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*Via Electronic Mail to rule-comments@sec.gov*

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Comments on Investment Adviser and Broker-Dealer Standards of Conduct**

Dear Chairman Clayton:

PFS Investments Inc. ("PFSI" or "we"), a registered broker-dealer and SEC Registered Investment Advisor, is an indirect wholly-owned subsidiary of Primerica, Inc. ("Primerica").[1] We thank the Securities and Exchange Commission (Commission) for seeking input to the standards of conduct for investment advisers and broker-dealers. Over the last years, we have provided substantial comment[2] on this topic to the Commission and the U.S. Department of Labor (DOL) as a means to inform others of our primary concern – ensuring middle-income Americans have the investor protections and resources necessary to overcome the financial challenges they confront.

We believe securities law properly balances investor protection with the delivery of resources that are necessary to help middle-income families save and invest. We urge the Commission to carefully consider any actions that may disrupt this balance. There is a real danger that exchanging high standards for a "higher" standard will force firms upscale where the economics of an account will bear the costs of the regulation. The DOL Fiduciary Rule has proven this out: applying an ERISA-based standard of care to individual investment accounts, as the DOL Fiduciary Rule does, is creating a fractured approach that ultimately is harming and confusing retail investors. It takes away the benefits they receive from the service options available. We believe the Commission and DOL, working together, have an opportunity to stop the harm. Our comment recommends a standard of care that is grounded in securities law, as directed by the Dodd-Frank Act. It puts clients' interests first. Enhancing consumer protection is a

[1] Primerica, Inc. trades under the ticker symbol "PRI."
[2] We incorporate by reference our Comment Letters to the U.S. Securities and Exchange Commission and the U.S. Department of Labor. Our Comment Letters are supported by independent economic studies predictive of the DOL Fiduciary Rule's adverse impacts. We respectively request the Commission to further consider this work. *See, e.g.* PFS Investments, Inc. Primerica, Inc., Comment Letter, July 5, 2013, available *at https://www.sec.gov/comments/4-606/4606-3133.pdf;* PFS Investments, Inc. Primerica, Inc., Comment Letter, 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.

legitimate regulatory objective, which we endorse, but it must be accomplished with a clear understanding of the consequences. Overregulating standards of conduct ultimately risks harming many middle-class Americans who are aspiring to increase their income and assets. Such result undermines investor protection and capital formation.

We agree that the principles of choice, consistency, clarity, and cooperation offer an appropriate construct for reviewing, and potentially taking action with respect to, standards of care. In this comment letter, we aim to (i) assess the middle-income market's needs and the potential impact of the DOL fiduciary rule and related exemptions published by the DOL as a final rule on April 8, 2016 ("DOL Fiduciary Rule")[3] on reducing access for that market to investment help and suitable products, (ii) suggest a workable approach to securing "best interest" advice for investors, (iii) assess the extent to which gaps may exist in the current regulatory regimes governing broker-dealers, and (iv) discuss the importance of preserving the commission-based brokerage model to helping ordinary Americans save and invest for retirement.

## Our Company

Over the past 40 years, Primerica's mission has been to help underserved Main Street families become properly protected, debt free and financially independent. We underwrite our own term life insurance products and distribute investments and other financial products on behalf of third-parties. The retail investment and savings products we offer comprise mutual funds, managed accounts, and annuities. Our "buy term and invest the difference" philosophy has generated 757 billion of life insurance in force and $58 billion in asset values for millions of middle-income families.[4]

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.[5] Approximately 74% of our assets are in qualified accounts.[6] We educate clients about the long-term benefit of dollar-cost averaging through systematic investing into a diversified investment portfolio. 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.[7] Consequently, we have one of the largest and most diverse sales forces in North America with approximately 24,000 mutual fund licensed representatives helping over 2 million middle-income clients with their investment

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[3] In its final form, 81 FR 20946 available *at* https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice, including without limitation the Best Interest Contract Exemption.

[4] As of September 30, 2017.

[5] U.S. Census Bureau, Census Population Survey 2016 Annual Social and Economic Supplement, last revised August 26, 2016. Based upon 125.8 mm households.

[6] Full-year 2016.

[7] 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; *Good Intentions Gone Wrong: The Yet-To-Be Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, Robert Litan and Hal Singer, (July 2015), https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00517.pdf; *Econometric Models on the Value of Advice of a Financial Advisor,* Claude Montmarquette and Nathalie Viennot-Briot, (July 2012), available *at* http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf.

accounts.[8] Our securities representatives generally hold Series 6 and 63 FINRA registrations, and approximately 3,200 of our registered representatives are also registered as Investment Adviser Representatives.

## I. The Middle-Income Market

(Questions 1, 2, 7, 15)

**Middle-income Americans Need One-on-One Help to Become Financially Literate and Properly Protected**

The biggest conflict confronting Americans today is between spending and saving. Low financial literacy rates compound this conflict. Far too often we work with families who have "too much month at the end of the money." They find themselves stuck in a pernicious cycle of spending that leads them to perceive that saving and investing is only for the affluent. A fundamental cause behind this misperception can be found in the Commission's *Saving and Investing* guide (Guide).[9] It aptly states, "No one is born knowing how to save or to invest."[10] Indeed, the Library of Congress' findings in a report for the Commission elaborates on this major issue among working Americans:

> According to the Library of Congress Report, studies show consistently that American investors lack basic financial literacy. For example, studies have found that investors do not understand the most elementary financial concepts, such as compound interest and inflation. Studies have also found that many investors do not understand other key financial concepts, such as diversification or the differences between stocks and bonds, and are not fully aware of investment costs and their impact on investment returns. Moreover, based on studies cited in the Library of Congress Report, investors lack critical knowledge about investment fraud. In addition, surveys demonstrate that certain subgroups, including women, African-Americans, Hispanics, the oldest segment of the elderly population, and those who are poorly educated, have an even greater lack of investment knowledge than the average general population.[11]

We believe middle-income Americans need help becoming financially literate to overcome their spending vs. saving conflict. Specifically, middle-income Americans confronting these issues need human resources, or one-on-one interaction, to expose and educate them about basic financial concepts. Information alone is insufficient. For example, a basic internet search using the search terms *how to save and invest* returns nearly 18 million results.[12] Such results produce a web of complexity that the average working American has neither the time to digest nor the confidence to take action without encouragement. Independent studies show that having a trained person, such as a licensed financial representative, can help consumers improve their financial well-being by bringing a clarity and confidence on basic financial concepts where it did not exist before.[13]

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[8] As of December 31, 2016 (includes 18,000 in the United States and 6,000 in Canada); 40% of life licensed representatives are millennials, 30% of Regional Vice Presidents (RVPs) are women, 19% of RVPs are African-American and 13% of RVPs are Hispanic as of December 31, 2016.

[9] *Saving and Investing: A Roadmap to Your Financial Security Through Saving and Investing*, U.S. Securities and Exchange Commission Office of Investor Education and Advocacy, available *at https://www.sec.gov/investor/pubs/sec-guide-to-savings-and-investing.pdf.*

[10] *Id* at 3.

[11] *Study Regarding Financial Literacy Among Investors*, U.S. Securities and Exchange Commission, (August 2012), available *at* https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf.

[12] Google, available *at www.google.com* (last accessed December 5, 2017).

[13] Supra note 7.

We agree with the Commission's Guide when it states that "… for most people, the only way to attain financial security is to save and invest over a long period of time. Time after time, people *of even modest means* who begin the journey reach financial security and all that it promises: buying a home, educational opportunities for their children, and a comfortable retirement" (emphasis added).[14] Having a licensed financial representative is often the difference between middle-income families who take the critical "first steps" on that journey and those who do not.

We raise this issue at the outset of our comment because it is paramount to the central question before the Commission and other regulators – how a new standard of conduct governing financial representatives and financial advisers will affect financial literacy rates. At issue is whether a new standard will incentivize one-on-one help for underserved families or disincentive it. These issues are intricately intertwined but have too often been treated separately in the public debate on "best interest." While the concept of "best interest" makes for a simple political talking point, any securities lawyer will attest it is rife with substantive complexity. As you recently testified, "If this were easy, it would already have been fixed."

The best interest debate has heavily centered on the need to address perceived investor confusion over the legal standards governing recommendations. With all due respect we believe this myopic focus misses the mark. Adding clarity to the current legal standards and remedies is an endeavor we support; however, the real issue that should be addressed is how to encourage Americans to save. **Indeed, consumers want investor protection, but they want protection that guarantees them access to investment help and products designed to help meet their needs.** It is notable the RAND survey that found retail investors did not understand differences between investment advisers and broker-dealers *also* found that retail investors "…are largely satisfied with the services they currently receive from financial professionals."[15]

As the SEC Staff Study states, "Investment advisers and broker-dealers [already] must adhere to high standards of conduct in their interactions with investors."[16] Unfortunately, stakeholders on both sides of the standards of conduct debate have too often failed to even agree upon this widely accepted view. We agree with the Staff Study and add that the ongoing debate of "fiduciary" versus "suitability" has been allowed to obscure the truth that the current rules and regulations under both regimes provide effective investor protections. In fact, in our experience, the rules-based system of the Securities Exchange Act of 1934 (Exchange Act), including FINRA regulation, imposes significantly more comprehensive, delineated and actionable investor protections than those under the principles-based system that governs our registered investment adviser (RIA) business.

Regulatory examinations are one example. The average adviser operating under the Investment Advisers Act of 1940 (Advisers Act) can expect to be examined only once every 11 years.[17] On the contrary, broker-dealers are examined by FINRA, the SEC, and the states. FINRA examines over half of all broker-dealers every year. Every broker-dealer is examined at least once every four years, and those that have disciplinary or financial problems are examined at least annually.[18] It is bewildering that some of the biggest proponents of an ERISA-based fiduciary rule (and critics of brokerage) are RIAs who oppose increased examination resources.

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[14] Supra note 9, at 3.
[15] Angela A. Hung, et. al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice, (2008), available *at* https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.
[16] *Study on Investment Advisers and Broker-Dealers*, Staff Study, U.S. Securities and Exchange Commission, (Jan. 2011), available *at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf at 92.
[17] James S. Wrona, "The Best of Both Worlds: A Fact-Based Analysis of the Legal Obligations of Investment Advisers and Broker-Dealers and a Framework for Enhanced Investor Protection, Business Lawyer, 00076899, Nov2012, Vol. 68, Issue 1.
[18] *Id.*

Another is that, under FINRA rules, broker-dealers are required to establish and maintain robust compliance systems to supervise the activity of registered representatives. A broker-dealer also must have policies and procedures to test and verify the firm's supervisory procedures, and must certify annually that the firm has in place processes to establish, maintain, review, test and modify policies and procedures reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules. The result of these efforts, in our experience, is that our registered representatives are effectively supervised and the interests of our customers are effectively protected. One measure of this effectiveness is that we receive relatively few customer complaints and even fewer customer arbitrations.

Every broker-dealer must also have written policies and procedures designed to achieve compliance with the respective rules and regulation governing its operations. The DOL asked whether it should craft a set of model policies and procedures for firms to implement. We have commented that such a model would not ultimately benefit investors because it would only further the disruptive restructuring of an otherwise free-marketplace that has until now functioned well to preserve investor choice and protect investors. Our business operations are specifically structured to provide middle-income families the financial resources they need. For example, 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. 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 risks imposing a "one size fits all" approach that would inadvertently affect the middle market's ability to receive the service they need to invest little amounts over time to save for their future.

These are a few examples of the important safeguards that protect customers of broker-dealers. In short, the current rules and regulations governing broker-dealers and RIAs under their respective statutes have great merit with respect to investor protection and capital formation. Nevertheless, we understand the charge before the Commission is considering how it may improve upon these rules and regulations. Consequently, we seek to offer the following comments in that regard.

## II. A Harmonized Standard for Individual Investment Accounts

(Questions 6, 8, 9, 11, 15)

The standards of conduct governing the activities of registered representatives and investment adviser representatives are grounded in Section 15 of the Exchange Act and Section 211 of the Advisers Act. Title I of ERISA, specifically Section 404(a), sets forth the standard of conduct that pertains to employee benefit plans, which as discussed in Section III does not cover retail IRAs. In fact, ERISA Section 404(a) is considerably different from the standards under the Exchange Act and the Advisers Act.[19]

Some stakeholders suggest ERISA Section 404(a) should form the basis for unifying standards of conduct relevant to broker-dealers and RIAs within the retail account context. We disagree. This view fails to respect the substantive differences Congress deliberately created between employee benefit plans and individual investment accounts – qualified or non-qualified. We understand the Commission's potential action to change the standards of conduct for individual retail accounts is guided by Section 913 of the Dodd-Frank Act (Dodd-Frank), which amended Section 15 of the Exchange Act and Section 211 of the Advisers Act. It is notable that Congress in Section 913 does not reference ERISA even though it was in effect for the prior 36 years. The Commission should consider this omission when determining the extent to which uniformity between ERISA's and securities law statutory standards of conduct should be

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[19] David C. Kaleda, *What it Means to be an ERISA Fiduciary: A Comparison to the Securities Laws*, NSCP Currents, (May/June 2013), available *at* http://www.groom.com/media/publication/1269_ERISA_Fiduciary_Comparison_to_Securities_Laws.pdf.

achieved, as opposed to respect for the defined jurisdiction of each authority. While harmonization between securities law standards may be realized, it is legally impossible for the Commission (or DOL) to create a uniform standard across statutes. Only Congress may do that, and it most recently chose not to do so in Dodd-Frank. To this extent we encourage the Commission and the DOL to continue its cooperation as a means to safeguard its respective mandates from unintended consequences that Congress sought to avoid. It is also why we caution the Commission from using ERISA or the DOL Fiduciary Rule, including the Best Interest Contract Exemption (BICE), as a guide for potential rulemaking.

We have provided substantial comment to the DOL on our views of the DOL Fiduciary Rule, and specifically BICE. We feel strongly that the DOL Fiduciary Rule, including its exemptions, is flawed and should be rescinded. One reason for this view is that is the DOL Fiduciary Rule violates Section 913(g) under Dodd-Frank by imposing investment advice standards on individual retail accounts that are different from those under Section 211 of the Advisers Act.[20] Notwithstanding the definition of fiduciary expansive overreach, many recognize BICE's contract and warranty obligations as equally over-reaching and disruptive to the goal of helping Americans save. The Impartial Conduct Standards within the BICE and the Transition Rule are also flawed because they are grounded in ERISA-based standards applicable outside of securities law.

There are substantial differences between the ERISA-based standards under the DOL Fiduciary Rule, including BICE, and securities law. The contract, warranty, and Impartial Conduct Standards under ERISA 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.

Others of our concerns are directed to the novel and ambiguous language used to form the prescriptive warranties, which the DOL has made clear form the basis of "actionable obligations." These concerns persist even if these warranties were removed, and the underlying contract requirements remained in force through rulemaking. For example, if, at the end of the transition period, the DOL Fiduciary Rule goes into effect with only modest changes, financial institutions will be 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. Though the DOL recently has attempted to clarify the intended application of differential compensation during the transition period, uncertainty prevails. 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 BICE and Dodd-Frank section 913(g). Again, application of the "neutral factors" requirement during the transition period remains less than certain, as the DOL directed firms to look to the current BICE language as a "safe harbor". Clearly, after the transition period if the consequences for failure to comply remain private litigation and loss of the exemption resulting in liability, companies may not be able to take the risk of misinterpreting this warranty or its underlying contractual requirements.

[20] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law. No. 111-203, Section 913(g), *requiring* "the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940."

Despite the DOL'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 DOL, 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 prohibited transaction penalties for failure to comply are too great for a firm to proceed under the BICE 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.

We believe that the Commission's stated policy objective can be accomplished by following three primary principles: (i) advice should be in the best interests of the client, (ii) fees should be reasonable, and (iii) no misleading disclosures should be made. While these are the essential elements of the Impartial Conduct Standards, those standards as expressed by the DOL under ERISA are rife with novel and vague terminology that lack clear meaning. They also suffer from having been weighed down by several years of mixed messaging. **The best policy is a best interest standard that follows these principles but makes clear it is grounded in securities law as the Dodd-Frank Act directs.**

*Best Interest*

Over the course of the past 80 years a robust doctrine of securities law has developed to protect investors regardless of whether they work with a broker-dealer or RIA. It is disappointing that the debate on whether a consistent standard of conduct may be developed to better serve retail investors has often devolved to whether the Exchange Act or Advisers Act standard is better. A reflection of this view can be summed up when some commonly say the Advisers Act requires recommendations to be in the investor's best interest; whereas, the Exchange Act requires recommendations to merely be suitable. This view grossly misleads the public discourse aimed at helping answer the question before the Commission. Its premise is false because case law, regulatory notices, and the SEC Staff Study on 913 expressly state to the contrary that a "broker's recommendations must be consistent with his customers' best interests."[21]

The appropriate question is whether a consistent standard may be developed considering that valuable operational differences exist between broker-dealers and RIAs. Section 913 requires that any new standard be "the same" as the standard applicable to advisers under Section 211 of the Advisers Act. Section 211 imposes a duty of care and a duty of loyalty on recommendations made to clients.

Investment Advisers' duty of care requires the adviser to assess the *suitability* of a recommendation and provide best execution.[22] Broker-Dealers are also subject to these same requirements; yet, the obligations surrounding a broker-dealers' assessment of suitability are more pronounced. Thus, we question whether additional rulemaking for a duty of care is necessary to satisfy Dodd-Frank because a consistent duty of care effectively exists. If the Commission disagrees, then we encourage it to look to the obligations that apply to broker-dealers under current rules as a means to inform the Commission whether further guidance under the Advisers Act is necessary.

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[21] Supra, note 17.
[22] Supra, notes 17 and 19.

Investment Advisers' duty of loyalty prohibits the adviser from subordinating the clients' interests to its own, and it requires the adviser to eliminate or disclose any conflicts of interest. FINRA guidance and case law governing broker-dealers also "prohibits a broker from placing his or her interests ahead of the customer's interests."[23] Thus, both advisers' and registered representatives' interests vis a vis their clients' interests are effectively positioned the same – client first. However, broker-dealers have more limited requirements than RIAs do with respect to disclosing conflicts of interest.[24] These divergent requirements should be harmonized.

*General Relationship Guide*

As we previously commented, we encourage the Commission to create a simplified, plain-English disclosure regime that provides consistency for clients regardless of whether they use a broker-dealer or RIA. We support the use of a general relationship guide akin to Form ADV Part 2A (General Relationship Guide) when delivering personalized investment advice to retail customers. We believe that a General Relationship Guide can serve as the ideal and primary mechanism through which broker-dealers would fulfill their duty of loyalty to retail customers, just as RIAs do. Whether dealing with an adviser or a registered representative, the person best equipped to advance the interest of the retail customer is the individual investor. A well-designed, simple, clear and concise General Relationship Guide will arm retail customers with the information necessary to make informed decisions about products, services, fees and potential conflicts of interest. A General Relationship Guide has the potential to advance investor protection, and if implemented effectively, minimize transition costs and preserve investor access and choice.

Such a change for broker-dealers would align the current standards of care between registered representatives and advisers so that every retail investor receives a consistent level of protection while retaining the product and service choices that are in their best interest.

*Reasonable Fees*

Section 913(g) of Dodd-Frank clearly states that commission-based compensation and other standard compensation arrangements are consistent with the best interest standard outlined above. Congress effectively affirmed current fee and compensation arrangements for investment advice, which we previously commented is critical to ensuring all investors have equal opportunity to receive financial education and guidance from the type of provider they view best for them.

Retail investors currently enjoy a diversity of investment product and service options at varying levels of service and price. This is the sign of a competitive and healthy marketplace that should be preserved with any future action by the Commission. Any new definition or requirements related to fee arrangements that the Commission may consider should be defined in standard terms, meaning fees normally charged for similar transactions in the marketplace.

*No Misleading Statements or Disclosures*

Broker-dealers and RIAs are already prohibited from engaging in any manipulative, fraudulent, or otherwise deceptive practice. Such prohibitions are paramount to delivering a high standard of care to clients. It is a duty that we, like other firms, take seriously. It is incumbent to any potential action the Commission and other regulators may take on this issue.

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[23] FINRA Rule 2111 (Suitability) FAQ, available at http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq#_edn3.

[24] Supra, note 17.

*Application*

Dodd-Frank Section 913(g) appropriately captures the unique functional differences between broker-dealers and RIAs by stating there should be no requirement that the new best interest standard be continuous for broker-dealers. The Commission is well acquainted with these differences, and we recommend that the Commission consider them with respect to the application of the new best interest standard.

Clients and representatives should be informed about the options for services and the related duties of their representative. Any potential investor confusion with respect to the responsibilities of a broker-dealer could be addressed in the General Relationship Guide, which should clearly set forth service levels available to investors, that would include the option to purchase products on a commission basis, or, where applicable, to select advisory services on an ongoing basis for a fee. Specifically, for an investor who chooses to work with a broker-dealer, the new best interest standard should apply at the point in time a recommendation, as defined under current law, is made with no ongoing or continuous duty of care subsequent to the transaction. This typically occurs at account opening or when a product is sold, exchanged, or purchased.

It is critical that the Commission create a bright-line for application of the standard so that retail investors and their chosen service provider have the options and certainty they need. Applying the standard at the time a recommendation is made ensures that investors may still receive the benefit from investment education, sales and marketing of a firm's services, and other activities that typically take place under the ordinary course of broker-dealers' or RIAs' business. Moreover, it is important to keep in mind the standard in question relates to investment advice, which is one aspect of a broker-dealer's business. Retail customers will continue to receive protection outside a recommendation by the many rules governing the general commercial activities that take place between a broker-dealer and its clients. For example, a broker-dealer "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[25]

Lastly, we encourage the Commission to permit broker-dealers and RIAs to deliver their General Relationship Guide on their website and at a client's request. Additionally, the Commission should consider requiring firms to deliver no later than account opening, a short, concise disclosure that clearly defines the governing standard of care along with a reference encouraging retail customers to access the General Relationship Guide and FINRA's BrokerCheck for more information about the broker-dealer and registered representative.

**Harmonization with ERISA**

While we recognize the respective roles and authorities between the Commission and the DOL, we are encouraged by the desire for cooperation between the two agencies. In our view, harmonization can best be achieved by DOL deferring to the SEC's authority with respect to individual retirement accounts. In this regard, we would like to inform the Commission that we commented to the DOL on the need for it to promulgate a Seller's Exception and/or a Brokerage Prohibited Transaction Exemption (PTE) that would effectively allow the standard of conduct under securities law that is highlighted in this comment to govern. For more information about our views on a Seller's Exception or a Brokerage PTE, we refer the Commission to Sections IX and III(b) of our September 6, 2017, comment letter to DOL.[26]

[25] FINRA Rule 2010.
[26] Supra, note 2.

## III. An ERISA-based Approach is Inconsistent With the Current Investor Protection Regime Established by Congress

(Questions 2, 4, 5, 6, 9, 11, 15, 16)

**ERISA and Securities Law – Investor Protections Increase as Third-Party Control *Increases***

The United States' approach related to standards of conduct governing financial intermediaries has historically been comprehensive and coordinated. It spans multiple statutes, regulatory and enforcement agencies at the federal and state levels. It also includes a deep reservoir of judicial opinion and precedent. On the whole, the entire investor protection regime represents a remarkable balance that ultimately benefits individual investors. However, the DOL Fiduciary Rule would severely disrupt this balance in a manner that poses substantial harm to all retail investors.

The SEC Staff Study rightfully noted in 2011, "…broker-dealers generally are not considered ERISA "fiduciaries," as traditional recommendations by broker-dealers would not usually constitute "investment advice" for ERISA purposes."[27] The DOL, by leveraging its regulatory authority to define "fiduciary" under Internal Revenue Code Section 4975, has flipped this statement on its head, and in the process radically altered the United States' retail investor protection regime.

Securities law, under the Exchange Act and the Advisers Act, respectively takes a rules-based and principles-based approach to regulation. ERISA takes a prohibitive approach. This is a distinguishing characteristic of ERISA compared to statutes under the Commission's jurisdiction. In other words, securities law generally permits broker-dealers' and registered representatives' activities unless they are otherwise prohibited; whereas, ERISA bans them altogether. Under ERISA, an accompanying Prohibited Transaction Exemption (PTE) is required for activity to take place. ERISA experts have observed that the PTE regime is "(1) lengthy and protracted; (2) burdened with conditions, limitations, and requirements; and (3) generally ineffective in addressing the needs of [participant stakeholders and investors]."[28]

Most notably within the context of DOL's goal to eliminate conflicts, ERISA's entire PTE regime, which includes the BICE and its Impartial Conduct Standards, directly supports the existence of conflicts. By virtue of being an "exemption" from prohibited transactions triggered by being covered as an ERISA fiduciary, BICE and its Impartial Conduct Standards are prima facie evidence of "conflicted investment advice."

The DOL, under ERISA's approach to conflict management, is well-suited to oversee employer-sponsored plans since the funds are collected and administered by the employer. On the contrary, a tax-advantaged individual brokerage account for the benefit of one person and directed by one person bears little *operational* resemblance to pensions or 401(k)s. Serious thought should be given to whether the DOL 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.

We believe it does not. Congress deliberatively designed two very different statutory approaches to managing conflicts of interest. Title I standards of conduct under ERISA, which the DOL Fiduciary Rule follows, was never designed for individual retirement accounts. Title I assumes there is a trustee or plan

[27] Supra, note 16.

[28] *Using PTEs to Define A Fiduciary Under ERISA: Threading a Needle with a Piece of Rope,* U.S. Chamber of Commerce, (February 19, 2015), available *at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/White-Paper-Using-PTEs-to-Define-a-Fiduciary-Under-ERISA-2.19.15-FINAL.pdf.

sponsor controlling plan members' investment assets, acting in a fiduciary capacity on their behalf and therefore regulated as ERISA fiduciaries, subject to that title'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 services 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.

Applying ERISA's Title I standards, under the DOL Fiduciary Rule, to IRAs limits individual freedom and choice by 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 Commission under the Exchange Act and the Advisers Act. This approach is 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 motive behind the DOL's Fiduciary Rule is noble – to eliminate conflicts of interest. For example, it rests on its Regulatory Impact Analysis' premise that, the final rule and exemptions will benefit small plan and IRA investors" because it will replace "conflicted investment advice" with "impartial investment advice" through BICE.[29] This view is flawed because it incorrectly presumes "impartial" or "conflict-free advice" exists. It ignores that,

> All financial advisers – like all people who perform a service for anyone else, including journalists – have conflicts of interests. That is true regardless of whether they work for someone else or for themselves, whether they earn fees or commissions, or whether they call themselves 'fiduciaries' who put clients' interests ahead of their own.[30]

The DOL rightly notes that Congress subjected IRAs to the prohibited transaction provisions of the Internal Revenue Code (Code).[31] It even correctly points out that the Code does not attach a duty of loyalty or a duty of prudence to IRAs.[32] However, it is important to note that Congress placed these Code provisions in Title II of ERISA instead of Title I. Perhaps this is one reason DOL 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 Title I does for plans or our securities laws already do for qualified and non-qualified individual accounts, Congress limited the Code's IRA provisions to prohibit investors from gaming tax-advantages for purposes beyond retirement savings. The DOL's failure to understand this limitation has led to a DOL Fiduciary Rule that is overly broad by producing conflicting and overlapping regulation of retail brokerage accounts held in the form of an IRA. Congress intentionally and wisely sought to avoid this harmful outcome when carefully designing the intersection of authorities as it relates to ERISA, the Code, and our securities laws.

Some have argued that Congress intended to hold retirement assets to a higher standard. This view fails to appreciate the overarching guiding principle behind the U.S. investor protection regime – investor protections increase as third-party control increases. Regardless of the type of asset held, all investors deserve equal respect under the law no matter which specific statute or regulator directly governs.

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[29] Definition of the Term "Fiduciary" Conflicts of Interest-Retirement Investment Advice, *Regulatory Impact Analysis for Final Rule and Exemptions*, at 312 (April 2016).
[30] Jason Zweig, *Why Your Financial Adviser Can't Be Conflict Free*, WALL ST. J. (Apr. 7, 2017, 1:46 PM), https://blogs.wsj.com/moneybeat/2017/04/07/why-your-financial-adviser-cant-be-conflict-free/.
[31] Supra note 29.
[32] *Id* at 29.

Congress clearly intended for management of conflicts in dealing with retirement *plans* to be led by the DOL under ERISA and the management of conflicts for *individual* (or retail) accounts to be led by the Commission under our securities laws. 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 more flexible approach that is found under our securities laws. Subjecting IRA holders to ERISA type limitations and restrictions sacrifices individual freedom for collective conformance. Such an approach for investors with qualified or non-qualified retail accounts is ill advised as a matter of law and policy.

Nevertheless, the DOL Fiduciary Rule favors this approach. It tips the balance in favor of less investor choice and more investor confusion by layering ERISA and BICE's complex conflict management regime on top of a securities-based system that currently protects middle-income savers and gives them the resources they need.[33]

**Applying ERISA-based Legal Concepts to Accounts Controlled by Individuals Harms Retail Investors**

Cooperation between the DOL and the Commission is welcomed. Our hope is that such cooperation will lead to an exception to the DOL Fiduciary Rule for brokerage accounts that defers to the standards set by the Commission. FINRA warned against applying ERISA's standards of conduct to individual accounts in its 2015 comment letter to the DOL:

> The Proposal would impose a best interest standard on broker-dealers that differs significantly from the fiduciary standard applicable to investment advisers registered under the federal and state securities laws, and it would impose the best interest standard only on retirement accounts. This fractured approach will confuse retirement investors, financial institutions, and advisers.[34]

This result is precisely where investors find themselves today. Regrettably, these concerns, along with warnings from other stakeholders like us, have been substantiated by the public statements of independent broker-dealers and wirehouses. In response to the DOL Fiduciary Rule, as finalized by the DOL in 2016, firms announced plans to fundamentally restructure their IRA businesses in a manner that would abandon more moderate savers and families and small independent businesses. Public statements from companies in response to the DOL Fiduciary Rule have included notices of the following: elimination of commission brokerage for IRAs (Merrill Lynch,[35] JP Morgan Chase & Co.,[36] Capital One,[37] Commonwealth

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[33] Investment Company Institute Comment Letter, RIN 1210-AB79; Proposed Rule, Extension of Applicability Date (March 17, 2017),., 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…." available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01073.pdf.

[34] FINRA, Comment Letter, (July 17, 2015), at 3, available *at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00405.pdf.

[35] Michael Wursthorn, *Merrill Lynch to End Commission-Based Options for Retirement Savers*, The Wall Street Journal, October 6, 2016, available at https://www.wsj.com/articles/merrill-lynch-to-end-commission-based-options-for-retirement-savers-1475784928; *See also,* Michael Wursthorn, *Merrill's Fiduciary Alternative Would Affect Limited Number of Clients*, The Wall Street Journal, March 10, 2017 (While Merrill Lynch is considering offering an alternative product, such a product would "carry heavy restrictions. … The people familiar added that there is no guarantee an alternative product will be created.")

[36] Michael Wursthorn, *J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs*, The Wall Street Journal, March 13, 2017, available at https://www.wsj.com/articles/j-p-morgan-moves-ahead-with-plan-to-drop-commissions-in-iras-1489420979

[37] Grete Suarez, *Capital One will eliminate commissions on IRAs*, Investment News, November 16, 2016, available at http://www.investmentnews.com/article/20161116/FREE/161119951/capital-one-will-eliminate-commissions-on-iras

Financial[38]); limitation of small accounts to robo-advice only or no face-to-face service (Merrill Lynch[39], State Farm[40]); establishment of higher minimums for brokerage accounts (Edward Jones,[41] Stifel[42]); sales of brokerage businesses (MetLife, AIG, Barclays).[43] As predicted by volumes of industry and economic experts commenting to the DOL, this restructuring reflects a hastened movement toward fee-based advisory accounts for the wealthy as a result of the DOL Fiduciary Rule, leaving those who cannot meet higher minimum account balances and fees to fend for themselves online.

These announcements in the wake of publication of the final DOL Fiduciary Rule to the Federal Register demonstrated that the DOL Fiduciary Rule, if not significantly modified or revoked, will put upward pressure on account minimums for brokerage accounts, so much so that some firms have already taken away the choice investors enjoy today between paying for a single transaction versus paying ongoing advisory fees. This is a change that may ultimately benefit firms more than customers.

As the Commission is well-aware, brokerage clients often do not favor switching to fees.[44] In a recent survey, for example, J.D. Power reported that "Judith Friedlander, an 80-year old retiree from Murieta, Calif., doesn't appreciate the government trying to regulate how she manages her roughly $400,000 individual retirement account." The report adds that "Ms. Friedlander isn't interested in a switch. She trades only a few times a year and says moving to a fee-only account that charges a percentage of her assets would be far pricier than the periodic commissions she currently pays."[45]

Other firms are selling their brokerage business entirely,[46] which means there will be less competition, putting upward pressure on prices and downward pressures on jobs and wages. Recent research from Cerulli Associates warns the DOL Fiduciary Rule, "will have an enormous impact," adding that "small broker-dealers without scale are at high risk under the DOL Fiduciary Rule."[47] An associate director at Cerulli stated that, "It is likely that some of these boutique firms will be unable to support new regulatory

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[38] InvestmentNews Staff, *Commonwealth Financial eliminates commission-based retirement products in wake of DOL rule*, Investment News, October 24, 2016, available at http://www.investmentnews.com/article/20161024/FREE/161029956/commonwealth-financial-eliminates-commission-based-retirement.

[39] Supra, note 35.

[40] Greg Iacurci, *State Farm, citing DOL fiduciary rule, cuts agents from mutual fund and variable annuity sales*, Investment News, September 12, 2016, available at http://www.investmentnews.com/article/20160912/FREE/160919992/state-farm-citing-dol-fiduciary-rule-cuts-agents-from-mutual-fund?AID=%2F20160912%2FFREE%2F160919992.

[41] Michael Wursthorn, *Edward Jones Shakes Up Retirement Offerings Ahead of Fiduciary Rule*, The Wall Street Journal, August 17, 2016, available at http://www.wsj.com/articles/edward-jones-shakes-up-retirement-offerings-ahead-of-fiduciary-rule-1471469692.

[42] Kenneth Corbin, *Stifel's fiduciary solution for commissions*, OnWallStreet, November 3, 2016, available at https://www.onwallstreet.com/news/stifels-fiduciary-solution-for-commissions.

[43] *See* Katherine Chiglinsky and Margaret Collins, *AIG Advisor Group Sale Fueled by DOL Fiduciary Rule, CEO Says,* ThinkAdvisor, January 28, 2016, available at http://www.thinkadvisor.com/2016/01/28/aig-advisor-group-sale-fueled-by-dol-fiduciary-rul?slreturn=1492280745; *See* Christine Idzelis, *MetLife is second major insurer to exit the brokerage business, in the sale of adviser unit to MassMutual*, February 29, 2016, available at http://www.investmentnews.com/article/20160229/FREE/160229937/metlife-is-second-major-insurer-to-exit-the-brokerage-business-in; *See* Andrew Welsch, *Fiduciary rule forced Stifel's hand to sell IBD, CEO says*, OnWallStreet, August 3, 2016, available at https://www.onwallstreet.com/news/fiduciary-rule-forced-stifels-hand-to-sell-ibd-ceo-says.

[44] Janet Levaux, *Commission Clients Don't Favor Switch to Fees: J.D. Power*, ThinkAdvisor, March 16, 2017, available at www.thinkadvisor.com/2017/03/16/commission-clients-dont-favor-switch-to-fees-jd-po.

[45] Daisy Maxey and Veronica Dagher, *Meet the Retirement Savers Who Oppose the Fiduciary Rule*, The Wall Street Journal, February 15, 2017, available at https://www.wsj.com/articles/meet-the-retirement-savers-who-oppose-the-fiduciary-rule-1487168986

[46] Supra, note 43.

[47] John Manganaro, *Broker/Dealer Evolution Ahead of Fiduciary Rule*, planadvisor, December 12, 2016, available at http://www.planadviser.com/Broker-Dealer-Evolution-Ahead-of-Fiduciary-Rule/.

costs, resulting in an increase in firm consolidations."[48] One trade association representing independent financial advisors estimated that its member firms have created 482,000 jobs and contribute $48 billion to the U.S. Gross Domestic Product.[49] By placing the greatest burden on the smallest firms, the DOL Fiduciary Rule is putting these jobs and their economic benefit in jeopardy.

The structural changes previously announced are the "tip of the iceberg" as to the sea change the DOL Fiduciary Rule will cause across the market if it is not substantially revised during the transition period. A recent study from A.T. Kearney reveals "a $20 billion revenue impact for the industry through 2020, along with significant asset shifts across players and formats within the wealth management value chain. Industry players will be impacted at *all levels*. To remain competitive and viable, *all must aggressively address these changes*"[50] (emphasis added). Among the most significant shifts is the "dropping of undersized accounts."[51] The report states, "As firms move toward fee-based advisory, many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advisory and self-directed."[52] At the very least, the new data provided by A.T. Kearney's study demonstrates that the DOL Fiduciary Rule "deemphasizes" the small IRA investor or small plan segment.

Based on an independent survey performed by CoreData Research ("CoreData"), the DOL Fiduciary Rule, if only modestly revised, will force a majority of firms to abandon the U.S. middle-income market.[53] CoreData found in part, the following:

- *Seven out of ten (71%) financial advisors will look to disengage from at least some mass-market investors due to the fiduciary rule. On average, these advisors estimate they will disengage from a quarter (25%) of their mass-market clients.*

- *Two-thirds (64%) of advisors view the impact of the fiduciary rule on mass-market investors as largely negative. And 60% believe the fiduciary rule will have a negative impact on at-retirement clients.*[54]

While our commitment to the middle-income market remains, it is clear from the initial research performed in the DOL Fiduciary Rule's wake that it will impose a policy that delivers the highest cost to the small IRA investor in the form of being "deemphasized" or abandoned.

This is exactly what happened in the United Kingdom with its Retail Distribution Review ("RDR"), which banned commissions. While the BICE is technically structured to permit the continuation of commission-based brokerage business, the evidence is clear that commissions are severely constrained under the DOL Fiduciary Rule's and particularly BICE's ERISA-based conflict management regime for the reasons discussed above. These clear similarities between the RDR and the DOL Fiduciary Rule obliged the DOL to assess the RDR's impact in its Regulatory Impact Analysis. It concluded its analysis

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[48] *Id.*
[49] Financial Services Institute and Oxford Economics, *The Economic Impact of FSI's Members*, July 2016, available at http://www.financialservices.org/economicimpact/.
[50] *A.T. Kearney study: The $20 billion impact of the new fiduciary rule on the U.S. wealth management industry*, A. T. KEARNEY (Oct. 2016), https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69
[51] *Id.*
[52] *Id.*
[53] *Fiduciary Rule To Leave Us Mass-market Investors Stranded, Study Shows*, CoreData Research, November 2016, available at http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf ; See also, Supra, note 47.
[54] *Id.*

of the RDR by stating, "[B]ased on the available data from post-RDR reports since 2013, the Department believes that the RDR has not significantly reduced availability of advice, and any RDR-related advice gap is likely minor and temporary."[55] This conclusion is wrong. The general *availability* of advice is not the issue.

The issue is whether supply is meeting demand by market segment. One of the reports the DOL relies on to support its erroneous conclusion was conducted by Towers Watson, which studied the RDR's impact on small savers for the U.K.'s Financial Conduct Authority.[56] The DOL fails to even mention that Towers Watson concluded, "…it has not been possible to analyse (sic) supply by segment. This is because data on customer segment focus and other key business model attributes (eg what types of consumer specific firms sell to) is not available and *cannot be surmised from other data sources*"[57] (emphasis added). In light of the DOL's omission, this conclusion, buried among the last pages of the report, should be reconsidered. The Towers Watson report further adds,

> Based on our modeling, we estimate that over 60% of demand for retail investment advice is likely to be transactional rather than holistic in nature. It is therefore quite possible that the initial strategic response of advisory businesses to the RDR to move towards holistic financial advice would lend itself to a capacity application mis-match and a shortage of advice capacity – especially at the lower end of the mass market. There may therefore be a gap for other forms of financial guidance to less affluent segments.[58]

As previously discussed, the "initial strategic response" to the Rule, as supported by public statements and research, demonstrates that the United States market is similarly reacting by moving away from transaction-based distribution towards "more holistic," or fee-based financial advice. Unlike the U.K., the United States still has a chance to prevent prospectively what the U.K. Government found retrospectively in 2016 – the RDR contributed to an advice gap.

Perhaps this is one reason the Canadian Securities Administrators after 13 years of examining this particular issue decided to propose "target reform" proposals, such as "regulating the titles used by people who provide financial advice…."[59]

We welcome the review directed by the President's Memorandum and Chairman Clayton because it provides an opportunity for U.S. policymakers to avoid importing bad ideas based on identical policy justifications that have proven to disenfranchise small savers. The sad reality is we have long proclaimed the middle-market to be underserved, and it is for this reason alone that we believe that a rule that forces, or otherwise results in, any firm to consider "deemphasizing" or abandoning the middle segment is completely misguided as a matter of law and policy. The middle class deserves the best of America's policy-making decisions instead of inheriting a new regulatory regime that sacrifices high standards and vital saving and investment resources for one that imposes "higher" standards and fewer resources.

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[55] Supra, note 29, at 87.
[56] Towers Watson, *Advice Gap Analysis: Report to the FECA*, December 2014, available at https://www.fca.org.uk/publication/research/advice-gap-analysis-report.pdf.
[57] *Id.* at 42.
[58] *Id.*
[59] Monira Matin, *Canada vetoes best interest duty for financial 'advisors,"* International Adviser, available *at,* https://international-adviser.com/canada-vetoes-duty-financial-advisors/.

## IV. Middle-Income Investors' Choice of Service Must Be Protected

**(Questions 3, 4, 7, 12, 15)**

Today, the American public generally has three ways to receive help meeting their saving and investment needs. They can (1) use online systems to invest without the assistance of a licensed representative; (2) work on a transactional basis with a registered representative licensed under the Exchange Act (brokerage); or (3) employ a full-time registered investment adviser licensed under the Advisers Act (advisory). These three choices provide individual investors the opportunity to pick the business model that best serves their diverse and unique interests. While they work towards the same general goal – helping Americans save and invest – they are functionally different. Each provides a positive societal impact by presenting different levels of service for different types of retail investors.

*Online Systems*

Online technologies in the saving and investment marketplace have positioned themselves to generally be viewed as an efficient means for retail investors to save and invest. However, data consistently shows that an overwhelming majority of Americans are *uncomfortable* using online systems for their investments.[60] Evidencing this fact, so-called "FinTech" self-help online investment tools have proliferated in terms of availability, but not, to the same degree, market share. The reality is that our human nature is more drawn to spending money online in exchange for an immediate tangible benefit than it is to put that same money at risk through an unfamiliar intangible investment that may provide a benefit at some point in the future. This fact, in addition to low financial literacy rates, makes most Americans uncomfortable with online investment platforms. **Moreover, online systems require customers to seek them out, which is precisely what most middle-class families will not do.**

Despite the bulk of data supporting that most middle-income investors do not self-initiate saving, the DOL placed too much emphasis on "robo-advice" as a means to adequately fill any "advice gap" the DOL Fiduciary Rule would cause. The fact is self-directed online systems are most beneficial for those with a certain amount of time, financial education, and confidence to save and invest.

Moreover, the DOL's endorsement of online systems as a panacea for most middle-class families ignored the "digital divide" that still exists in America. That is, many minorities and low-income Americans are beset by lower than average rates of internet access that threatens their economic opportunities.[61] Relying on self-help technology to fill the advice gap caused by the DOL Fiduciary Rule without acknowledging the divergent availability of internet access would, of course, leave many of those most in need of

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[60] *The 2012 Retirement Confidence Survey: Job Insecurity, Debt Weigh on Retirement Confidence, Savings* Employee Benefit Research Institute (2012), available at http://www.ebri.org/pdf/surveys/rcs/2012/EBRI_IB_03-2012_No369_RCS.pdf (finding, "… just 10 percent of [workers and retirees] say they are comfortable obtaining advice from financial professionals online."); see also, *The 2015 Retirement Confidence Survey: Having a Retirement Savings Plan a Key Factor in Americans' Retirement Confidence* Employee Benefit Research Institute (2015), available at https://www.ebri.org/pdf/surveys/rcs/2015/EBRI_IB_413_Apr15_RCS-2015.pdf (finding,"While just 4 percent of workers report being very interested in obtaining investment education and advice online, 22 percent say they are somewhat interested. Nevertheless, the majority of workers are not too (26 percent) or not at all (48 percent) interested.") see also, *"U.S. Investors Opt for Human Over Online Financial Advice: Just one in three are very comfortable using online technology for investing."Gallup Poll (2014)* available at http://www.gallup.com/poll/174851/investors-opt-human-online-financial-advice.aspx; see also, *Younger Workers Want In-person Education;* Matthew Greenwald Survey, available at http://www.benefitnews.com/news/retirement/younger-workers-want-in-person-education-2746146-1.html. (finding, "Despite their familiarity with technology, the Generation X and Generation Y populations prefer traditional means when it comes to retirement education."

[61] African American Leadership Council and Hispanic American Leadership Council, Primerica, Comment Letter, RIN 1210-AB82; Request for Information (September 6, 2017), available *at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00649.pdf*.

personalized investment help without access to advice. Unfortunately, though strides have been made in closing America's digital divide, the most recently available data confirms the divide remains.[62]

Our view is online systems can be beneficial for the marketplace but it must be acknowledged that they are unable to meet the needs of every consumer, especially many middle-income families. Any new legal standard the Commission develops should avoid the DOL's mistakes. It should be agnostic on the service choices consumers have and squarely focus on giving investors the protection they deserve regardless of the business model they select.

*Brokerage*

Those who desire a person to help educate and guide them with their basic financial needs often choose to work with a licensed registered representative affiliated with a broker-dealer. The economics of the broker-dealer business model provide middle-class families many benefits that online systems and RIAs fail to deliver.

Brokerages are capable of employing resources throughout the saving and investment value chain in a scalable and cost-efficient manner. A middle-class family often has a small amount of money to initially invest. Consequently, it is vital that service providers in the marketplace are able to facilitate low account minimums to provide such families the same privileges that affluent families often take for granted – access to America's capital markets. Brokerages with licensed representatives are best positioned to introduce, guide, and connect middle-income families to our nation's capital markets at an affordable price. Notwithstanding this fact, the delivery of services to small accounts is often viewed as not economically feasible.

Every investment account has fixed costs associated with it because every client requires a minimum level of service. Educational materials, call centers, online account access, portfolio management tools, account administration and recordkeeping are among some of the services clients need. The fixed costs for small accounts, typical of a middle-income retail investor, incur marginally higher costs than larger accounts. This is best exhibited by the U.S. Treasury Department's MyRA program and ERISA's Automatic Rollover Rules.

Mark Iwry was the chief architect of the MyRA program. He recently stated the program was designed to receive the "small deposits of millions of new, less-affluent savers, where costs of administration and investment would exceed investment returns."[63] The program held $34 million in assets under management but cost taxpayers $70 million. The economics of carrying many small accounts simply did not incent the program's continuation.[64]

Similarly, it is widely accepted that small accounts within an employer-sponsored retirement plan (e.g. 401(k)) are a problem for plan sponsors who have an ERISA-based fiduciary responsibility to the plan. Carrying many small accounts for a retirement plan often results in higher overall plan expenses. This is

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[62] *Id.*

[63] John Waggoner, *J. Mark Iwry, architect of myRA, discusses its demise*, Investment News, (Aug. 2, 2017), available *at* http://www.investmentnews.com/article/20170802/FREE/170809987/j-mark-iwry-architect-of-myra-discusses-its-demise.

[64] Ashlea Ebeling, *Treasury to Close myRA Retirement Program, Abandoning Low-Income Savers*, Forbes, (July 28, 2017), available *at* https://www.forbes.com/sites/ashleaebeling/2017/07/28/treasury-to-close-myra-retirement-program-abandoning-low-income-savers/#65e3a9a66df3.

one reason the law permits plan administrators to move certain accounts with $5,000 or less invested out of the plan and into an individual retirement account.[65]

Unlike the MyRA program and employer-sponsored plans, retail broker-dealers using a commission-based model are uniquely able to overcome the economic challenge small accounts present by, in part, receiving indirect support payments from asset managers that ultimately inure to the benefit of the middle class. A recent study commissioned by the Investment Funds Institute of Canada found that

> Most fees charged in a mutual fund are allocated to investors based on their assets held within the fund. As such, some fixed per account costs (e.g. transfer-agent fees) are actually higher than the amount paid by investors with very small accounts – thus such costs to the fund and their associated fees are in reality subsidized by larger shareholders. Overall, mutual funds are investments where higher-balance investors "subsidize" some of the costs of lower-balance investors….[66]

Ultimately, these economics empower licensed registered representatives to deliver education materials, create investor profiles, help set financial goals, and review investment options for underserved families. Transaction-based pricing allows consumers to pay up front for education and investment help instead of bearing the potentially higher cost of annual, asset-based advisory fees. The DOL Fiduciary Rule puts that model at risk by imposing unworkable requirements, particularly with respect to smaller accounts. Without the affordable "helping hand" offered by brokerage-based representatives, families are unlikely to take the critical "first steps" toward saving and investing on their own through other service channels.[67]

Potential solutions proposed by DOL and consumer advocacy groups to preserve the brokerage model under the DOL Fiduciary Rule miss the fact that many registered representatives are not licensed to provide advice for a fee. As a result, altering brokerage compensation by segmenting services, or otherwise, presents legal challenges. As the SEC is well-aware, broker-dealers are prohibited by law from receiving any "special compensation" for providing investment advice. Courts view compensation as "special" when it is received specifically in exchange for giving investment advice and *takes a form other than commission-based compensation resulting in the sale of a product*.[68] Compensation arrangements that deviate from the current model of transaction-based commissions jeopardize a broker-dealer's status as exempt from the definition of investment adviser. Without the exemption, broker-dealers would be forced to cease operations or register as investment advisers. Likewise, registered representatives would be compelled to pass additional licensing exams and register as investment adviser representatives. In the United States, there are approximately 360,000 registered representatives that do not have an Investment Adviser Representative license.[69] Any new standard that operationally requires "special compensation" to be received in lieu of or in addition to a commission puts the livelihood of

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[65] Bruce Ashton and Fred Reish, *The Benefits of Mandatory Distributions*, DrinkerBiddle, (February 2013), available *at* *http://fredreish.com/wp-content/uploads/2013/03/The-Benefits-of-Mandatory-Distributions-A-White-Paper-February-2013_NEW.pdf*.

[66] *A Perspective on the Evolution in Structure, Investor Demand, Distribution, Pricing, and Shareholders' Total Costs in the U.S. Mutual Fund Industry*, Strategic Insight, (November 2012), available *at* https://www.ific.ca/wp-content/uploads/2013/08/US-Study-Perspectives-on-the-Evolution-of-the-US-Fund-Industry-and-Shareholders-Total-Costs-of-Ownership-November-2012.pdf/1652/.

[67] 76 FR 66136, available *at* https://www.federalregister.gov/documents/2011/10/25/2011-26261/investment-advice-participants-and-beneficiaries (stating, "…investment mistakes cost participants approximately $114 billion in 2010 for participants, the Department [of Labor] estimates. The Department believes that participants, after having received such advice, may pay lower fees and expenses, engage in less excessive or poorly timed trading, more adequately diversify their portfolios and thereby assume less uncompensated risk, achieve a more optimal level of compensated risk, and/or pay less excess taxes.")

[68] *Thomas v.Metropolitan Life Insurance Company and MetLife Securities, Inc.*, 631 F.3d 1153 (February 2, 2011).

[69] DiscoveryData, as of December 6, 2017.

these registered representatives at-risk. Such an outcome would unfairly place undue burdens on these individuals and their families.

Another idea offered with respect to brokerage is so-called "clean shares."[70] 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.[71] Clean shares "externalize" the indirect support payments that brokerages currently receive from asset managers. This harms underserved families because it ultimately removes the private-sector subsidy they receive. Firms would either charge more to small accounts or go upscale to focus on a more affluent client base, much like an RIA does.

*Advisory*

The fact is for most middle-class Americans, an Investment Adviser Representative (fee-based advisers), if utilized, would be the most expensive way to get investment education and guidance because they are compensated to actively and continuously manage the invested assets. 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 advisers 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.[72] Those who do serve individuals with less assets often have high account minimums, such as $50,000 or higher.[73]

Below are the average financial advisor fees for fee-based 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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[70] Other ideas include developing "T-shares" and "modified A-shares." One difficulty in the new shares' development was that to be usable under the DOL Fiduciary 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".

[71] 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.

[72] *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.

[73] 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/.

**Average Financial Advisor Fees | 2017 Report**[74]

| 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 an RIA typically charges on an ongoing basis (often in excess of 1% annually for accounts under $100,000).

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

***Average Fixed Fees (Annual Fees Per AUM)***[75]

| 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 |

The average hourly rate for fee-for services financial planning is $200 per hour for clients who do not seek an ongoing relationship.

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[74] *Average Financial Advisor Fees & Costs | 2017 Report | Understanding Advisory & Investment Management Fees,* AdvisoryHG, available at http://www.advisoryhq.com/articles/financial-advisor-fees-wealth-managers-planners-and-fee-only-advisors/.
[75] *Id.*

In addition to charging hourly fees, some firms charge an additional annual retainer ranging from $6,000-$11,000 per year depending on location.[76]

In a recent Brookings study, Martin Baily and Sarah Holmes summarized the difference between advisory and brokerage well when they wrote:

> [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.[77]

We recognize that many families, regardless of income, desire choices when determining what type of service they prefer to meet their needs. The choices the market provides every consumer are functionally distinct with respect to the specific services and benefits they offer. While brokerage often helps a middle-income family begin their journey towards financial security, other services provided by online systems or RIAs are available as they progress. A legal standard that favors one service option over another puts at-risk the general public benefit each service collectively provides - addressing America's saving and investing needs.

**Conclusion**

Most middle-income families need personal help learning how to save and invest. Harmonizing legal standards of conduct under the Exchange Act and Advisers Act can provide retail investors recommendations in their best interest for a reasonable fee and without any misleading statements. Such action can improve upon the robust investor protection framework governing broker-dealers and RIAs today. However, applying ERISA-based standards of conduct to individual investment accounts, as the DOL Fiduciary rule does, will further harm and confuse retail investors by taking away the benefit they receive from commission-based brokerage.

We thank the Commission for its efforts and we appreciate the opportunity to share our thoughts in this critical matter. We are hopeful opportunities for further input materialize as the Commission continues to examine this issue. The challenge before the Commission and other regulators like the DOL is difficult. We are confident that a resolution can be achieved that grants investors added protection while guaranteeing them resources designed to help meet their needs.

Sincerely,

[76] *Id.*
[77] 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.