics - and risks – underlying the provision of personalized service to modest savers. Person-to-person advice becomes more expensive and riskier to deliver. For that reason, financial services firms will choose, and already are choosing, to demur on helping lower balance clients.

These abandoned households will do nothing, or worse, seek information and guidance from unregulated sources that do not have their financial well-being at heart. This, indeed, is the major vice of the rule. Studies show that the presence of a financial professional in the lives of a family increases by threefold the amount saved for retirement.[31] Yet, this Rule erects new barriers to such assistance. The clear result will be decreased savings. While the RIA touted the so-called "benefit" of eliminating conflicted advice, it ignored the substantially greater cost of lost savings. Analyses indicate that American's lost savings could reach close to $80 billion during a future market downturn, outweighing the Department's claimed ten-year benefits of the Rule.[32]

Companies are resilient and will indeed adjust to comply with the law, but it is the individual who suffers the most. The Department's overly broad definition perversely incentivizes the marketplace to conform by limiting its service options to the consumers who need the most help.

D. United Kingdom's Experience in Preferring One Business Model Over Others Should Be Heeded

We recommend that the Department fully consider outcomes that have occurred to date from the Retail Distribution Review ("RDR"), which was implemented in 2013 in the United Kingdom with similar aims as the Rule. The Department's RIA referred to the RDR in support of its view that markets would adapt to its Rule. The RIA also distinguished the Rule from the RDR on the basis that unlike the RDR, the Rule does not ban commissions.

Available evidence to date contradicts these conclusions. Current evidence shows that the RDR has increased costs for consumers and resulted in an advice gap for smaller investors. Further, this impact should not be easily dismissed because, like the RDR, the Rule in fact is having the effect of limiting commission-based options for retirement savings.

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[29] *Id.*

[30] Definition of "Fiduciary;" Conflict of Interest Rule-Retirement Investment Advice: Proposed Rule (Fiduciary Proposal), 80 Fed. Reg. 21,928, *et seq.*, at 21,929 (proposed Apr. 20, 2015).

[31] See, e.g., *The Role of Financial Advisors in the US Retirement Market*, at 17, OLIVER WYMAN (July 10, 2015), 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.

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

The RDR data supports that brokerage firms will respond to the government-imposed economic restraints by adjusting their business models towards more affluent clients. The U.K's final report on the Financial Advice Market Review revealed that the RDR led to increased barriers for the middle class to get the help they need. "This is supported by some quantitative evidence - a survey of advice firms suggested that, over the last two years [of the RDR being in effect], the proportion of firms who ask for a minimum portfolio of more than £100,000 pounds has more than doubled, from 13% in 2013 to 32% in 2015." This is the opposite outcome that U.S. public policymakers should be taking with the Administration's regulatory priorities.

The Department's RIA denied assertions that the RDR has caused an "advice gap" in the U.K., stating that "advice is amply available." This assertion missed the key question: Advice is amply available *for whom*? An early 2014 Towers Watson report commissioned by the U.K. government found that while it was not yet possible to assess the supply of advice by customer segmentation because that data was not available, "[A]necdotal evidence of developments in the market post RDR suggests that advice capacity serving less affluent segments is likely to have reduced. ... There may therefore be a gap for other forms of financial guidance to less affluent segments."

More current U.K. data now is available. This new evidence strongly indicates that U.K.'s RDR has contributed to the present plight of the U.K.'s middle-income family. After being subjected to a higher standard, advice "is primarily accessible and affordable only for the more affluent in society." The U.K.is now considering narrowing the definition of regulated advice so that "firms offering services that help consumers to make their own investment decisions without a personal recommendation" is not covered advice. The Department should consider a similar approach with respect to narrowing its broad definition of investment advice to ensure it does not mistakenly import the U.K.'s advice gap for America's middle class.

III. <u>Contract and Warranty Requirements in BIC Exemption</u>

In Questions 5 and 6 of the RFI, the Department requests information regarding potential regulatory changes that could alter or eliminate contractual and warranty requirements under the BIC Exemption, and asks further, for suggested enforcement mechanisms to replace them.

A. *The Contract and Warranty Provisions Should Be Removed*

We appreciate the Department's interest in revisions or alternatives to the contract and warranty provisions of the BIC Exemption. We feel strongly that the contract and warranty obligations should be rescinded. They are the most over-reaching aspects of the BIC exemption, driving the most severe structural changes. However, we do not agree that an alternative enforcement mechanism will be needed. The penalties provided under ERISA and the Code are sufficient to incentivize compliance. By imposing fiduciary status on almost every transaction, the Fiduciary Rule is intended to compel firms to use the BIC Exemption for commission-based brokerage. Failure to comply – even stripped of its contract and warranties -- could result in the unwinding of transactions, disgorgement of profits, and payment of excise taxes.

Section II of the BIC Exemption sets forth the contractual requirements, the warranties, and the Impartial Conduct Standards[33] that must be satisfied in order for financial institutions and their

[33] A financial institution and its advisers must provide advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise, based upon the investment objectives, risk tolerance,

representatives to rely on the exemption. For the Transition Rule, the Department made effective only the Impartial Conduct Standards, delaying the contract and warranties to the Full Applicability Date.

Under Section II, as a condition of the BIC Exemption, firms must *contractually agree* to provide investment advice that meets the Impartial Conduct Standards.[34] In addition, firms must *warrant* that they have adopted "policies and procedures reasonably designed to mitigate the impact of material conflicts of interest . . . and *ensure* that individual Advisers *adhere* to the Impartial Conduct Standards."[35]

Among the serious concerns we have, the Section II provisions – contract, warranty and Impartial Conduct Standards -- impose strict liability dependent upon a subjective, facts-and-circumstances analysis. Though a firm might conclude that its practices satisfy the Impartial Conduct Standards, a litigant could claim the contrary after the fact. Thus, a firm will not know with any degree of certainty whether its policies and compensation practices effectively satisfy the exemption, absent a final adjudication of the issue by a court or the Internal Revenue Service years later. As such, the untenable litigation risks have compelled firms to mitigate exposure to these risks, which is having the effect of limiting tax-advantaged retirement products and services to modest retirement savers.

This concern extends beyond the contract requirements. Requiring actual compliance with the subjective Impartial Conduct standards as a condition of the BIC Exemption would expose the firm to strict liability for a prohibited transaction regardless of whether there was even a loss. We note that similar risks are managed in the context of ERISA section 404, where remedies are generally balanced against the severity of the infraction; they are not managed under the strict liability prohibited transaction rules. This is because the penalties for engaging in a non-exempt prohibited transaction are severe, and may include undoing the transaction, forfeiture of all compensation, disgorgement of any profits and payment of excise taxes of 15% to 100% of the amount "involved" in the transaction.

Others of our concerns are directed to the novel and ambiguous language used to form the prescriptive warranties, which the Department has made clear form the basis of "actionable obligations." For example, 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 are "intended" or would "reasonably be expected" to cause recommendations that are not in the "Best Interest of the Retirement Investor," and as long as they "avoid a misalignment " of the interests of representatives and investors; further, differential compensation is, at least in theory, acceptable if it is based on "neutral factors". This "differential compensation" 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 private litigation and loss of the exemption, companies have decided they may not be able to take the risk of misinterpreting this warranty.

Despite the Department's FAQs and speeches attempting clarification, it remains unclear how fee differences could be supported by "neutral factors". A firm has no ability to control what the Department, or state courts, may consider to be a "neutral factor", particularly when prices are set by third-party manufacturers based upon market factors. It is unclear, from a compliance perspective, how this standard could be administered and supervised in practice. Without this certainty, the liability risks and the

financial circumstances, and needs of the retirement investor, without regard to the financial or other interests of the adviser, financial institution or any of their affiliates or any other party (the "Impartial Conduct Standards").

[34] 80 Fed. Reg. at 21,987.

[35] *Id.* at 21,970.

prohibited transaction penalties for failure to comply are too great for a firm to proceed under the BIC Exemption except in narrow circumstances and by limiting products and services.

Strikingly, the differential compensation warranty favors a specific business model that does not currently exist. Compensating representatives entirely neutrally across products and assets would be a massive change, and may be impossible to operationalize.

The Section II provisions create so much uncertainty that firms are at odds with how to comply. Even in the transition period, some are eliminating commission-brokerage altogether; some are scaling back products available to retirement accounts. Firms are making rational decisions in the face of untested, subjective requirements knowing they are designed to yield strict-liability penalties 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." This has forced firms to find alternatives to providing commission-based brokerage to smaller accounts deemed not to be profitable enough to justify the risk.

It is well-documented that litigation imposes an extraordinary burden on businesses, workers, and the economy. The U.S. Chamber's Institute for Legal Reform estimates that United States has the highest liability costs as a percentage of GDP of Canada, Europe, Japan and the United States, reflecting more frequent claims and/or higher claim costs.[36] Across industries, companies spent $2.17 billion on class action lawsuits in 2016. Given the risks presented by class actions and the burdens they impose, companies settle more than 62% of their class action lawsuits, most before a class certification decision.[37]

When the economic arrangements of a business are reordered by government regulation, firms should be expected to respond rationally. In this case, the initial restructuring that has occurred under the Transition Rule – which has had the effect of limiting human advice to higher-wealth clients who fit into advisory models – should rightly be expected to be greatly magnified once the additional conditions of the exemptions become applicable. Again, in spite of the Department's stated intention to preserve current business models, the BIC's cumulative effect is to force firms to severely reduce or eliminate any brokerage.

We believe that the Department has gone far beyond what is necessary to achieve its goal of best-interest advice.

B. A New Brokerage Exemption Should Be Developed

If the Fiduciary Rule is not withdrawn, rather than attempting to reconstruct the overly complex BIC Exemption –- admittedly designed to be reliant on the contract and warranties -- we recommend that the Department adopt a new, straightforward "brokerage exemption" to preserve investor access to traditional commission-based brokerage services.

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[36] *International Comparison of Litigation Costs, Canada, Europe, Japan and the United States,* US Chamber Institute for Legal Reform, (June 2013 Update), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf.

[37] Julianna Thomas McCabe and Chris S. Coutroulis, *Surprising Findings on the Latest Class Action Litigaiton Trends*, Carlton Fields (March 6, 2017*), available at* https://www.carltonfields.com/surprising-findings-on-the-latest-class-action-litigation-trends/.

As we have stated in previous comment letters, we believe that the Department's policy objectives can be accomplished by three primary rules: (i) advice should be in the best interests of the client, (ii) fees should be reasonable, and (iii) no misleading statements should be made. These are the essential elements of the Impartial Conduct Standards. Unfortunately, those standards as written are rife with novel and vague terminology that lack clear meaning, and they suffer from having been weighed down by several years of mixed messaging. A new simple exemption could be renamed and modeled on the Impartial Conduct Standards, with clarifications to provide certainty to the marketplace.

Specifically, the brokerage exemption would require "best interest" advice inclusive of a duty of prudence, and reasonable fees. It would be explicit that any duty of loyalty could be satisfied by clear and conspicuous disclosures meant to be read and understood by average investors.

The brokerage exemption should differ from the BIC Exemption in the following important ways:

- The "best interest" standard should adhere to the FINRA formulation: the financial professional should provide recommendations that are in the "best interests" of the client and put the client's interest before his or her own – the "without regard to" language should be removed and the duty of loyalty should be satisfied by clear disclosure.

- No private right of action should be compelled; no contract should be required.

- Actual adherence to the Impartial Conduct Standards as a condition of the exemption should not be required.

- It should have no contractual warranty requirements.

- The Department should make clear that levelized compensation is not a requirement of the rule by expressly providing that differential compensation, to the financial representative and to the firm, among products and asset classes, is permissible provided clear and conspicuous disclosures are made.

- It should expressly permit revenue sharing and other forms of third-party compensation provided conflicts are mitigated and adequate disclosures are made: clear and objective guidance should be issued.

- Disclosures should require solely the information required in a summary prospectus.

- It should have no website and data record keeping requirements.

- There should be no restrictions on parties' ability to waive class actions in connection with arbitration agreements.

We believe this healthy new start is needed. Firms would be encouraged to rely on the new brokerage exemption.

IV. Alternative Streamlined Exemption

In RFI Questions 7-9, the Department asks for information about market "innovations," such as new share classes and fee-based annuities. The Department questions how the regulated community may respond to new regulations designed to favor these models.

As an initial matter, to understand share class "innovations," it is helpful to understand the revenue streams typical of mutual fund investments. On sales of mutual funds or variable annuities, like all firms, we receive a "dealer reallowance" or commission from the product provider, which it unilaterally establishes and it discloses in the prospectus that is delivered to the investor. Upon receipt, we pay a large portion of this amount as a commission to the selling representative and his or her supervisors, and retain a much smaller portion to help cover the administrative and overhead expenses of running the firm. Every investment account has fixed costs associated with it. Small accounts, due to less assets invested, have marginally higher fixed servicing and distribution costs than a large account. To help defray the typically higher servicing and distribution costs associated with the smaller-sized accounts typical of middle-income consumers, we, like most firms, receive marketing and support compensation from most of the product providers that we represent, referred to as "revenue sharing". This compensation is variable among providers, negotiated at arm's length, some based on sales, some on assets under management, and some on both. We do not use these revenue sharing payments to incent our representatives to favor the sale of one product over another. Finally, we receive shareholder servicing fees from the mutual fund companies we serve, which is payment for performing shareholder services that would otherwise have to be performed by those companies, or their affiliates. These fees are also variable, and negotiated at arm's length with each mutual fund provider on our platform. Each of these revenue streams is important, as they help us cover the relatively higher costs associated with providing high-quality services to middle-income investors.

A. New PTEs Favoring Certain Products Would Not Be Helpful

While we appreciate the Department's interest in helping stakeholders comply with its Rule, we strongly advise that the Department should not develop PTEs designed to support certain products or business models. This is not the appropriate function of a government agency. Regulations should be principles-based in order to be adaptable to varying economic environments, rapidly changing technologies, and investor needs and desires.

Moreover, the Department should not believe that any one product or business model may be a panacea. Each will have its own drawbacks. For the Department to choose a favorite would be a short-sighted mistake.

T Shares and "Modified A" Shares. A recent example of this is the rapidity with which T-shares came and went out of favor. Notably, the impetus to develop T-shares was not in reaction to investor demand, as the free-markets historically have worked. Rather, it was in reaction to the Rule.

Following issuance of the final Rule, companies scrambled for solutions to avoid the BIC Exemption. An idea was that if a number of mutual fund manufacturers could agree to each issue a share class – designated "T-shares"—with the same commission schedule, level breakpoints and no rights of accumulation, broker-dealers could distribute the shares without having to rely on the BIC Exemption. The shares would "trade like an ETF" – a client would pay a commission on each trade. Essentially, by eliminating differences among them, broker-dealers could offer a limited platform of mutual fund T-shares and ETFs to retirement savers. This would mitigate the "conflicts" that the Rule seemed to want to regulate. A similar exploratory path was taken with so-called "modified A shares".

One difficulty in the new shares' development was that to be usable under the Rule's regulatory regime, every fund manufacturer would have had to price its shares the same, with the same breakpoints. This raised antitrust concerns, as it would require broker dealers' to agree on desired pricing.

A short year later, these new, great ideas already are out of favor. First, it proved difficult to obtain consensus among broker-dealers and fund issuers, all being sensitive to anti-trust issues. Second, it was

quickly realized that these products would bring new conflicts and may not be in the best interest of clients. Of particular concern with T-shares, clients would lose the benefit of free exchanges within fund families. Also of concern is that because of their fee structure, T-shares would encourage "churning".

Clean Shares. Another trend is so-called "clean shares." Clean shares, as we understand them, would not assess a sales charge determined by the issuing fund company, but would allow each broker-dealer to determine its own compensation for the services provided. Unlike most traditional mutual fund share classes, clean shares would not carry the administrative and third-party payments that support the back-office functions and front-office cost of distribution.[38]

One concern we have with clean shares is that they would disrupt the economics that support modest transactions. Specifically, administrative and support payments, as well as revenue sharing, generally are received as a percentage of assets under management. As such, modest transactions represent a fraction of a typical firms' revenue that is disproportionately less than the number of transactions – and use of infrastructure resources – attributable to them. When channel support payments are squeezed, or removed from the share class, the incentive to serve clients with less to invest, whose accounts carry marginally higher fixed costs, is eroded.

The economics of modest transactions to the financial representative are similar. For example, a representative who sells $1,000 in securities may earn $50. This fee is meant to cover the representative's work in putting together an investment proposal that suits the client, the gas money and time spent going to the client's home (where most of our transactions take place), the time to complete the suitability, sales process and record-keeping requirements, etc. A $100,000 sale would have yielded the representative substantially, more – in this case potentially $1,000 – for the same effort.

Currently available share classes such as Class A shares facilitate the cost of carrying smaller accounts – which cost firms the same to maintain as large accounts. When channel support payments are prohibited or externalized – charged directly to the client – the nature of fees is likely to change. Options to restructure will be limited. Firms will either pass additional costs on to their middle-income customers through larger minimum account sizes or higher IRA fees, or retain a larger portion of the dealer reallowance thus forcing our representatives to go "up-market" in search of larger transactions. Each of these potential actions has the same inevitable result -- it will no longer make economic sense for the representative, or the firm, to serve clients with smaller amounts to invest.

The Department should not mistakenly believe that consumers will benefit in the end: clean shares open a new pathway of levying fees on consumers. Payments by fund manufacturers support the real costs of distribution. If clean shares resulted in fund manufacturers ending channel support to distributors, fund companies may have to develop their own sales forces to distribute their funds. The cost of distribution to the consumer ultimately would be the same or higher. Similarly, if the current system's "private subsidy" from large transactions supporting smaller ones were removed, it is likely that a public subsidy – MyRA, for example – would be needed for modest investors.

Experience with myRA, now being shut down after the Treasury Department found that it is not cost effective, is a case in point. This program cost taxpayers $70 million and supported only $34 million in contributions. According to Mark Iwry, who was the chief architect of the program, it was designed to

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[38] As a service provider to the mutual fund companies on our platform, we receive recordkeeping and shareholder servicing fees from those companies (or their affiliates). This is a common arrangement in the mutual fund industry. In essence, the fund companies are paying us to perform services for shareholders that they, or their affiliates, would otherwise have to perform. *See* www.dalbar.com/AwardsRankings/AwardHistory.

receive the "small deposits of less-affluent savers, where costs of administration and investment would exceed investment returns." Why did it fail? We suggest that the economics did not incent the program's continuation.

Ultimately, if clean shares became the only brokerage-based investment option for qualified accounts, there is a great risk that distribution of mutual funds to small accounts would slow substantially. Thus, the Department's hope for clean shares as a solution to the harmful effects of its Rule on Main Street America would be lost.

At PFSI, we question whether clean shares could be in the best interests of the modest investors we serve. Because with clean shares fees must be taken directly from the client (as opposed to manufacturers), an investor opening a typical brokerage IRA, for example, would be required to make two payments, one to the fund company in the amount of the IRA contribution to be invested, and another to the selling broker-dealer for the sales charge or commission. This inherently puts more of the cost burden on middle-income consumers while giving more bargaining power to the affluent.

Clean shares also alter the existing tax benefits of opening an IRA in a way that is particularly detrimental to small investors. Currently, when an investor opens a brokerage IRA, makes a deductible contribution and then purchases a mutual fund, the sales charge is assessed by the fund company against the amount invested. Because the amount invested resulted from a deductible IRA contribution, the sales charge is also "deductible" or, to say it another way, is paid with pre-tax money. An IRA contribution is an "above-the-line" deduction on Form 1040 which is available to all taxpayers without having to itemize deductions. Unfortunately, the purchase of clean shares by the IRA investor significantly alters the result for a small investor. First of all, the small investor has to come up with the additional funds to pay the separate sales charge. We believe that it is more likely than not that the small investor will reduce her IRA contribution by the amount of the sales charge. In addition, because this investor must now write a separate check for the sales charge, the sales charge is not being paid out of the IRA contribution and will no longer be afforded above-the-line deductibility. Instead, the sales charge is only deductible if the investor itemizes her deductions on Schedule A to Form 1040, and then only to the extent the amount of the commission exceeds 2% of the investor's adjusted gross income. Unfortunately, for the small investor, many of which do not itemize deductions, we believe that the purchase of clean shares in an IRA, instead of Class A shares, is likely to (i) cause her to reduce her annual IRA contribution by the amount of the commission, (ii) increase her taxable income by the amount her IRA contribution is reduced, and (iii) render the sales charge, that is incurred to make the investment, non-deductible. Multiply this annual scenario over the life of an IRA and the harm to a small investor becomes significant. Clearly, not a good result for small investors that are struggling to accumulate retirement savings.

These above scenarios demonstrate that it is unwise for government to choose winners and losers in the financial marketplace. Market innovations are not magic: they may be short-lived, or work for some but not all. The Department needs to have confidence that American savers can make decisions in their own interest. It should not weight the scale in favor of a product, an industry, a business model or a compensation structure. Regulation should be principles-based, not product-specific -- drafted to allow firms to continue to innovate and adapt to investors' needs.

B. The Department Should Not Draft a PTE Based on a Model Set of Policies and Procedures

In RFI Question 10, the Department asks whether a PTE based on a model set of policies and procedures would help achieve compliance with the Rule. It would not. Instead, we fear such a PTE

would only further the disruptive restructuring of an otherwise free-marketplace that has until now functioned well to preserve investor choice and protect investors.

At PFSI, we have limited our offering of investment products to those that are most appropriate for our middle-income clients. We offer open-end mutual funds and annuities, all from well-known and respected companies. Likewise, our investment education and philosophy is geared toward our middle-income clients, who oftentimes are new or less experienced investors. Our primary investing principle, which is consistent throughout our educational pieces, is the long-term benefit of dollar-cost averaging through systematic investing into a diversified investment portfolio. To help our clients adopt this approach, our affiliated shareholder servicing entity facilitates periodic investments (monthly or quarterly) into mutual fund accounts by processing electronic bank drafts against client checking accounts for five platform fund families.[39] In addition to the advantages of dollar-cost averaging and diversification, we emphasize the benefits of asset allocation, which spreads investment dollars across different asset classes in an effort to reduce risk and increase returns. By any measure, we have been highly successful in aiding Americans to save; we currently handle transactions for over 1.2 million client accounts, and was recently awarded the 2016 DALBAR Service Award for exemplary client service for the fourteenth consecutive year.[40]

Our unique business model has been designed to successfully serve the middle-income market. In that regard, we cannot say that we are in favor of the Department drafting a "model set of policies and procedures" on which a streamlined exemption will be based. We processed over 8.5 million transactions last year under $5,000. It would make no sense to model the same policies for us as others who typically process large transactions. In addition, firms' policies and procedures are regulated and overseen by FINRA and the SEC. We question how the Department's model would avoid conflicts. Inevitably, a model set of policies and procedures will tend to favor certain business models over others, no matter how well intentioned. No doubt, the government favoring one business model over others will stifle the creativity of the marketplace.

We favor a principles-based approach to exemptions that will allow the market the continued freedom it needs to innovate, based on trial and error, success and failure, profit and loss. Any PTE based on a government-drafted "model" set of policies and procedures is certain to favor certain business models over others, and surely will result in more unintended negative consequences for investors. Individuals will have the greatest opportunities to make the arrangements for themselves that they want when government sheds its paternalistic tendencies.

V. Exemption for Prudential Regulators

In RFI Question 11, the Department asked whether it should consider a streamlined exemption based on "updated" standards of the SEC or other regulators. The Department also asked what protections it may take from other regulators' rules to improve its Rule.

A. Exemption for Compliance with Prudential Regulators' Rules is Needed

[39] The five fund families available on the PSS platform are American Century, Franklin Templeton, Invesco Funds, Legg Mason and Pioneer Investments.
[40] DALBAR, Inc. is the financial community's leading independent expert for evaluating, auditing and rating business practices, customer performance, product quality and service. *See* www.dalbar.com/AwardsRankings/AwardHistory.

We appreciate that Secretary Acosta has indicated his willingness to work cooperatively with the SEC to improve the Rule. We are similarly pleased that SEC Chairman Clayton has shown interest in moving forward with a fiduciary standard. This is a positive step towards uniformity.

The SEC, FINRA, state securities regulators, and state insurance regulators have a long-established comprehensive regime that thoroughly regulates financial institutions and their registered representatives, and holds them to high professional standards based on a duty of fair dealing. This regime is effectively enforced through oversight and investors' rights.

The Department should respect this vast legal framework designed by Congress to regulate conflicts of interest in the delivery of information, guidance, and advice to retail individuals. We do not believe that the Department should impose upon that framework a requirement that financial institutions' prudential regulators must "update" their rules before giving them respect.

Without imposing its own judgment by first requiring the SEC or other regulators to adopt new standards of conduct applicable to the provision of investment advice to retail investors, the Department should use its exemptive authority to create a "prudential regulator" exemption. Such an exemption would provide investor protections that most closely align with the direct statutes governing the broker-dealer and/or registered investment adviser. A prudential regulator exemption would recognize that SEC and FINRA are the intended regulators of non-employer retirement accounts like IRAs, in which individuals have discretion over their own accounts. This can also be achieved by narrowing the definition of "fiduciary". Fiduciary status should be based upon a mutual understanding that advice is individualized to the recipient and intended for the recipient's material consideration. Likewise, a meaningful seller's exception, which would allow participants to select their own services, would support this result.

B. A Prudential-Regulator Exemption Would Respect Statutorily-Recognized Differences Between Brokers and Advisors

A well-established distinction as a matter of law between investment advisers and broker-dealers is that a registered investment adviser renders advice for a fee and the registered broker provides advice "incidental" to making a sale.[41] The Rule fails to distinguish "advice" from "advice incidental to selling." Even if the Department believes such a distinction is not possible, the law compels the Department to recognize the distinction because Congress statutorily created it.

The selling activities of brokers and dealers are primarily regulated under the Securities and Exchange Act of 1934. The Investment Advisers Act of 1940 contains a "broker-dealer" exception to the standards it imposes on registered investment advisers. The '40 Act does not include "any broker or dealer" who provides advice that is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." Congress continued recognizing this distinction when enacting ERISA.[42] Most recently, Congress again reaffirmed the distinction in the Dodd-Frank Act

[41] Gibson Dunn & Crutcher, Comment Letter, July 20, 2015.

[42] *See* Investment Company Institute, Commenter Letter, February 3, 2011, at p. 1 (stating, "ERISA Conference Report, P.L. 93-406, at 323 ("...the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions..."), *id.* at 309 (some otherwise prohibited transactions "nevertheless should be allowed in order not to disrupt the established business practices of financial institutions" and directing the Secretaries of Labor and Treasury to grant an administrative exemption for brokerage services). The Department has suggested in recent proposals that the purpose of the 1975 rule was to "significantly narrow []" the definition of investment advice from the plain language in section 3(21). 75 Fed. Reg. 65264. We disagree. The purpose of all of the regulatory activity the Department of Labor and Treasury engaged in shortly after the enactment of ERISA-including what became the current rule and Class Exemption 75-1 – was to ensure that "established

when regulating precisely on the issue that the Rule attempts to regulate – standards of conduct for broker-dealers and registered investment advisers.

Soon after the enactment of the Dodd-Frank Act, the Honorable Barney Frank informed the SEC that Congress intended for any new standard to "recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers." He added that if Congress intended the SEC to simply apply the standard governing registered investment advisers to broker-dealers, "it would have simply repealed the broker-dealer exemption (in the '40 Act) – an approach Congress considered *but rejected* (emphasis added)." Notably, Congress, by omitting the Department from the Dodd-Frank Act, clearly saw the Securities and Exchange Commission – not the Department – as the correct venue to change the standards of conduct.

The Department and some Commenters have argued that the Rule, which effectively does away with the distinction that Congress preserves in statute, is necessary because the market has evolved over the past 40 years. While that may be true, market evolution is not an authoritative basis upon which the Department may rely on to change the plain meaning of a statute. Only Congress may do that.

Recognizing that conflicts cannot be entirely eliminated, Congress designed two very different statutory approaches to managing conflicts of interest. The Department's approach under Title I of ERISA, which the Rule follows, was never designed for individual retirement accounts. ERISA assumes there is a trustee or plan sponsor controlling plan members' investment assets, acting in a fiduciary capacity on their behalf and therefore regulated as fiduciaries, subject to Title I's fiduciary responsibility regime. Unlike plan members, IRA holders have full freedom to choose the investments held in their account and the service provider that service the account. These are choices made by the account holder/owner, not a third-party or unrelated trustee or plan sponsor acting on their behalf. This simple difference makes IRAs fundamentally different from ERISA plans.

The rule of law requires the Department to recognize the complex and delicate investor protection regime Congress established between employer-provided benefits and individual retail investment accounts. Applying ERISA, under the Rule, to IRAs destroys individual freedom and limits choice by the mere fact of subjecting IRAs to ERISA's blunt and one-size-fits-all fiduciary responsibility regime. Congress intended for IRAs, like all individual accounts, to be regulated by the SEC under the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940. This approach is surgical and tailored to empower Americans to make their own financial decisions while protecting investors through rules that identify and mitigate conflicts, increase transparency, and provide enforcement against bad actors.

The RIA rightly notes that Congress also subjected IRAs to the prohibited transaction provisions of the Internal Revenue Code.[43] It even correctly points out that, unlike ERISA and this Rule, the Code does not attach a duty of loyalty or a duty of prudence to IRAs.[44] However, the RIA misinterprets Congressional intent with respect to the Code's provisions that cover IRAs. Rather than using the Code to regulate professional standards of conduct for IRAs, as our securities laws already do, Congress limited the Code's IRA provisions to prohibit investors from gaming tax-advantages for purposes beyond retirement savings. The Department's failure to understand this limitation has led to a Rule that is overly broad by producing conflicting and overlapping regulation of retail brokerage accounts held in the form

business practices of financial institutions" in interacting with employee benefit plans, and the benefits flowing from these practices, were not disrupted.)"

[43] Supra note 29, at 21.

[44] *Id* at 21.

of an IRA, which Congress intentionally and wisely avoided when carefully designing the intersection of authorities as it relates to ERISA, the Code, and our securities laws. Congress intended for management of conflicts in dealing with retirement *plans* to be led by the Department under ERISA and the management of conflicts for *individual* (or retail) accounts to be led by the SEC under our securities laws.

The differences between these approaches are vast but a distinguishing characteristic between the statutes is that ERISA produces investor conformity; whereas, the securities statutes produce investor diversity. While it may make sense to require similarly situated trustees and plan sponsors to adhere to ERISA's strict demands, individual investor preferences demand a different approach altogether, an approach that is found under our securities laws. Subjecting IRA holders to ERISA type limitations and restrictions under this Rule sacrifices individual diversity for collective conformance by completely ignoring the protections and freedoms individual investors have enjoyed for over eight decades.[45] Such an approach is ill advised as a matter of law and policy and has never been tested on American consumers.[46]

Nevertheless, the Rule favors this approach. The RIA measures managing conflicts for middle-income savers under the BIC Exemption as a "benefit" gained without properly weighing the added "costs" of layering the BIC Exemption's complex conflict management regime on top of the securities regulation-based system that currently protects middle-income savers when working with a commission-based representative.[47]

Current law under the securities statutes and ERISA are the basis upon which the Department may act to bring the Rule into conformance with the law's distinction between "advice" and "advice incidental to selling."[48] The Department has authority under ERISA to create exceptions and exemptions to its rules. Presumably, one reason for this authority is to ensure activities Congress did not intend the Department to primarily regulate not fall victim to duplicative investor protections.

Even without action by the SEC, the Department should at least consider out of respect for the distinction that current law draws between "advice" and "advice incidental to selling" to use its authority to create a broad "sellers' exception" that unequivocally preserves that distinction as Congress clearly intends.

The use of both of these authorities is more fully discussed in response to question 18.

VI. Disclosure Requirements

In RFI Question 13, the Department asks how the BIC Exemption's disclosure requirements may be simplified, and whether a model disclosure would be helpful to firms.

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[45] *See* Commissioner Daniel M. Gallagher (Retired), *Remarks at The SEC Speaks in 2015,* February 20, 2015, *available at* *https://www.sec.gov/news/speech/022015-spchcdmg.html*.

[46] *See* Dave Michaels, *SEC's Piwowar: Obama-Era Retirement-Savings Rule Boon for Trial Lawyers; Acting SEC head calls the rule "highly political" and was "never about investor protection,"* The Wall Street Journal, March 2, 2017, available at https://www.wsj.com/articles/secs-piwowar-obama-era-retirement-savings-rule-boon-for-trial-lawyers-1488468477; *See* Attracta Mooney, *Obama's fiduciary rule is a disaster, warns former SEC regulator*, Financial Times, March 26, 2017, available at https://www.ft.com/content/58d0e884-0b11-11e7-97d1-5e720a26771b.

[47] Supra, note 29, at 3-4, stating, "Indeed, because the 2016 RIA's benefit calculation is not supported by the very studies on which it is based, estimates based on the 2016 RIA are also unreliable and of little relevance to assessing the potential impact...."

[48] The Honorable Michael S. Piwowar, Comment Letter, July 25, 2017, available at, https://www.sec.gov/news/public-statement/piwowar-comment-dol-fiduciary-rule-prohibited-transaction-exemptions (stating, "The DOL Fiduciary Rule fails sufficiently to distinguish "selling" activities from "advice" activities, undermining the Commissions longstanding approach to regulation of broker-dealers and investment advisers...").

A. The Department Should Not Draft Model Transaction Disclosures

First, as with a model policies and procedures, a model disclosure is likely to exacerbate the unintended negative consequences of the Rule, and result in more unproductive costs and market upheaval. Second, financial institutions' primary regulators already impose disclosure requirements and have enforcement authority with respect to them. Respectfully, the Department should not replace its judgment with that of those regulators with greater expertise in the industry.

Second, the Rule's foray into requiring specific disclosures has been less than successful. In its current state, the Rule imposes a transaction disclosure that is duplicative of SEC and FINRA requirements, an on-demand disclosure that is nearly impossible to satisfy, and a website disclosure intended only to foment litigation. None of these disclosures is likely to add to a client's understanding of a potential transaction or improve investor outcomes.

Our firm, for example, provides each client, prior to establishing a new account, a standardized, plain-English disclosure that informs the client of the types of products we sell, the cost of owning the products, how and by whom we are compensated, and how we limit and mitigate conflicts. It is tailored to our product suite, our representatives, and our clients. The BIC Exemption disclosures, in contrast, are excessively burdensome and duplicative of SEC-required disclosures. With respect to mutual funds and annuities, the majority of data required by the BIC on-demand 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 timely 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. In our view, this on-demand disclosure provides only marginal benefit but results in enormous costs that will eventually end up being passed through to investors. If this requirement is implemented without revision, the result would be to limit investment alternatives to clients to a limited number of product providers.

As we have stated in earlier comment letters, we believe the Department can best 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.[49]

[49] 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 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.

The fact that this information is almost identical to the transaction 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, is further evidence that the Department is not best-situated to draft – and steer compliance toward – a novel model-disclosure form that does little to improve upon the SEC's requirements.

It is our view that investors are best-served when firms have the freedom to comply with principles-based rules in the manner that suits their clients. In our case, in addition to fee disclosures, our representatives provide the standardized disclosure noted above that explains in plain terms how the firm and its representatives are compensated when the client makes a purchase. Other distributors make similar disclosures, but theirs appropriately are tailored to the products they offer and their client-base. Investors know that brokerage firms are not giving away their services for free.

We do not believe the Department should provide prescriptive disclosures that will have the effect of favoring certain business models. The resultant increase in 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.

B. The Department Should Not Require a Website Disclosure

The BIC Exemption requires a firm to maintain a webpage, open to the public, which provides a schedule of fees, a model contract, policies and procedures, a list of all product manufacturers that provide third-party payments and a description of the arrangements, and disclosure of compensation and incentive arrangements with advisers, all of which must be "reasonably calculated to present a materially accurate description of the arrangements". This requirement – vague as it is -- appears to be intended to assist trial lawyers in their search for causes of action. It requires firms to defer to the Department's judgment on how best to make disclosures to their clients. We believe it also would require public disclosure of our sensitive business information, and cause harm to our firm and affiliates, and to competition.

We believe the Department's webpage disclosure requirement, even as adjusted in the final Rule, is anticompetitive and would not withstand legal scrutiny. The Department requires disclosure of various aspects of Primerica's arrangements with mutual fund and annuity providers. These arrangements are often the result of intense negotiations between Primerica and its product providers, and vary in their structure and pricing. Both the negotiations of these contracts and their terms are confidential, and are treated by Primerica and the providers as highly sensitive. 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.

It would also harm consumers: 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.[50] 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 competition."[51] The FTC "urge[d] the Council to consider how mandatory disclosure requirements might be tailored narrowly" to mitigate "the risk of competitive harm."[52]

The information addressed in the FTC's 2014 letter is similar to the information that would be made public by the BIC Exemption to the Rule. 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.[53]

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.

VII. Exception or Exemption for Contributions to Plans or IRAs

In Question 14 of the RFI, the Department requested information on whether recommendations to make or increase contributions to a plan or IRA should be excluded from the definition of advice, or added as a PTE. The very nature of this question demonstrates the overly-broad definition of the Rule.

Rather than a PTE, information on contributions to an IRA should be expressly excluded from the definition of investment advice. We note that in the new FAQ on this issue published by the Department on August 3, 2017, examples of recommendations to increase contributions that the Department may not consider to be "investment advice" regard plan interactions, not IRAs.

As we have emphasized in the past, we firmly believe that an exception for investment education be broadened rather than narrowed. Without a broadened education exception in the final rule, we are concerned that the middle-market will continue to be left behind when it comes to investment opportunities and decisions which will result in reduced retirement savings in an already underserved market.

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[50] 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-councilu.s.department-labor-regarding-pharmacy-benefit-manager-compensation-fee-disclosure/140821erisaadvisory.pdf.

[51] Id.

[52] Id. at 5.

[53] 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-guidelinescollaboration-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-policyguidance/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.

Saving for retirement is a very difficult thing for the majority of Americans. Studies have shown that people need a "nudge," or help, to make responsible choices about saving. More often than not, our experience with the middle-income and smaller savers has shown us that the decision to invest in an IRA or other account means making a conscious, even sometimes counter-intuitive decision. Our representatives frequently stress the importance of making the difficult decision to save rather than spend. When household finances are already tight, saving can seem like a luxury or unimportant. Our representatives act as the "nudge" for our clients; they empower our clients with educational tools that encourage those individuals to save.

In May of 2015, the LIMRA Secure Retirement Institute found that people who work with advisors (as broadly defined) are more than twice as likely (54% with advisors, as opposed to 26% without) to save for retirement on a regular basis (outside of the workplace) than people who do not work with advisors. Our representatives are trained to break down the complex retirement investment landscape into a format that is digestible and understandable for our clients. The representatives begin with basic financial principles that a client can later use with other investments. As written, the Department's carve out would cut off the necessary education that our clients use to make informed investment decisions.

We also have repeatedly expressed our concern that one of the negative consequences of the Rule will be loss of retirement savings when investors are considering leaving their employers – also known as "leakage" at the point of rollovers. This concern has been validated in recent studies.[54] This is because the Rule makes rollover advice "fiduciary," and thus subject to the BIC Exemptions. Our experience informs us that without a financial professional, many individuals -- who naturally want to break ties with former-employers -- end up spending their 401(k) rollover money to "buy a boat" or a "trip to Disney," rather than reinvesting it in a new IRA. We expect that providing an exception for advice on contributions would help slow this leakage.

The discussion on grandfathering, below provides additional information relevant to this question.

VIII. <u>Grandfathering</u>

In Question 16 of the RFI, the Department asks whether there are changes that could be made to the grandfathering provisions of the BIC Exemption that may minimize undue disruption and facilitate valuable advice.

To the extent that firms have relied on the grandfathering provision, letters have gone out to existing clients advising them that advice will no longer be available on their existing accounts. If the Rule goes into effect without revisions on the Full Applicability Date, more firms will send these letters and the disruption will be expansive. For us, it would affect the 1.2 million middle-income Americans with whom we have already established relationships and retirement accounts, as we expect it will the millions of Americans with existing IRAs across the industry.

While a limited transition rule is provided for those firms who choose to utilize the BIC Exemption, the Fiduciary Rule itself does not provide for grandfathering of clients, assets or accounts. In short, for

[54] *Unintended Consequences: Potential of the DOl Regulations to Reduce Financial Advice and Erode Retirement Readiness,* Quantria Strategies, LLC (July 2015) at 30 ("Plan participants terminating employment could be expected to increase withdrawals from qualified plans, reducing the total assets held in retirement accounts. . . . Our empirical models suggest that retirement savings plan balances are 33 percent higher if a financial planner or broker was consulted for advice.").

clients who may be served under exemptions outside of the BIC Exemption, the Department has provided no explicit grandfathering or transition relief. We believe that it should.

When a representative becomes a fiduciary under the Fiduciary Rule, 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 or (ii) assist clients with their monthly or periodic contributions to their retirement accounts. As noted above, the Department's recent FAQ does little to ease this problem with respect to IRAs.

Moreover, the Rule is resulting in a change in the types of assets and distribution models available to retirement plans. As firms adapt to the rigorous requirements of the Rule, the same mutual funds or annuities currently held by retirement savers may not be available to IRAs. 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 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 Fiduciary Rule itself – not merely the BIC Exemption. Alternatively, we support the grandfathering rule submitted by SIFMA in its response to the RFI. At a minimum, 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. Existing accounts and all prospective transactions within them should be grandfathered outside of the BIC Exemption.

The Department previously suggested to us as a solution to grandfathering outside of the BIC 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, as discussed in Section I of this letter, the vast majority of Main Street families cannot afford hourly fees, which are more expensive for small savers than commissions,[55] and would pay more in advisory programs, if they can meet the minimums. Likewise, middle-income savers are not attractive to fee-based advisers, who can only serve a limited number of clients. Most importantly, a broker-dealer is prohibited by law from receiving asset-based fees or hourly fees in exchange for giving advice. Rather, a broker-dealer is permitted to receive compensation for providing "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

[55] Light, Larry, "How Much Do Advisors Cost?," Forbes (July 26, 2012).

than commission-based compensation resulting from the sale of a product.[56] Accordingly, it is the law that a broker-dealer and its registered representatives are not permitted to accept a check from a client for an hourly fee or charge an asset-based fee as the fee would not be commission-based compensation, but "special compensation" received specifically for giving investment advice. In the United States, there are approximately 370,000 Series 6 registered representatives of broker-dealers who are eligible to assist retirement saver through commission-based advice arrangements. The Rule all but eliminates the viability of this model depriving the registered representatives of a critical component of their livelihood, and middle-income investors of a much needed and desired means of saving for retirement.

IX. Seller's Exception

In RFI Question 18, the Department requests input on its Independent Fiduciary exception. Rather than refine that exception, we urge the Department to correct the Rule by inserting a true seller's exception.

At its core, the complexity of the BIC Exemption, and ultimately its unworkability, derive directly from the Department's determination to impose a "fiduciary" standard where such a standard is not logical, and more importantly, where such a standard is unnecessary to advance the goal of investor protection. By defining "fiduciary" so broadly, the Department has, in effect, created a situation where 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. The BIC Exemption then purports to mitigate the harmful consequences of this definitional overreach by way of a complex and burdensome contract and multi-part disclosure regime. 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. 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 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 narrow the definition of "fiduciary investment advice" to make it clear that fiduciary status is based upon a mutual understanding or agreement that advice is individualized to the advice recipient, and is intended for the recipient's material consideration.

As an alternative, however, the Department could most effectively simplify the BIC Exemption by excluding from its new definition of fiduciary any broker-dealer or registered representative who accurately makes clear disclosure to a client similar to the following:

> "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 Rule would be unable to understand this

[56] *Id. at 1165*

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. Finally, it is critical for the Department to remain cognizant of the fact that sellers of investment products are, and will remain, closely and competently regulated by the SEC, FINRA and the states.

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We respectfully request that the Department conduct a review of the full Rule, rather than restricting its review to those conditions of the PTEs that have been delayed until the Full Applicability Date. In so-doing, we believe that the Department will determine that the Rule should be withdrawn.

If the Rule remains in place, we recommend that (i) the definition of "fiduciary" be narrowed to those relationships of trust intended by the parties to be fiduciary in nature, (ii) a meaningful seller's exception be restored, (iii) a straightforward brokerage exemption be added based on the Impartial Conduct Standards but that is free of the detrimental liability and excessive costs of the BIC Exemption, and (iv) an exemption be provided in deference to the SEC and other prudential regulators.

We thank the Department for its efforts in this matter and we appreciate the opportunity to share our thoughts in this critical rulemaking. Additionally, we respectfully request that concurrent with delay of the January 1, 2018 applicability date, the Department implement a corresponding extension of the temporary enforcement policy provided in FAB 2017-12.

Sincerely,