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

Re: Retirement Security Proposed Rule
Definition of an Investment Advice Fiduciary (RIN 1210-AC02)
Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32)

Ladies and Gentlemen:

PFS Investments Inc. ("PFSI"), is a broker-dealer and an investment adviser ("IA") registered with the Securities & Exchange Commission ("SEC") and is a member of the Financial Industry Regulatory Authority ("FINRA"). PFSI operates as an indirect wholly owned subsidiary of Primerica, Inc.[1] ("Primerica"). PFSI appreciates the opportunity to comment on the Department of Labor's ("Department") proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and amendment to Prohibited Transaction Exemptions ("PTE") 2020-02 ("Proposed Rule" or "Proposal").[2] Our interest is to ensure middle-income households are protected by high standards of care that also allow them to receive affordable retirement savings and lifetime income options.

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[1] Primerica is a leading distributor of basic savings and investment products to middle-income households throughout the United States. Our typical clients earn an annual income of $30,000 to $100,000, a category that represents approximately 50% of all U.S. households. Our business model allows our representatives to concentrate on the smaller-sized transactions typical of middle-income consumers and provides clients access to personal services that would usually not be available to middle-income investors with smaller account balances. We will open an IRA account for an individual with as little as $250 to invest, or for $25 per month

[2] We have commented extensively to the Department, the US Securities and Exchange Commission, and various state regulators regarding the standards of conduct that should apply to broker-dealers when providing services to retail investors. We incorporate by reference our prior comments entered into the Department's record on relevant past rulemakings; We also note the Proposal represents a comprehensive regulatory package that is not amenable to severance.

Since 2010, state and federal regulators have materially increased consumer protections governing the investment recommendations that licensed financial professionals provide. Specifically, the SEC and over 40 states have adopted standards and imposed regulations that prohibit and restrain financial institutions and professionals from making recommendations that are not in investors' best interests. Moreover, the Department's own rulemakings, exemptions and guidance have heightened the standard of care for recommendations governing retirement assets. Like us, broker-dealers and investment advisors have invested time and resources to align and adapt their businesses to comply with these standards and regulations. In so doing, firms have sought to maintain a balance between increased consumer protections and preserving investor choice.

The Proposal risks disrupting this balance. In particular, the Proposal risks disadvantaging middle-income households by restricting the retirement and lifetime income options available to help them become financially secure. Such a result is not fictitious or conjecture. In response to the Department's 2016 finalized rule and exemptions (2016 Rule), major financial firms announced changes to their business models that moved affordable and helpful retirement resources away from the middle market while preserving resources for the affluent.[3] These announcements were made prior to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") vacating the 2016 Rule. They did not have to be implemented thereafter. This Proposal is more expansive than the 2016 Rule and will result in a similar outcome. Confirming this, the National Association of Financial and Insurance Advisors (NAIFA) recently reported from a survey of its members that the number of NAIFA advisors with a minimum asset requirement for service -- which middle income households often cannot meet -- will rise from 30% to 72% if the Proposal is implemented.[4] Therefore, the Proposal should be withdrawn in favor of the new heightened standards of care imposed by the SEC, the states, and the Department.

I. Proposed Changes to the "Five-Part" Test

We agree with the Department that circumstances can exist where a relationship of trust and confidence is established between a licensed financial representative earning a commission and a

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[3] 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).

[4] NAIFA, *Impact of the Proposed DOL Fiduciary-Only Rule on NAIFA Members* (December 2023), *available at* https://advocacy.naifa.org/news/naifa-survey-shows-the-dols-fiduciary-proposal-will-increase-costs-and-reduce-access-to-retirement-planning-services.

retirement investor interested in rolling over a retirement account. However, the Department's Proposal misses the mark in its attempt to broadly proclaim such a relationship exists even when it does not.

Based on our experience serving middle-income retirement investors, we agree with the views expressed in comments submitted by our industry trade associations[5] on this point and believe they accurately reflect the boundaries of when such a relationship of trust and confidence occurs. The Department's Proposed redefinition of investment advice fiduciary is more expansive than its 2011 and 2016 attempts, effectively covering every single recommendation provided within a retirement savings and investment context as one of trust and confidence (i.e. fiduciary). The Proposal is contrary to common law under the Fifth Circuit's opinion, ERISA's statutory text, securities law under Regulation Best Interest and the Investment Advisers Act of 1940, and state insurance law under the NAIC Annuity Best Interest Model Regulation. The Proposed redefinition materially undermines the carefully tailored investor protection regime that Congress, the SEC, DOL, IRS, and state regulators developed to specifically delineate when relationships of trust and confidence exist and when they do not. Expansively defining the term investment advice fiduciary means that a firm and its financial advisors must be certain they can satisfy an exemption provided by the Department before directly interacting with a retirement investor. Investors are harmed when they are unable to afford and utilize face-to-face services they want and need to save and invest for retirement.

In opposition to other governing authorities, the Proposal fails to recognize that relationships of trust and confidence often do not exist in the broker-dealer, or commission-based, sales context. The Fifth Circuit accurately states, "Indeed, broker-dealers 'who render investment advice merely as an incident to their broker-dealer activities' are not fiduciaries 'unless they have by a course of conduct placed themselves in a position of trust and confidence as to their customers.'"[6] Congress recently considered placing broker-dealers in a position of trust and confidence as a matter of law by changing securities statutes that ERISA's statutory fiduciary definition relies on.[7] Section 913 of the Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173 (the "Dodd Frank Act")) could have repealed the broker-dealer exemption in the Investment Advisers Act of 1940 ("Advisers Act"). Had Congress chosen to do so, broker-dealers would always be deemed by law to be in a position of trust and confidence, which is the same position those "rendering investment advice for a fee" are in under the Advisers Act. However, Congress rejected such change. As the Honorable Barney Frank explained in his letter to the Chair of the SEC about the Dodd-Frank Act

[5] American Council of Life Insurers, American Securities Association, Financial Services Institute, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce.

[6] *Chamber of Commerce v. U.S. Dep't of Labor,* 885 F.3d 360 (5th Cir. 2018), citing *Hughes v. SEC,* 174 F.2d 969 (D.C. Cir. 1949).

[7] Eugene Scalia, Gibson Dunn comment on Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice (RIN 1210-AB32); Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25) (July 20, 2015), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00547.pdf).

> [The statute] was not intended to encourage the SEC to impose the Investment Advisers Act ('40 Act) standard on broker-dealers, but to ensure that the new standard would not be a 'watered down' version of the investment advisers' fiduciary standard. If Congress intended the SEC to simply copy the '40 Act and apply it to broker-dealers, it would have simply repealed the broker-dealer exemption – an approach Congress considered but rejected. The new standard contemplated by Congress is intended to recognize and appropriately adapt to the differences between broker-dealers and registered investment advisers.[8]

He wrote to the Department several months later reminding it of the important interaction of laws within this context and urging any changes to the definition of investment advice fiduciary to be done "in a way that does not have adverse effects on the choices available to consumers, municipalities, and pension plans, among others."[9]

These actions by Congress remain particularly relevant to this rulemaking because ERISA's statutory reference to "render[ing] investment advice for a fee or other compensation"[10] upon which the proposed definition of fiduciary relies incorporates terminology in the Adviser's Act. The Proposal's redefinition of investment advice fiduciary effectively does what Congress did not do nor intend to do – deem broker-dealers to always be in a fiduciary position of trust and confidence.

When implementing Section 913 of the Dodd-Frank Act, the SEC carefully examined the question that the DOL evidently struggled with - how to properly increase investor protections when a relationship of trust and confidence does not exist. The fact it took the SEC nine years after the enactment of the Dodd-Frank Act to regulate demonstrates the serious nature of their examination. The SEC's deliberations benefited from witnessing the impact of the Department's attempt to answer the same question with its 2016 fiduciary rulemaking. Ultimately, the SEC chose to balance its rulemaking to preserve investor choice, as the SEC explains in Regulation Best Interest:

> **The Broker-Dealer Standard of Conduct ("Reg BI")**
>
> We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e. transaction-specific recommendations and compensation), and would not properly take into account, and build upon existing obligations that apply to broker-dealers, including under FINRA rules. Moreover, we believe (*and our*

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[8] Letter from Congressman Barney Frank to Chairman Mary Schapiro (May 31, 2011), *available at* https://images.thinkadvisor.com/media/advisorone/files/ckeditor/Barney%20Frank%20Letter.pdf.
[9] Comment Letter from Congressman Barney Frank to Secretary Hilda Solis (September 15, 2011), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32/posthearing00114.pdf.
[10] Employee Retirement Income Security Act of 1974, Pub. Law No. 93-406, Sec. 3(21).

> *experience indicates*), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations (emphasis added).[11]

When the Proposal states that the Department "can set a uniform fiduciary standard for the regulation of conflicts of interest with respect to any advice on any investment products recommended to retirement investors,"[12] it directly contradicts the SEC's decision to protect investor access to retail brokerage services. Despite the Department's consistent articulation "that retirement investors and the regulated community are best served by a consistent, protective, and understandable fiduciary standard,"[13] Congress, the SEC, and other regulators have expressed their concern over such a blindly uniform approach. Specifically, the SEC stated their *experience* indicates the cost of a strictly uniform approach is a significant reduction in retail investor access and choice coupled with increased costs to obtain services.[14]

In fact, the SEC directly addresses this point in Reg BI, when it stated, "We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers."[15] The SEC declined the approach the Department's Proposal takes because as they further state in Reg BI

> Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances.[16]

We agree with the Department's assessment of Reg BI when it states in the Proposal that "the standard of conduct in SEC's Regulation Best Interest draws from key principles of fiduciary obligations, including those that apply to investment advisers under the Investment Advisers Act."[17] The Department correctly adds that the obligations under Reg BI are "substantially similar"[18] to the fiduciary duties under the Advisers Act of loyalty and care. We also agree with the Department that these higher obligations on broker-dealers and licensed financial professionals under securities law cover "recommendations to the individual IRA and ERISA plan investors covered"[19] by the Proposal. However, the differences are significant and impactful. The

[11] 84 FR 33318, at 33322 (July 12, 2019).
[12] 88 FR 75890, at 75927 (Nov. 3, 2023); *Cf.*, supra note 6, holding that "DOL is given no direct statutory authority to regulate IRA plan fiduciaries under (ERISA) Title II.
[13] *Id.*
[14] *Supra* note 11.
[15] *Id.*
[16] *Id.*
[17] 88 FR 75890, at 75924 (Nov. 3, 2023).
[18] *Id.*
[19] *Id.*

Department errs in its assessment that the potential costs "with respect to this area of overlap" are "relatively limited…."[20] Rather, removal of those differences and imposition of a uniform standard is likely to have the effect of limiting access to advice for millions of everyday Americans.

It is true, as the Department states, that "the SEC actions and this proposal share many similarities and many firms have already built compliance structures based on SEC actions, the Department's 2016 Final Rule, and PTE 2020-02."[21] We are one such firm. However, the differences are significant and would require material restructuring, having its most harmful impact on middle income savers. We believe that all investors, including retirement investors, would be better served by the Department narrowly tailing a rule that avoids the Proposal's overlap and the regulatory conflict it invites between ERISA's prohibitive statutory regime and securities law's regime.

While the Department and PFSI hold ERISA in high regard, we also adhere to and respect the standards of conduct imposed by other regulators within this context. We believe they can and should work in concert to provide investors the protections and choices they need at a price they can afford. Establishing a fiduciary relationship of trust and confidence, as the Proposal does, between broker-dealers, licensed financial professionals and individual retirement investors where the SEC and others do not is unnecessary and harmful to investors. The SEC aptly states in Reg BI that such approach does not "provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products)."[22]

II. Proposed Changes to Prohibited Transaction Exemption 2020-02

We agree with the views expressed by our industry trade associations that it is too early to amend PTE 2020-02, especially considering it has only been fully effective since 2022. PFSI has exerted considerable resources operationalizing the new standards of care implemented by the SEC, DOL, and the States. This includes building compliance structures that adhere to PTE 2020-02 as originally released. The Proposal's amendments are substantial and invite further disruption and confusion without any clear benefit.

We further agree with the views expressed by our industry trade associations[23] on the Proposal's overall amendments to PTE 2020-02. We add to their views with the following specific concerns and comments.

[20] *Id.*
[21] *Id.*
[22] *Supra* note 11.
[23] *Supra* note 5.

Section II.(c)(2) – Differential and Incentive Compensation Conflicts

We understand the Department's and other regulators' concern about differential and incentive compensation arrangements. While such arrangements have the potential to create conflicts, regulators also see the benefit they provide to investors. The issue for policymakers and those responsible in the marketplace for ensuring best interest recommendations is not whether such compensation arrangements should be permitted but the alignment of incentives with the investors' interests.

Commission-based brokerage businesses make available services to middle and lower income investors that otherwise would be out of their reach. This is because commission-based services have lower minimum investment amounts to open accounts and provide cost efficiencies for "buy and hold" investors due to the one-time transaction costs they permit. Differential compensation is fundamental to any broker-dealer operating a brokerage business on a commission-based compensation structure. While all investors can avail themselves of such benefits, low-to-moderate income investors particularly benefit from differential compensation arrangements' expanded service options and lower cost structures. Advisory accounts that "levelize compensation" are often accompanied by high minimum investment amounts and ongoing fees that are not always in the investors best interest. Investors benefit most when both options are available to them.

We believe the Department appropriately tailored PTE 2020-02 and its vacated Best Interest Contract Exemption by limiting its requirement to mitigate conflicts to those that operate on financial professionals, providing financial institutions with flexibility as to how to address conflicts at the firm level. This approach was also adopted by the SEC in Reg BI; however, the Proposal's deviation from it puts brokerage services for retirement investors at risk. [24]

To address the differential compensation requirements of the 2016 Rule, firms sought ways to levelize payments across all product manufacturers and types and to narrow the ranges of third-party compensation such as revenue sharing. It was not feasible. To do so would implicate anti-trust rules. Moreover, we do not believe we, nor most other distributors, have the negotiating leverage to demand the same level compensation structure and rates – nor wholesaler commitments – across product sponsors on their platforms. At the same time, we do not believe that these types of differential compensation arrangements are likely to result in harmful recommendations to investors. This compensation is not shared with our representatives who, thus, have no direct financial incentive to sell one product over another as a result of the third-party payments we receive.

The Proposal also introduces a subjective standard over incentives that reward financial professionals for total production or asset accumulation and growth that is wholly inconsistent

[24] See also *Supra* note 11 at 33390, footnote 739, stating "We are persuaded by commenters regarding the competitive issues for broker-dealers that could arise if we require mitigation of firm-level financial incentives, which is not required by an investment adviser's fiduciary duty, and could further encourage migration from the broker-dealer to investment adviser model and result in a loss of choice for retail customers."

with Reg BI and state laws. By rejecting the SEC's determination to limit its restrictions on bonuses, awards, cash, and non-cash incentives to those that favor specific products and are limited in time, the Department puts at risk a firm's ability to reward its financial professionals for incenting retirement savings. Section II(c)(ii) would cover incentives structured to motivate financial professionals to open new accounts and encourage additional savings and investments from existing clients. Under the Proposal, disclosure does not resolve the inherent conflict that arises from compensating financial professionals for growing their business. Instead, all financial professionals would be governed by the Department's subjective determination of whether to allow the exemption with respect to any retirement investment transaction. The Proposal undermines the important policy objective of encouraging middle income individuals to save and invest for retirement.

Further, the Proposal discounts the benefits that non-cash compensation provides investors. The Proposal states, "A Financial Institution should not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas."[25] The desirability of the destination is a prohibitive, subjective standard because "desirability" cannot be assessed by a broker-dealer with thousands of affiliated licensed financial professionals. One financial professional might find Miami in August desirable, but another may not. Rather than focusing on the destination, the Department's focus should be on aligning the incentive to produce a benefit for investors, as securities law and state law do. While we agree that sales contests and non-cash compensation programs should not favor different specific investment products, the DOL, like the SEC in Reg BI, should permit incentives that encourage registered representatives to engage in positive behaviors, such as seeking (and reaching out to) potential new customers and encouraging customers to save and invest more assets.

It should not be presumed that all such incentives drive negative behavior. To the contrary, these incentives are critical to ensuring access to education and investments for middle-income investors. Numerous studies suggest that non-cash compensation programs and performance-based bonus programs are a valuable and powerful tool to motivate individuals to engage in positive behavior in various industries.[26] They also are widely used across industries and well-accepted. One study indicates that over 74% of U.S. businesses use non-cash incentives and 46% of those businesses offer travel as rewards.[27] Incentive travel, in particular, has been shown to

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[25] 88 FR 75979, at 75987 (Nov. 3, 2023).

[26] *See, e.g.*, Jeanie Casion, *The Right Remedy: A Sales Incentive Case Study*, Incentive Mag., June 7, 2011, http://www.incentivemag.com/article.aspx?id=7268 ("Incentive programs are the primary way that our company is able to encourage the behaviors that are essential to not only successfully launching a product but also sustaining its market share trajectory"); Scott A. Jeffrey, *Justifiability and the Motivational Power of Tangible Noncash Incentives*, Mar. 31, 2009. https://www.researchgate.net/publication/232963008_Justifiability_and_the_Motivational_Power_of_Tangible_Noncash_Incentives (concluding that non-cash rewards were more powerful motivators than equivalent cash rewards).

[27] *See* Steve Bova & Kevin M. Hinton, *FICP and SITE Weigh In on Proposed DOL Fiduciary Rule*, INCENTIVEWISE BLOG (Apr. 6, 2016, 2:17 PM), https://www.siteglobal.com/blog/ficp-and-site-weigh-in-on-proposed-dol-fiduciary-rule-impact ("Any reduction in incentive travel opportunities may also reduce the number of face-to-face meetings where financial services employees can receive in-person education to develop advanced skills, learn about new regulations, and develop professionally.").

foster a strong sense of corporate culture within an organization.[28] Developing such a common culture is even more important and challenging in a post-pandemic work environment. Another study shows that the reward of travel is not simply the extrinsic reward of the trip itself, but also the networking and learning opportunities and intrinsic rewards such as feelings of accomplishment and public recognition.[29] Additionally, firms rely on these types of programs to advance team-building and to incent training. These are critical to both driving business success and ensuring that representatives have the tools and knowledge to deliver appropriate levels of service to retail customers. Moreover, FINRA and the SEC demonstrated their support of these programs. FINRA even proposed a new rule, as recently as 2016, to expand the availability of such programs, subject to certain conditions.[30]

Incentivizing licensed financial representatives with cash and non-cash compensation to reach out to potential and existing customers aligns with the public policy objective to reduce financial literacy rates and increase savings and investment. Such incentive programs should be structured so that sales are not tied to any particular product, but rather based on the amount and growth of customer assets for which a licensed representative is responsible. Programs that encourage the dissemination of financial education and savings resources are important means to produce positive financial outcomes for working families.

We recognize that, though cash or non-cash compensation incentives can motivate positive behavior that advantages middle-income communities, at the same time they are susceptible to creating conflicts that can cause negative behavior. A recent SEC Staff Bulletin makes clear that cash or non-cash incentive compensation based on the sales of specific securities or specific types of securities within a limited period of time should be eliminated.[31] We agree. Unfortunately, the Proposal does not adhere to this construction and instead is vague as to what would be required to satisfy Section II.c.2. It reads in part

> Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would

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[28] Pauline J. Sheldon, *The Demand for Incentive Travel: An Empirical Study*, JOURNAL OF TRAVEL RESEARCH (April 1995), http://journals.sagepub.com/doi/abs/10.1177/004728759503300404.

[29] *Id.*

[30] *See*, *e.g.*, Proposed FINRA Rule 3221 (proposing to eliminate the current non-cash compensation rules that apply in the context of investment company securities, variable insurance contracts, direct participation programs, and public offerings, and to replace them with a similar framework that would apply in connection with the sale of *any* security, such that, *e.g.*, sales contests would be permitted if: (1) based on the total production of associated persons with respect to *all* securities distributed by the member and not only product-specific contests; and (2) not based on conditions that would encourage an associated person to recommend particular securities or categories of securities) (also codifying existing guidance regarding the permissibility of certain travel for training and education); FINRA Reg. Notice 16-29 (Aug. 2016) (regarding proposed FINRA Rule 3221); Letter to Marcia E. Asquith Re: FINRA Regulatory Notice 16-29 Gifts, Gratuities and Non-Cash Compensation Rules, NASAA, Sept. 30, 2016, http://www.finra.org/sites/default/files/16-29_NASAA_comment.pdf (supporting FINRA's proposed Rule 3221). The SEC approved each FINRA rule that currently permits non-cash compensation, thereby finding the rules to be sufficient for the protection of investors.

[31] U.S. Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and investment Advisers Conflicts of Interest* (Aug. 3, 2022), *available at*, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest#.Yur4fda0L1w.mailto*.

> conclude are likely, to result in recommendations that are not in the Retirement Investors' Best Interest.[32]

Further, the Department notes that the Department is the final arbiter of whether a recommendation is in an investor's best interest. Firms will be unable to construct and implement policies and procedures around such subjective and expansive language other than by eliminating bonus and incentive programs altogether. As a result, financial professionals will migrate to serving only wealthier clients and be less motivated to seek out and serve middle income households, many of which are likely to have smaller amounts to invest. **We therefore urge the Department instead to use the well-understood and protective Reg BI standard, which reads**

> Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a specified time.[33]

Following Reg BI on this point does not undermine the Proposal's objective to protect retirement investors. As the SEC states in Reg BI,

> While conflicts of interest are also associated with sales contests, sales quotas, bonuses and non-cash compensation that apply to, among other things, total products sold, or asset accumulation and growth, …, these conflicts present less risk that the incentive would compromise compliance with Care Obligation and Conflict of Interest Obligation such that a recommendation could be made that is in a retail customer's best interest and that does not place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.[34]

The Proposal as drafted creates a conflict of law that effectively prohibits or materially restricts these types of programs in a manner that is inconsistent with securities law and the public policy objective to increase financial education and savings.

Section III – Eligibility

We align our views on the Proposal's amendments to PTE 2020-02's eligibility provision with those expressed by our industry trade associations[35] and offer the following specific comments.

The Proposal adds a new provision that states a systematic failure to comply with the Internal Revenue Code's enforcement regime could cause a Financial Institution to be ineligible to rely on the exemption for 10 years. This is one example of several new obligations and conditions imposed by the Proposal. We take seriously our obligations under the Internal Revenue Code and agree with the Department that penalties should be enforced for non-compliance. However, we

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[32] *Supra* note 25, at 76001.
[33] *Supra* note 11, at 33491.
[34] *Id.*, at 33396
[35] *Supra* note 5.

take issue with the Proposal's provisions that in the Department's words are to "ensure that IRAs and other Title II plans actually report and pay an excise tax that they owe."[36] Ensuring Title II compliance is a matter of enforcement. As the Fifth Circuit noted, provisions to require those relying on the exemption to add to their potential liability *"beyond"* the tax penalties provided for in ERISA Title II go beyond the Department's authority.[37] Certainly, the Proposal's provisions to strengthen its ability to enforce ERISA Title II violations by deeming a Financial Institution ineligible to rely on the exemption for 10 years is a significant potential liability that is contrary to the Internal Revenue Code and the Fifth Circuit's opinion.

Section II(b)(2) – A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor

We align our views on the Proposal's amendments to the written statement provision of PTE 2020-02 with those expressed by our industry trade associations[38] and offer the following specific comments.

PTE 2020-02 currently requires a written acknowledgment of fiduciary status. The Proposal adds to this obligation a requirement that will have the same effect and outcome as the Best Interest Contract in the Department's 2016 Rule. Retirement investors, particularly those with lower amounts to invest, will lose access to advice. The reasons we expressed to the Department in 2020 supporting our view that such an acknowledgment is deeply problematic and contrary to the Fifth Circuit's opinion remain applicable to the current obligation and the Proposal's amendments.[39]

Section II(b)(4) – Right to obtain specific costs, fees, and compensation

We align our views on the Proposal's amendments to provide specific costs with those expressed by our industry trade associations[40] and offer the following specific comments.

We agree that a financial representative should provide and review a disclosure for each investment that would illustrate fees and expenses of a set investment amount over a period of time. The Proposal's obligations cannot be operationalized for many of the same reasons we expressed in our comment on the 2016 Rule's Best Interest Contract Exemption's Individual Transaction Disclosure requirement.[41] Even if they could be operationalized the costs of doing so would be prohibitive relative to the benefit gained by the investor. Current law and our current practices

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[36] *Supra* note 25, at 75989.
[37] *Supra* note 6.
[38] *Supra* note 5.
[39] *See* Primerica comment on Improving Investment Advice for Workers & Retirees (ZRIN 1210-ZA29), at p. 6, *available at* https://downloads.regulations.gov/EBSA-2020-0003-0065/attachment_1.pdf.
[40] *Supra* note 5.
[41] *See* Primerica comment on Conflicts of Interest Proposed Rule Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice (RIN 1210-AB32), at p. 8 (September 24, 2015), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00386.pdf.

ensure investors have the necessary costs, fees, and compensation information they need to make an informed decision that is best for them.

Web Disclosure

We align our views on the Department's desire for comments on required web disclosures with those expressed by our industry trade associations[42] and offer the following specific comments.

We have provided the Department several comments on such a recordkeeping and disclosure requirement that remains applicable to the Proposal.[43] We continue not to understand the need to publish this information with regard to IRA accounts over which the Department has no enforcement authority. By extending a form of audit authority to members of the public, the Department has effectively delegated enforcement to the plaintiff's bar.

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For the reasons set forth in our industry association comments and provided here, the Proposal should be withdrawn in favor of allowing the new heightened standards of care implemented by the states, the SEC, and the Department to govern.

We thank the Department for its efforts on this matter. We would be pleased to discuss with the Department any issues raised in this letter or more generally related to the Proposal.

Sincerely,

Karen Sukin

[42] *Supra* note 5.
[43] *Supra* note 41, at p. 10*; Supra* note 39, at p. 9.