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Via Electronic Mail to EBSA.FiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, 11713, 11850
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

Re: Proposed Extension of Transition Period and Delay of Applicability Dates: DOL's Regulation Defining the Term "Fiduciary" and Related Prohibited Transaction Exemptions (ZRIN 1210-ZA27)

Dear Sir or Madam:

PFS Investments Inc. ("PFSI" or "we") is a registered broker-dealer and an indirect wholly-owned subsidiary of Primerica, Inc. ("Primerica")¹. On July 21, we responded to Question 1 of the Request for Information,² urging the Department of Labor ("Department") to delay conditions set to become applicable on January 1, 2018 (the "Full Applicability Date") of the prohibited transaction exemptions ("PTEs") 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 We appreciate that the Department has now

¹Primerica is a leading distributor of basic savings and investment products to U.S. middle-income households. Our clients earn, on average, between \$30,000 and \$100,000 in household income, a category that represents approximately 50% of all U.S. households. Approximately 70% of our accounts are IRAs. Our business model allows our representatives to accept the smaller-sized transactions typical of middle-income consumers and to provide clients with personal services that ordinarily would be out of reach to middle-income investors with smaller account balances. We will open an IRA for an individual with as little as \$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.

²Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278. See, PFS Investments Response (July 21, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00261.pdf>.

³Definition 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

issued a Notice of Proposed Extension of Transition Period and Delay of Applicability Dates (“Extension”).⁴

We support extension of the transition period and delay of the Full Applicability Date to July 1, 2019. Our view is that the extension should be without conditions and should be date-specific to provide needed certainty. We request that the Department use its time in the intervening period to reexamine the Rule in its entirety -- rather than restrict its review to the delayed conditions of the PTEs -- and to freshly evaluate the Rule’s costs and benefits consistent with the President’s Memorandum of February 3, 2017.⁵

As we have stated in our previous comment letters,⁶ we believe that the Rule should be withdrawn. New analyses recently have been submitted to the department demonstrating that the cost-benefit analysis underlying the Rule is critically flawed, and that, for example, the quantitative analysis included an error that, once corrected, shows that the quantified benefits are close to zero while the harm to modest savers is substantial.⁷

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. Our recommendations, detailed in our prior comment letters, include the following:

- (i) the definition of “fiduciary” be refined 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,
- (ii) a meaningful seller’s exception for retail investors be added that preserves access to non-fiduciary investment assistance and the commission-based brokerage model,
- (iii) a straightforward brokerage exemption calling for best-interest advice, reasonable fees, and no misleading statements, 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 Securities Exchange Commission (“SEC”) and other prudential regulators.⁸

These changes are needed in order for commission-based brokerage to be viable for modest investors. They are also essential to allow for the SEC to retain its role in regulating broker-dealers.

We remind the Department once again that 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

Transaction Exemptions 75–1, 77–4, 80–83, 83–1, 84–24 and 86– 128.; RIN 1210-AB79 Final rule; extension of applicability date, 82 Fed. Reg. 16,902.

⁴ 82 Federal Register 41,365 (August 31, 2017).

⁵ Memorandum of February 3, 2017 for the Secretary of Labor re: Fiduciary Duty Rule, 82 Fed. Reg. 9675.

⁶ *Supra*, note 2. *See also*, PFS Investments Response (September 6, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00648.pdf>, AALC and HALC RFI Response (Sept. 6, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00649.pdf>, PFS Investments 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>.

⁷ Craig M. Lewis, *The Flawed Cost-Benefit Analysis Underlying the Department of Labor’s Fiduciary Rule*, Patomak Global Partners, LLC (August 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00647.pdf>.

⁸ *See*, PFS Investments Response (Sept. 6, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00648.pdf>.

fee-based advisory accounts. Industry's response to the Rule has not been what the Department said would occur. Firms are abandoning Main Street households rather than accepting the heightened legal and regulatory risks and additional costs of serving them.⁹

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 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. However, 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 to limit its review to the additional conditions of the PTEs – rather, the Department should undertake an open-minded look at the goals and benefits of the Fiduciary Rule itself. The negative consequences we now are seeing in this transition period are only the beginning. Once plaintiffs' lawyers begin enforcing the new definition of "fiduciary," whatever resolve the industry had to help smaller investors will dissipate as the reality of a trial-bar driven enforcement scheme sinks in.

The Department has shown a willingness to work side-by-side with the SEC in crafting a harmonized standard for brokerage accounts. We urge the Department to continue down that path. One of the fundamental issues we have with this rule-making is that Congress did not equip the Department to rewrite the rules of the securities industry. Burdened by the prohibited transaction and strict liability dictates of ERISA, the Department is left to use its exemptive authority broadly to mitigate the negative impact of the expanded fiduciary definition. However skillful the Department may be, there is no way to navigate this course. In our view, the Department should limit itself to defining a fiduciary in a way that comports with well-settled principles of fiduciary law and not sweep into that definition persons who are engaged in selling a product in an arm's length transaction. Any concern that this will leave investors "unprotected" can be addressed by the SEC which has the primary responsibility for overseeing sales activity in the securities marketplace.

We hope that whether the Department chooses to revoke the Rule, or to materially revise the Fiduciary Rule and the PTEs through a series of rulemakings, the Department will continue its efforts to coordinate with the SEC, FINRA and state insurance authorities. Further, any re-proposed rule, and any new or revised exemptions, should be principles-based, rather than favoring certain products or business models.

We have noted in our prior letters that the Department should be wary of adaptations to business models and "innovations" by the regulated community. These are being driven by firms' decisions to minimize the risks and costs of the Rule, rather than by consumer needs and desires. Tying a delay to firms' adoption of certain "innovations" or business models would only add further to the perception or actuality that government is favoring a product, an industry, a business model or a compensation structure. Government intervention into the securities marketplace, however well-meaning, almost

⁹ See, e.g., Deloitte, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors*, (August 9, 2017, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf>); Harper Polling, *Department of Labor Fiduciary Rule National Survey of Financial Professionals*, Financial Services Roundtable (July 7-12, 2017), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00601.pdf>; *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.

always drives up costs and complexity at the expense of small balance savers whose economic profile makes them less attractive to many financial securities firms.

Moreover, such a conditional delay would increase marketplace uncertainty and add costs that are unlikely to yield any meaningful benefit to middle-income Americans. Firms like ours require certainty. If we cannot decipher whether a delay has ensued, firms will assume there is no delay and this could force irreversible changes that might have been unnecessary had we been able to see the final rule before compliance was mandated. A date-specific delay would help give firms the confidence needed to plan for the future.

The Department thoughtfully sought to enhance market certainty in its Extension by delaying the Full Applicability Date to July 1, 2019. We support this date for the final Extension. Additionally, we request that any re-proposal of the Fiduciary Rule, the PTEs, or any new related prohibited transaction exemption includes a sufficient period of time for firms to make and adapt to the changes it imposes before it becomes effective.

We respectfully request that concurrent with extension of the Full Applicability Date, the Department implements a corresponding extension of the temporary enforcement policy provided in FAB 2017-12. Extension of this good faith policy is needed given the abundant uncertainties in how to interpret and comply with the Rule and the Impartial Conduct Standards, as well as its intended enforcement through the trial bar.

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

Sincerely,

A handwritten signature in blue ink, appearing to be 'KW', followed by a horizontal line extending to the right.