



1 Primerica Pkwy.
Duluth, GA 30099-0001

Karen L. Sukin
Executive Vice President and
Deputy General Counsel

Office of the General Counsel
Tel. (470) 564-6580
Fax (470) 564-7174
karen.sukin@primerica.com

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Via email to: securitiesregs-comments@sec.state.ma.us

Secretary William F. Galvin
Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

***Re: Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for
Broker-Dealers, Agents, Investment Advisers, and Investment Adviser
Representatives***

Dear Secretary Galvin:

Thank you for the opportunity to respond to the preliminary solicitation of public comments (the “Solicitation”) on a regulation that would apply a fiduciary conduct standard on broker-dealers, agents, investment advisers, and investment adviser representatives (the “Regulation”). PFS Investments Inc. (“PFSI” or “we”) is a broker-dealer and investment adviser registered with the Securities and Exchange Commission (“SEC”) and is an indirect wholly owned subsidiary of Primerica, Inc. (“Primerica”). We have over \$12 billion face amount of life insurance in force and over \$1 billion of assets under management in Massachusetts. Our nearly 800 licensed representatives help over 91,000 residents strive for financial independence, with a focus on middle-income families earning, on average, between \$30,000 and \$100,000 a year.¹

For over 40 years, Primerica has focused on helping middle-income individuals across North America. While other financial services companies typically focus on the wealthy, Primerica serves everyday Americans in neighborhoods all across our nation, including in Massachusetts. We take an educational approach and offer financial tools to help our clients reach their goals. We underwrite our own term life insurance products and distribute straightforward investments sponsored by industry-leading third parties. The investment and savings products we offer comprise mutual funds, managed accounts, and annuities. Our “buy term [life insurance] and invest the difference” philosophy has generated \$783 billion of term life insurance in force and \$57.5 billion in assets under management for millions of middle-income families.²

¹ As of December 31, 2018, we had nearly 800 licensed life insurance agents and over 225 securities-licensed representatives in Massachusetts.

² As of December 31, 2018.

Helping middle-income families and individuals achieve financial security and independence is our mission. **Addendum 1** to this letter provides more information about Primerica as a company, our mission to help middle-income families achieve financial independence, and the importance of our face-to-face services in encouraging these savings, which is empowered by the transaction-based brokerage model. We are concerned that the Regulation could threaten this model and hinder our ability to continue to serve these families as they work towards their goals. Based on our experience helping middle-income households invest for the future, and known reactions by firms to similar fiduciary rule proposals, we fear the Regulation will unnecessarily harm Massachusetts's middle-income investors by impeding their access to help from financial professionals on a cost-effective basis.

Since the Solicitation was published, the SEC finalized a package of rules and interpretations (the "SEC Rulemaking") that substantially elevate, strengthen, and enhance the standards of conduct and disclosure requirements for SEC-registered broker-dealers and investment advisers.³ The SEC Rulemaking will require us to make significant changes to our business and incur costs, but we believe these costs are worth it because the SEC Rulemaking appropriately balances the goals of protecting investors while preserving choice of, and access to, financial services. ***Given these new, enhanced federal standards, we urge you not to go forward with the Regulation.*** Should you nonetheless choose to go forward with this rulemaking, this letter provides suggestions for changes to reduce the harm the Regulation may cause.

In **Section I** of this letter, we summarize our view of the SEC Rulemaking and why we believe Massachusetts should not go forward with its rulemaking. In **Section II**, we address the overbreadth of the Regulation that make it impracticable to implement in the brokerage model and provide recommended modifications to the Regulation that may mitigate the unintended harm the Regulation is likely to cause to Massachusetts families' ability to save and invest for their futures.

I. The SEC Rulemaking Appropriately Protects Consumers

Primerica has commented extensively on the topic of standards of care for retail investors over the past several years, including to both the SEC and the Department of Labor ("DOL").⁴ We have

³ See Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf> (hereinafter, "Regulation Best Interest"); Form Customer Relationship Summary ("CRS"); Amendments to Form ADV, 84 Fed. Reg. 33,492 (July 12, 2019) (to be codified at 17 C.F.R. pts. 200, 240, 249, 275, and 279), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12376.pdf>; Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669 (July 12, 2019) (to be codified at 17 C.F.R. pt. 276), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf>; Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer, 84 Fed. Reg. 33,681 (July 12, 2019) (to be codified at 17 C.F.R. pt. 276), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12209.pdf> (hereinafter, "Solely Incidental Interpretation").

⁴ We incorporate by reference our previously filed comment letters to the SEC and DOL. See Letter to Mr. Brent J. Fields Re: Regulation Best Interest [File Number S7-07-18]; Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles [File Number S7-08-18]; Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation [File Number S7-09-18] (Aug. 7, 2018) (<https://www.sec.gov/comments/s7-07-18/s70718-4184373-172568.pdf>); Letter to The Honorable Jay Clayton Re: Comment on the Standards of Conduct for Investment Advisers and Broker-Dealers (Dec. 10, 2017) (<https://www.sec.gov/comments/ia-bd-conduct-standards/cil4-2782348-161672.pdf>); Letter to the Employee

consistently requested that the SEC, as the primary federal regulator of broker-dealers and investment advisers, take the lead in addressing this issue for retail investors and savers. Over the past decade, we have seen various other regulators, including the states, insurance regulators, and most significantly the DOL, put forth their own standards purporting to address the perception that retail investors lack appropriate consumer protections (the “Fiduciary Rule”).⁵ We believe this fragmented approach to regulation has resulted in significant and observable harm to investors by having the effect of reduced access and choice and increased costs for middle-income families. With the DOL Fiduciary Rule now vacated, we appreciate the harmonization provided by the SEC Rulemaking, which sets forth new rules that enhance the standards across securities statutes, applies to all retail investor accounts, and avoids the unnecessary complexities and expense that result from widely different standards and rulesets for personal investment accounts.

At its core (and consistent with concepts under the Regulation), the SEC Rulemaking now clarifies that both broker-dealers and investment advisers must act in the *best interest* of a retail investor, and not put their interests ahead of the retail investor’s interests. The SEC Rulemaking also requires broker-dealers to disclose, mitigate, and in some cases, eliminate conflicts of interest, effectively imposing obligations on broker-dealers that do not apply to investment advisers. The broadened disclosure obligations require disclosures of information about services, fees, and conflicts of interest—imposing new, and significantly heightened additions to current broker-dealer regulation—and require both broker-dealers and investment advisers to provide a clear, plain-English summary of important information about their services.

At the same time, the SEC Rulemaking recognizes, and is tailored to, the differences between the broker-dealer and investment adviser service models. SEC Chairman Jay Clayton, in his statement at the open meeting regarding the SEC Rulemaking, emphasized that “while both broker-dealers and investment advisers play important roles in helping retail investors achieve their long-term financial goals, they do so in significantly different ways—offering different types of relationships, different services, and different fee models.”⁶ Chairman Clayton went on to state that “to be effective and not unduly disruptive, the obligations applicable to each financial professional should reflect these different characteristics.”⁷ As shown in **Addendum 2** to this letter, the obligations

Benefits Security Administration Re: Request for Information Regarding DOL’s Regulation Defining the Term “Fiduciary” and Related Prohibited Transaction Exemptions (Sept. 6, 2017) (<https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00648.pdf>) (hereinafter, “DOL Comment Letter (2017)”); Letter to Secretary Elizabeth M. Murphy Re: SEC Release No. 34-69013; IA-3558; File No. 4-606 (Duties of Brokers, Dealers and Investment Advisers): Request for data and other information (July 5, 2013) (<https://www.sec.gov/comments/4-606/4606-3133.pdf>) (hereinafter, “SEC Comment Letter (2013)”); Letter to Office of Regulations and Interpretations Re: Conflicts of Interest Proposed Rule (July 21, 2015) (<https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00615.pdf>) (hereinafter, “DOL Comment Letter (2015)”); Letter to the Employee Benefits Security Administration Re: Conflicts of Interest Proposed Rule (July 5, 2013) (hereinafter, “DOL Comment Letter (2013)”).

⁵ Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016); Best Interest Contract Exemption, 68 Fed. Reg. 21,002 (Apr. 8, 2016), *vacated*; *U.S. Chamber of Commerce v. DOL*, No. 3:16-cv-01476-M (N.D. Tex., Feb. 8, 2018).

⁶ SEC Chairman Jay Clayton, “Statement at the Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors,” June 5, 2019 (“Clayton’s Statement”).

⁷ *Id.*

that apply to broker-dealers and advisers are substantially similar, but are tailored to fit the transactional nature of brokerage relationships and the ongoing nature of advisory relationships.

Recognizing that all retail investors are entitled to best interest recommendations, we nevertheless note that this concept—that retail investment advice regulations should reflect differences in different financial services models—is missing from the Regulation. As a result, we believe that the Regulation, if finalized, will cause significant harm to Massachusetts investors by jeopardizing the ability of firms to continue to service Massachusetts residents under a commission-based brokerage model (i.e., transaction-based sales). Because brokerage is a cost-effective method of distributing financial products and services to more modest savers and buy-and-hold, long-term investors, such as through tax-advantaged individual retirement accounts (“IRAs”), this harm will disproportionately fall on middle-income families, which may lose access to professional financial assistance and education.

Among our concerns, the Regulation is overly broad, incompatible and inconsistent with the commission-based brokerage business model,⁸ imposes unworkable standards and untenable presumptions upon broker-dealers that are inconsistent and incompatible with federal rules and will subject firms to hindsight and second-guessing by regulators and the trial bar. In the face of these challenges, costs, and risks, firms will have no choice but to opt for the simple solutions: migrate the services available in Massachusetts to fee-based advisory programs, which are subject to account minimums and ongoing fees, scale back or discontinue brokerage services in the commonwealth, and/or raise fees to cover higher costs.

Our concerns, many of which the SEC recognized in crafting its rules, are informed by observing changes made throughout the U.S. financial services industry in response to the DOL Fiduciary Rule.⁹ With its introduction of unmanageable class action risks through a private right of action and uncertainty as to whether and how the transaction-based brokerage model could be sustained, the DOL Fiduciary Rule transition resulted in significant reductions in the availability of products and services—particularly for less affluent Americans.¹⁰ We also note that recent commission

⁸ For more information on the benefits of the brokerage model for many middle-income investors, please see Addendum 1.

⁹ Regulation Best Interest, at 33322 (“Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated Department of Labor (‘DOL’) Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances.”).

¹⁰ See, e.g., Deloitte & Touche Study (Aug. 9, 2017) (National accounting firm Deloitte studied 21 financial institutions that represent 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that “[A]s of the [DOL] Rule’s first applicability date on June 9th, 53% of study participants reported limiting or eliminating access to brokerage advice for retirement accounts, which the firms estimate impact 10.2 million accounts and \$900 billion AUM.”); Harper Polling (2017) (In a Harper Polling survey of 600 financial professionals, 68% reported that they or their institutions would take on fewer small accounts.); Daisy Maxey, *Winners and Losers in a Post-Fiduciary World*, Wall St. J., May 24, 2017, <https://www.wsj.com/articles/winners-and-losers-in-a-post-fiduciary-world-1495638708>; Crystal Kim, *BofA, JPMorgan, and the Fiduciary Rule: Will They or Won’t They*, Barron’s, Mar. 15, 2017, <https://www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-rule-will-they-or-wont-they-1489588442>; Imani Moise, *Merrill Lynch Does about Face on Fiduciary-ERA Policy*, Reuters, Aug. 30, 2018, <https://www.reuters.com/article/us-bank-of-america-fiduciary/merrill-lynch-does-about-face-on-fiduciary-era-policy-idUSKCN1LF1R9>.

bans in the United Kingdom have had similarly devastating effects, resulting in less affluent investors losing access to financial services and advice.¹¹

We have always advocated that the interests of investors should be put first.¹² In fact, we believe that acting in the customer's best interests is critical to our business's long-term success. Of course, the contours and details of the applicable standard, and how it is enforced by regulators or the trial bar, will have a profound impact on whether it is workable and preserves access to help middle-income Americans. The very real pullback from the middle-income market by many in the financial services industry as a result of the DOL Fiduciary Rule, as well as recently announced plans by a number of large firms to withdraw brokerage services from Nevada as a result of Nevada's fiduciary rule proposal, leave no doubt that regulation in this space risks severe and detrimental consequences, which may not be intended.¹³

Our years of experience tell us that with the Regulation, Massachusetts risks harming the very middle-income investors it is charged with protecting. The Regulation would depart from the simplicity of having a single federal standard and introduce unnecessary complexity, uncertainty, and risk in the regulatory scheme that will not markedly assist investors and may instead encourage further abandonment by the financial services industry of middle-income investors. Our purpose is to ensure that Massachusetts preserves our ability, and the ability of others, to serve middle-income Americans who tend to have smaller amounts to invest and who need and deserve access to help. To that end, we urge Massachusetts to withdraw the Regulation in light of the now finalized SEC Rulemaking.

II. Certain Modifications to the Regulation Could Mitigate Unintended Harm to Massachusetts Residents

If the Regulation is not withdrawn in its entirety, we offer modifications to certain aspects of the Regulation that, if finalized without changes, are likely to result in reduced access for middle-income investors to transaction-based brokerage in Massachusetts.¹⁴ While we believe the Regulation should be withdrawn, these suggestions for changes may reduce the Regulation's

¹¹ Beioley, *Financial Advice Gap has Widened since 2015—Millions are Priced Out of the Market and Unaware of Free Help Available*, Financial Times of London (May 21, 2019), <http://www.ft.com/content/1b931788-7be1-11e9-81d2-f785092ab560>.

¹² See, e.g., SEC Comment Letter (2017); DOL Comment Letter (2015).

¹³ See, e.g., Kenneth Corbin, *Brokers Vow to Pull Business if Nevada sets Fiduciary Duty*, Financial Planning, Mar. 20, 2019, <https://www.financial-planning.com/news/morgan-stanley-schwab-td-wells-fargo-threaten-to-pull-services-if-nevada-sets-fiduciary-duty>; Bruce Kelly, *Morgan Stanley Threatens to Pull Out of Nevada Over State's Fiduciary Rule*, InvestmentNews, Mar. 13, 2019, <https://www.investmentnews.com/article/20190313/FREE/190319968/morgan-stanley-threatens-to-pull-out-of-nevada-over-states-fiduciary>; Gabriel T. Rubin, *States Pursue Their Own Broker-Conduct Rules*, Wall St. J., Apr. 19, 2019, <https://www.wsj.com/articles/states-pursue-their-own-broker-conduct-rules-11555666200>.

¹⁴ We have not attempted to comment on every concern in the Regulation, but have focused this letter on critical elements that we believe will threaten brokerage in Massachusetts and harm Massachusetts modest savers and middle-income families. We note there are other issues with the Regulation, including its vague and undefined terms and conflicts with federal law, including, in particular, the broad preemption under the National Securities Markets Improvement Act of state regulation over federally registered investment advisers. While we agree with other comment letters regarding these issues, including the Securities Industry and Financial Markets Association letter dated July 26, 2019, we do not believe addressing these issues alone will ensure the preservation of the brokerage model in Massachusetts.

potential harms to Massachusetts residents' ability to save should Massachusetts decide to go forward.

A. Clarify that the Regulation Is Not Intended to Create a Private Right of Action

We do not believe the Regulation creates, or is intended to create, a private right of action for investors under the Massachusetts Uniform Securities Law or under any other Massachusetts statute.¹⁵ This should be clarified in the Regulation. To the extent the Regulation would create private rights of action, we believe the Federal Arbitration Act and Securities Litigation Uniform Standards Act would preempt any such rights. We note that the SEC explicitly considered commentators' suggestions to include a private right of action in its SEC Rulemaking and declined to do so.¹⁶ As such, the Regulation would be inconsistent with, and contrary to, federal securities rules should the Regulation provide otherwise.

We also note that the DOL's creation of a private right of action under its Fiduciary Rule is viewed by many as its fatal flaw, both from a practical perspective because it caused firms to reduce access to financial services and advice, and also from a legal perspective because it formed a key basis for the Fifth Circuit Court of Appeals' opinion striking down the rule. A private right of action with respect to the Regulation's standards would be far worse than under the DOL Fiduciary Rule. This is because the Regulation includes a number of presumptions (as discussed in more detail below) that stack the deck against financial services firms by effectively shifting the burden of proving that the fiduciary duty was satisfied to the firm.

The risk of frivolous lawsuits for firms doing business in Massachusetts may become untenable because the burden-shift would be likely to result in significant hurdles to obtaining dismissals on summary judgment and heightened potential for state law class actions. Due to the costs of protracted litigation, the pressure to settle these cases, rather than to incur the cost to fight and prevail, will be enormous. This will incentivize plaintiffs' lawyers who will allege claims knowing they can extract settlements even if their claims are baseless. As such, a private right of action would deter many firms from attempting to operate brokerage services in Massachusetts. We therefore ask Massachusetts to confirm that it intends enforcement of the standards to be limited to the domain of the Massachusetts Securities Division, and that the Regulation would not create a private right of action.

B. Revise the Regulation to Avoid Imposing Ongoing Fiduciary Duties for Broker-Dealers

Under the Regulation, a broker-dealer's fiduciary duty applies through the execution of a recommendation, unless the "broker-dealer, agent, or adviser makes ongoing recommendations or provides investment advice, in any capacity, to a customer or client, or receives ongoing compensation in connection with the recommendation or advice," in which case the duty is ongoing. An ongoing fiduciary duty is incompatible with transaction-based brokerage. Its incompatibility is likely to cause firms to reconsider their ability to provide brokerage services to

¹⁵ Including, but not limited to, the Massachusetts Consumer Protection law, section 204 of the Massachusetts Uniform Securities Act, and section 950 CMR 12.204 of the Massachusetts Code.

¹⁶ Regulation Best Interest, at 33327 ("Furthermore, we do not believe Regulation Best Interest creates any new private right of action or right of rescission, nor do we intend such a result.").

Massachusetts residents in a cost-effective manner. Imposing a new, ongoing fiduciary duty on broker-dealers would require a complete restructure and rethinking of the transaction-based brokerage business model, including current compliance systems and processes, client agreements, and compensation structures. We note that both the SEC and the DOL recognized, and accepted, in their respective rulemakings that brokerage advice is inherently episodic in nature and that to subject broker-dealers to an ongoing fiduciary duty to monitor client accounts would be to recreate the advisory model on the brokerage platform.¹⁷ Firms are not going to pay for, or support, this overhaul required by a single state that is inconsistent with SEC Rulemaking when they can simply shift investors to their existing advisory platforms where appropriate to do so, and cut off services to everyone else.¹⁸

Moreover, imposing a fiduciary duty on broker-dealers based on no more than the provision of “investment advice” in “any capacity” or where the broker-dealer provides “ongoing” recommendations would be inconsistent and incompatible with the SEC Rulemaking. In its Solely Incidental Interpretation, the SEC reinforces that Congress excluded broker-dealers and agents from the scope of the Advisers Act under the “solely incidental” prong even when they provide substantial and meaningful advice to their customers, including, voluntary account monitoring and agreed upon account monitoring on a periodic basis. The SEC made clear that the amount, importance, and frequency of the advice does not determine whether the solely incidental prong is satisfied.¹⁹

Additionally, we request clarification that, under the Regulation, the acceptance of trailing commissions, revenue sharing, and other ongoing compensation that is for effecting and executing securities transactions and other brokerage services would not be viewed as “ongoing compensation” that would trigger an ongoing fiduciary duty. These commissions and compensation streams are not recommendations, advice, or ongoing advice and therefore should not result in the imposition of an ongoing duty on the broker-dealer or agent. An ongoing duty should apply only where a broker-dealer receives “special compensation” for advice consistent with the SEC’s interpretations under the Advisers Act.

In addition, the SEC recognizes that through the provision of adequate disclosure, investors can be trusted to select different forms of accounts and fee structures. Many investors prefer to segregate their assets among account types most suitable to their interests and needs. Imposing an ongoing fiduciary duty upon brokerage accounts simply by reason of dual registration will jeopardize the availability of brokerage services to Massachusetts residents.

To avoid harming Massachusetts investors, we request that an ongoing fiduciary duty for broker-dealers apply only where the broker-dealer has agreed to provide ongoing advisory services – that is, by offering ongoing account monitoring services to a customer in writing, even when the broker-dealer is dually registered, but particularly when not. The fiduciary duty should not be

¹⁷ Regulation Best Interest, at 33331 (“In contrast [to investment advisers], the provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer’s account following a recommendation.”).

¹⁸ *Id.* at 33327.

¹⁹ Solely Incidental Interpretation at 33684.

triggered when a broker-dealer offers recommendations that are considered to be solely incidental to brokerage services under applicable SEC rules and interpretations.

We also request that the Regulation be modified to provide that a broker-dealer's fiduciary duties apply at the time a recommendation is provided and not through the time a recommendation is executed, which is exclusively in the control of the client. Applying a fiduciary duty through execution of a recommendation is a novel approach in the context of the broker-dealer business model and would require significant new recordkeeping and operational changes. Additionally, potentially requiring firms to break customer-directed trades could create conflicts with investors who generally expect to be able to execute transactions (recommended or not) without interference from the broker-dealer, and could even potentially cause a broker-dealer to violate its best execution obligation under federal law.

C. Revise the “Without Regard To” Construct and Permit the Duty of Loyalty to Be Satisfied Through Clear Disclosure and Reasonably Designed Policies and Procedures

The Regulation frames the duty of loyalty as an obligation to avoid conflicts and provide advice “without regard to” the financial or other interests of the firm, its representatives, or any party other than the investor. Furthermore, this duty is presumed to be breached if a recommended transaction is not the “best of” the reasonably available options, and receiving transaction-based remuneration is only permitted if that is the “best of” the reasonably available remuneration options. These formulations are vague and will inevitably leave firms open to second-guessing in hindsight.

While we agree that a firm should not put its interests ahead of an investor's interests, we believe the standards for measuring compliance with the duty of loyalty should be clear and objective. It would be difficult, if not impossible, to prove that a firm made a recommendation “without regard to” any interest other than the investor's in any particular circumstance. Moreover, in its Rulemaking, the SEC articulated the known harms that resulted from the DOL's use of the “without regard to” fiduciary construct—loss of access to brokerage services for middle-income investors—and expressed its desire to avoid them.²⁰ In this regard, the SEC stated:

[W]e are concerned that there is a risk that the “without regard to” language would be inappropriately construed to require a broker-dealer to eliminate all of its conflicts when making a recommendation (i.e., require recommendations that are conflict free), which we

²⁰ Regulation Best Interest, at 33323 (“The potential for a range of different meanings to be given to the phrase ‘without regard to’ was heightened by the DOL’s use of this same language for purposes of the Impartial Conduct Standards set forth in the BIC Exemption. We recognize, as noted by some commenters, that the DOL interpretation of this phrase does not require ‘conflict-free’ recommendations. Nevertheless, because of the differences in the approach to the treatment of conflicts under ERISA and under the federal securities laws—ERISA starts by prohibiting conflicts and then through exemptions permits certain conflicts, whereas the federal securities laws generally start with disclosure and become more restrictive—we share commenters’ concerns that DOL’s use of the ‘without regard to’ language could alter the way in which conflicts are viewed and cause a substantial portion of conduct that is currently permitted, and reasonably accepted and desired by retail customers, to be limited or eliminated. Based on market participant experience with the implementation of—and reaction to the subsequent overturning of—the DOL Fiduciary Rule, in particular the BIC Exemption, we continue to believe that it is better to use language that provides similar investor protections, but does not raise these legal ambiguities.”).

believe could ultimately harm retail investors by reducing their access to differing types of investment services and products and by increasing their costs.²¹

Similarly, it is unclear whether the requirement to avoid conflicts means that all conflicts must be eliminated—a goal that is impossible to meet in both brokerage and advisory business models unless services are provided for no fees or compensation. We therefore request that Massachusetts revise this language to be consistent with the language used in the SEC Rulemaking—that a firm or representative should not put its interests ahead of the investor’s interests—so that the Regulation can achieve this common goal and avoid unclear and ambiguous terminology.

In addition, the notion that recommendations be “best” was rejected by the SEC and is inconsistent and incompatible with federal law. As the SEC has recognized, in view of the myriad of different investment options available, many with substantially similar characteristics, it is generally not possible to select the single “best” option.²² Creating a presumption that the fiduciary duty is breached unless the “best” option is selected will thus leave broker-dealers in the untenable position of never knowing with any degree of certainty whether they have satisfied the fiduciary duty.²³

As an alternative approach, we recommend that the Regulation be amended to be consistent with SEC Rulemaking to provide that a firm and its representatives must not place its financial interests ahead of the interests of the investor and to remove the “best of” presumptions.

Finally, the Regulation should eliminate the presumption that the duty of loyalty cannot be satisfied through disclosure. Such a presumption is inconsistent with the SEC Rulemaking, which permits firms to disclose certain conflicts, while requiring others to be mitigated or eliminated. Instead, the Regulation should be revised to state that firms are required to establish, maintain, and enforce written policies and procedures reasonably designed to identify and disclose material conflicts of interest associated with a recommendation sufficient for informed consent, and mitigate material conflicts of interest that create an incentive for a representative to place the firm’s or representative’s interest ahead of the investor’s interests.

²¹ *Id.*

²² *Id.* at 33327 (“A broker-dealer will not be required to recommend the single ‘best’ of all possible alternatives that might exist, in part because many different options may in fact be in the retail customer’s best interest.”); *see also*, e.g., *Braden v. Wal-Mart Stores Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (“The [Employee Retirement Income Security Act’s] ‘prudent person standard is an objective standard ... that focuses on the fiduciary’s conduct preceding the challenged decision.’ In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.” (internal citations omitted)).

²³ *Id.* at 285 (“A broker-dealer will not be required to recommend the single ‘best’ of all possible alternatives that might exist, in part because many different options may in fact be in the retail customer’s best interest. We are sensitive to commenters’ concern that this determination, to the extent it can be made at all, may be judged in hindsight even though Regulation Best Interest applies at the time of the recommendation”). *See* Mark Schoeff Jr., *SEC’s Blass Rebuts Assertion Reg BI is Tougher than Fiduciary Standard*, InvestmentNews (July 10, 2019), <https://www.investmentnews.com/article/20190710/FREE/190719992/secs-blass-rebuts-assertion-reg-bi-is-tougher-than-fiduciary-standard?X-IgnoreUserAgent=1> (Dalia Blass, director of the SEC Division of Investment Management, and Brett Redfern, director of the SEC Division of Trading and Markets, both stated “that ‘best’ is a determination that can only be made in hindsight”).

D. Sales Contests and Other Incentives that Do Not Favor Particular Products Should Be Permitted

While not expressly limited in the text of the Regulation itself, the Solicitation notes a concern with sales contests or quotas which the Division views as “problematic practices in the securities industry.” Though we generally agree that sales contests and non-cash compensation programs should not improperly differentiate among different specific investment products, we do not believe Massachusetts intends to prohibit incentives to encourage representatives to engage in positive behaviors, such as seeking (and reaching out to) potential new customers and encouraging customers to save and invest more assets.

It should not be presumed that all such incentives drive negative behavior. To the contrary, we believe that these incentives are critical to ensuring access to education and investments for middle-income investors. Numerous studies suggest that noncash compensation programs and performance-based bonus programs are a valuable and powerful tool to motivate individuals to engage in positive behavior in various industries.²⁴ They are also widely used across industries and well accepted. One study indicates that over 74% of U.S. businesses use noncash incentives and 46% of those businesses offer travel as rewards.²⁵ The positive motivational impact of these types of noncash incentives has been shown to be more effective than cash awards.²⁶ Incentive travel, in particular, has been shown to foster a strong sense of corporate culture within an organization.²⁷ Consistent with our experience, another study shows that the reward of travel is not simply the extrinsic reward of the trip itself, but also the networking and learning opportunities and intrinsic rewards such as feelings of accomplishment and public recognition.²⁸ Moreover, incentives have been shown to improve results—not just for the firms that use them, but also for the customers they serve. For example, in the field of medicine, one study showed that financial incentives provided to physicians to improve patient experience resulted in significant

²⁴ See, e.g., Jeanie Casion, *The Right Remedy: A Sales Incentive Case Study*, Incentive Mag., June 7, 2011, <http://www.incentivemag.com/article.aspx?id=7268> (“Incentive programs are the primary way that our company is able to encourage the behaviors that are essential to not only successfully launching a product but also sustaining its market share trajectory”); Scott A. Jeffrey, *Justifiability and the Motivational Power of Tangible Noncash Incentives*, Human Performance, Mar. 31, 2009, https://www.researchgate.net/publication/232963008_Justifiability_and_the_Motivational_Power_of_Tangible_Noncash_Incentives (concluding that noncash rewards were more powerful motivators than equivalent cash rewards).

²⁵ See Steve Bova & Kevin M. Hinton, *FICP and SITE Weigh In on Proposed DOL Fiduciary Rule*, IncentiveWise Blog (Apr. 6, 2016, 2:17 PM), <https://www.siteglobal.com/blog/ficp-and-site-weigh-in-on-proposed-dol-fiduciary-rule-impact> (“Any reduction in incentive travel opportunities may also reduce the number of face-to-face meetings where financial services employees can receive in-person education to develop advanced skills, learn about new regulations, and develop professionally.”).

²⁶ See *Conscious and Unconscious Reward Preference & Choice: A Biometric Experiment*, Incentive Research Foundation (Nov. 28, 2017), <http://theirf.org/research/conscious-and-unconscious-reward-preference-choice-a-biometric-experiment/2328/>. See also Bill Hastings, Julia Kiely & Trevor Watkins, *Sales Force Motivation Using Travel Incentives: Some Empirical Evidence*, Journal of Personal Selling & Sales Management (Oct. 24, 2013), <https://www.tandfonline.com/doi/abs/10.1080/08853134.1988.10754490>; Scott Jeffrey, *Justifiability and the Motivational Power of Tangible Noncash Incentives*, Human Performance (Mar. 2009), https://www.researchgate.net/publication/232963008_Justifiability_and_the_Motivational_Power_of_Tangible_Noncash_Incentives.

²⁷ Pauline J. Sheldon, *The Demand for Incentive Travel: An Empirical Study*, Journal of Travel Research (Apr. 1995), <http://journals.sagepub.com/doi/abs/10.1177/004728759503300404>.

²⁸ *Id.*

improvement of communication, care coordination, staff interaction and patient care experiences, particularly for physicians that had low base line performance.²⁹

PFSI currently sponsors programs that reward our representatives with cash and noncash compensation to incentivize them to reach out to potential and existing customers and encourage them to save and invest more assets, which we believe should be viewed as a necessary policy objective to address the savings crisis. This is in large part a material aspect of our mission to help educate and “nudge”³⁰ middle-income Americans to make the right choices for their financial futures. We note that our programs are not tied to sales of any particular product, but rather are based on the amount and growth of customer assets for which our representative is responsible. We firmly believe that with the proper alignment of the interests of the customer and the representative, everyone benefits.

In our experience, incentive programs are essential to encourage and recognize legitimate business conduct that, in many ways, is essential to providing access to financial services for middle-income Americans. Specifically, these programs encourage representatives to reach out to prospective customers to encourage them to open an account and start saving and investing for their futures. We have found that the best way to get middle-income Americans to save is for our representatives to actively reach out to them and in many cases sit at their kitchen table to educate them on the benefits of saving for their futures. Otherwise, the distractions and competing priorities they face in their daily lives will result in them never taking that initial step towards their financial security, which seems to elude so many. As our experience shows, in-person outreach is by far more effective than over the phone or via computer, at helping families make positive decisions about managing their own money. Too often middle-income families have “too much month at the end of their money,” and our salesforce needs to be incentivized and recognized for helping these families improve their financial well-being. Programs that encourage the dissemination of financial education and savings are important and powerful means to produce positive financial outcomes for these families.

Additionally, firms, including us, rely on these types of programs to advance team-building and to incentivize training. These are critical to both driving business success and ensuring that representatives have the tools and knowledge to deliver appropriate levels of service to retail customers. Moreover, FINRA, the SEC, and the North American Securities Administrators Association (“NASAA”) have each demonstrated their support of these programs. FINRA even proposed a new rule, as recently as 2016, to expand the availability of such programs, subject to certain conditions.³¹

²⁹ See Hector P. Rodriguez, PhD, MPH, Ted von Glahn, MS, Marc N. Elliott, PhD, William H. Rogers, PhD & Dana Gelb Safran, ScD, *The Effect of Performance-Based Financial Incentives on Improving Patient Care Experiences: A Statewide Evaluation*, Financial Incentives and Patient Care Experiences (Oct. 14, 2009), <https://link.springer.com/content/pdf/10.1007%2Fs11606-009-1122-6.pdf>.

³⁰ See discussion, *infra*, at Note 44 et seq. and accompanying text, regarding Richard Thaler’s and Cass Sunstein’s book *Nudge* regarding using “choice architecture” to influence people to make better decisions.

³¹ See, e.g., Proposed FINRA Rule 3221 (proposing to eliminate the current noncash compensation rules that apply in the context of investment company securities, variable insurance contracts, direct participation programs, and public offerings, and to replace them with a similar framework that would apply in connection with the sale of *any* security, such that, e.g., sales contests would be permitted if (1) based on the total production of associated persons with respect to *all* securities distributed by the member and not only product-specific contests; and (2) not based on

We recognize that, though our incentives motivate positive behavior that benefits the middle-income communities we serve, at the same time they are susceptible to creating conflicts that can cause negative behavior. To mitigate conflicts, our incentive programs are not contingent on sales of any particular product or the product of any particular product sponsors. We focus on total production. To address the concern that incentives could encourage unnecessary trading in an account, we have structured our supervision program to aggressively identify and address potential instances of churning or recommendations for nonsuitable investments. We also implement heightened supervision and surveillance procedures as a representative nears an incentive threshold to help determine if the incentive is causing the representative to provide advice that is harmful to the customer. Unfortunately, the Regulation leaves us uncertain as to what would be required to satisfy the duty of loyalty where these exist.

While the SEC Rulemaking requires firms to eliminate incentives based on the sale of specific securities or types of securities within a limited period of time, the Rulemaking does not prohibit sales contests, sales quotas, bonuses, and noncash compensation that apply to, among other things, total products sold, or asset accumulation and growth, recognizing that such programs can be consistent with requirements to put clients' interests first.³² If Massachusetts effectively prohibits or materially restricts these types of programs, firms like ours may have less ability to attract, motivate and incentivize their representatives to provide face-to-face personal services to the middle-income saver and small balance investors in Massachusetts. The middle-income market segment may ultimately be abandoned to passive execution-only platforms and robo-advice without human interaction, materially reducing the likelihood that these middle-income Massachusetts families will continue to shift from spending today to saving for tomorrow.

We believe the types of incentive programs we provide, structured as they are to mitigate conflicts, are entirely consistent with the Regulation's goal of improving the quality of advice investors receive through the brokerage channel and that they do not introduce any additional conflicts, beyond those already inherent in the transaction-based brokerage model. We therefore urge Massachusetts to clarify that, with proper supervision and disclosure consistent with the SEC Rulemaking and FINRA requirements, bonuses, awards, non-cash compensation incentives, and other appropriate financial incentive programs are expressly permitted under the duty of loyalty.

conditions that would encourage an associated person to recommend particular securities or categories of securities) (also codifying existing guidance regarding the permissibility of certain travel for training and education); FINRA Reg. Notice 16-29 (Aug. 2016) (regarding proposed FINRA Rule 3221); Letter to Marcia E. Asquith Re: FINRA Regulatory Notice 16-29 Gifts, Gratuities and Non-Cash Compensation Rules, NASAA, Sept. 30, 2016, http://www.finra.org/sites/default/files/16-29_NASAA_comment.pdf (supporting FINRA's proposed Rule 3221). The SEC approved each FINRA rule that currently permits noncash compensation, thereby finding the rules to be sufficient for the protection of investors.

³² Regulation Best Interest at 33396 ("While conflicts of interest are also associated with sales contests, sales quotas, bonuses and non-cash compensation that apply to, among other things, total products sold, or asset accumulation and growth, we agree with commenters these conflicts present less risk that the incentive would compromise compliance with the Care Obligation and Conflict of Interest Obligation such that a recommendation could be made that is in a retail customer's best interest and that does not place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.").

E. Effective Date Should Provide Time to Transition and Coordinate with New SEC Rules

As proposed, the Regulation does not include an effective date. In establishing an effective date, we ask that you consider the significant time and resources needed to make the changes that would be required to comply with the new rules without causing significant disruption for our customers.

In particular, the Regulation's requirements to provide ongoing monitoring and "best of" presumptions, if it is feasible to comply, would require a substantial overhaul of our brokerage platforms, including changes to our policies and procedures and the technology that underlies them. We may also need to make changes to our customer relationships (and documentation and agreements) to support compliance with the Regulation's requirements. Additionally, we will need time to train our personnel about the new obligations.

We also ask Massachusetts to consider the overlay of the SEC Rulemaking on these rules and the compliance dates of the SEC's requirements. In particular, Regulation Best Interest and Form CRS are scheduled to become applicable on June 30, 2020. To minimize disruption and ensure a smooth transition, we request that Massachusetts provide a compliance date of no earlier than June 30, 2020, or extensions thereto.

Overall, we believe that the Regulation is not necessary and will harm, and not help, Massachusetts middle-income investors. As the SEC recognized in its rulemaking, with the DOL Fiduciary Rule, we observed firms respond to the added litigation and penalty risks and increased compliance costs by curtailing the services they offer to retail investors.³³ The Regulation is likely to have even worse consequences—potentially severely limiting brokerage services in Massachusetts, thereby forcing some investors into more expensive advisory services and leaving others with no access to a financial professional who can help them achieve financial security and independence.

We recognize that some believe serious issues exist in the broker-dealer industry. Nonetheless, the Regulation is not the proper means for addressing those concerns. We respectfully request that

³³ See, e.g., Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule,'* Wall St. J. (Feb. 6, 2017), <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>; Greg Iacurci, *How insurers are losing when it comes to variable annuities,* Investmentnews.com (Aug. 30, 2016), <https://www.investmentnews.com/article/20160830/FREE/160839998/how-insurers-are-losing-when-itcomes-to-variable-annuities>; Financial Advisor IQ, *JPMorgan Halts Action as DOL Weighs Fiduciary Rule* (Apr. 13, 2017), http://financialadvisoriq.com/c/1611373/186813/jpmorgan_halts_action_weighs_fiduciary_rule?referrer_mod%20ule=emailMorningNews&module_order=0&login=1&code=YW1WdWIyTm9RSE5wWm0xaExtOXlaeXdn%20T1RZeE5EY3INeXdnTIRFek16azVOek00; Michael Wursthorn, *J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs,* Wall St. J. (Mar. 13, 2017), <https://www.wsj.com/articles/j-p-morgan-moves-ahead-with-plan-to-drop-commissions-in-iras-1489420979>; Janet Levaux, *Merrill Kills Mutual Fund Sales in IRAs; DOL Rule Sparks Move,* Thinkadvisor.com (Nov. 2, 2016), <https://www.thinkadvisor.com/2016/11/02/merrill-kills-mutual-fund-sales-in-iras-dol-rule-s/?slreturn=20190123121556>; Financial Advisor IQ, *JPMorgan Kills Commission IRAs as Industry Ponders Trump's DOL Stance* (Nov. 10, 2016), http://financialadvisoriq.com/c/1497033/172103/jpmorgan_kills_commission_iras_industry_ponders_trump_%20stance?referrer_module=emailMorningNews&module_order=1&login=1&code=WldaMWJtdEFjMmxtYldF%20dWIZSm5MQ0E0TkRNME56Z3pMQ0F4T1RjNE5UVXdoVGd6.

Massachusetts withdraw the Regulation entirely in light of the new, comprehensive protections provided under the SEC Rulemaking. At a minimum, we request that Massachusetts:

- Clarify that the Regulation does not create a private right of action;
- Revise the Regulation such that it does not impose ongoing duties on broker-dealers;
- Revise the “without regard to” construct of the duty of loyalty, eliminate the suggestion that recommendations must be “best”, and permit the duty of loyalty obligation to be satisfied through clear disclosure and reasonably designed policies and procedures;
- Permit contests, bonuses, awards, and incentives that do not preference a particular investment product or product type; and
- Provide sufficient time for compliance with the Regulation.

We would welcome the opportunity to meet with appropriate personnel to discuss these matters further. To the extent Massachusetts intends to proceed with this rulemaking, we would like to offer solutions that could relieve some of the potential harm. Please help us fulfill our mission of helping Massachusetts modest savers and middle-income families meet their financial goals.

We thank you for considering our comments and we appreciate the opportunity to share our thoughts regarding this rulemaking.

Respectfully submitted,



Karen L. Sukin

Executive Vice President
Deputy General Counsel
General Counsel, PFS Investments

Addendum 1: Who We Are and Our Interests in Protecting Middle Income Consumers

A. About Primerica

Our clients earn, on average, between \$30,000 and \$100,000 in annual household income, a category that represents approximately 50% of all U.S. households.³⁴ We educate customers about the long-term benefit of dollar-cost averaging through systematic investing into a diversified investment portfolio. What makes us different from the larger financial services companies, and allows us to focus on the underserved middle-income market, is that our business model allows our representatives to accept, on a profitable basis under the brokerage model, the smaller-sized transactions typical of middle-income Americans, while providing these clients with personal services that would otherwise be out of their reach. We are proud that we created a successful business model where we can open a brokerage account, and provide client support, for an individual with as little as \$25 per month or \$250 to invest.

Before finalizing the Regulation, please ask the other financial services firms how they can continue to help modest Massachusetts investors under the new rules.

We know firsthand that individuals with access to a financial representative accumulate greater and more balanced assets than those without, a fact that is supported by numerous studies.³⁵ Consequently, we have one of the largest and most diverse salesforces in North America with approximately 25,000 brokerage licensed representatives helping over two million middle-income customers with their investment accounts.³⁶ Our securities representatives generally hold Series 6 and 63 FINRA registrations, and approximately 3,600 of our registered representatives are also registered as investment adviser representatives.

Our representatives serve the communities in which they live. Accordingly, they are well-acquainted with the ever-changing financial challenges facing the middle-income market. The diversity of our salesforce fully reflects the diversity of the middle-income market and continues to be both a primary strength and a goal of ours. There is no doubt that our representatives are a big reason for our success, as well as the success of many middle-income American families saving for their future needs.

Our business model is designed to allow us to reach the middle-income market in a sustainable manner. In fact, it encourages our representatives to concentrate on the smaller-sized transactions

³⁴ U.S. Census Bureau, *Census Population Survey 2016 Annual Social and Economic Supplement*, last revised Aug. 26, 2016. Based upon 125.8 million households.

³⁵ 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> (finding 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); Robert Litan and Hal Singer, *Good Intentions Gone Wrong: The Yet-To-Be Recognized Costs of the Department of Labor's Proposed Fiduciary Rule*, Economists Inc. (July 2015), <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00517.pdf>; Claude Montmarquette and Nathalie Viennot-Briot, *Econometric Models on the Value of Advice of a Financial Advisor*, Cirano (July 2012), <http://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf>.

³⁶ As of December 31, 2018 (includes 17,468 in the United States and 6,858 in Canada); 44% of licensed representatives are millennials, 31% of Regional Vice Presidents ("RVPs") are women, 21% of RVPs are African-American and 15% of RVPs are Hispanic.

typical of middle-income clients. However, as is widely known, increased costs and risks associated with heightened regulatory requirements or legal uncertainty have induced many financial services companies to focus on more affluent clients and abandon the middle-income market.

This frailty became increasingly evident during the partial implementation of the DOL Fiduciary Rule and will be exacerbated in Massachusetts if the Regulation is finalized as proposed. This is not speculation, but fact based on the actual experiences of the industry attempting to implement the DOL Fiduciary Rule.³⁷

Primerica has tailored its offering of investment products to those that are most understandable and suitable for our middle-income clients. Through PFSI, our affiliated broker-dealer, we offer open-end mutual funds and variable annuities, all from well-known and respected companies. Our platform includes off-the-shelf products with commission levels consistent with those paid to other product distributors.

We gear our financial literacy and investment services toward our middle-income customers, who oftentimes are new or less experienced investors. In this regard, we continually produce plain language educational pieces highlighting fundamental investing concepts. Our primary investing principle, which is consistent throughout our educational pieces, is the long-term benefit of dollar-cost averaging through systematic investing into a diversified investment portfolio. In addition, we emphasize the benefits of a well-structured asset allocation, which spreads investment dollars across different asset classes to reduce risk and increase returns. We encourage our clients to stay with their savings plan and take a long-term view so that they can achieve their personal financial goals.

B. Our Focus on Saving for the Future

Our investment products and principles fit hand-in-glove with the primary financial needs of most middle-income Massachusetts families and individuals, which is to establish a long-term savings plan for future financial needs, such as college tuition and retirement. In response to these needs, Primerica and its representatives have made providing savings education and information a priority. Throughout our history, we have produced and distributed hundreds of thousands of educational brochures and pieces to help American families save and invest for their futures.³⁸

We introduce clients to fundamental retirement savings concepts, such as the difference between expected retirement age and life expectancy, the “Rule of 72” which produces the years required to double one’s investment based on an assumed rate of return, and how inflation and rate of return affect a long-term savings plan. As a result of our efforts to educate American families about the need to save for the future, and to provide beneficial, cost-effective, long-term savings solutions,

³⁷ See, e.g., Clayton’s Statement, *supra* note 6 (“[T]he initial implementation of the DOL Fiduciary Rule illustrated that our concerns for investor access, choice and cost are not theoretical ... it was widely reported that there was a significant reduction in retail investor access to brokerage services, and the available alternative services were higher priced in many circumstances.”).

³⁸ For example, some of the current brochures are identified as follows: How Money Works, How Money Works for Kids, Investing at Retirement; Power of Dollar-Cost Averaging; Invest for Success; and ABC’s – The Basics of Investing.

in just about any given year, close to three-quarters of all accounts opened by PFSI are held in retirement or education accounts (e.g., IRAs, ESAs, etc.).

The Survey of Consumer Finances (the “SCF”) is conducted by the Federal Reserve Board every three years and is a leading source of data on Americans’ wealth. It provides detailed information on the incidence of retirement plan ownership—a critical tool for amassing sufficient savings—and categorizes the results by different criteria, one of which is family income. In its analysis of the results of the 2013 SCF, the Employee Benefit Research Institute (the “EBRI”) finds that participation in an employment-based retirement plan (either a defined benefit or defined contribution plan) is strongly linked to family income.³⁹ According to the EBRI’s report, in 2013 the SCF shows that 67.1% of all families with an income of \$100,000 or more had someone participating in a plan at a current job. But in middle-income America, with incomes below \$100,000, participation is significantly lower; in 2013, just 53.5% of families with incomes ranging from \$50,000 to \$99,999 had a participant in a plan. In the \$25,000 to \$49,999 income range, participation is even lower; in 2013, the number of families with a participant in a plan at a current job was just 25.8%.⁴⁰ These results show that middle-income market families take advantage of employer-sponsored retirement plans at rates far below their more affluent counterparts.⁴¹

Also, the SCF takes a more inclusive look at retirement plan ownership by measuring the percentage of all families with a participant in an employer-based plan or an IRA or Keogh plan. A wide variance in participation remains. In 2013, for families with incomes of \$100,000 or more, fully 93.0% had a participant in one of these plans. But for families with incomes of \$50,000 to \$99,999, participation drops to 81.8%, and for incomes of \$25,000 to \$49,999, participation drops to a lowly 58.9%.⁴² Again, the lack of participation is particularly acute in the lower income range, where more than 4 out of 10 families have no retirement account or savings.

Finally, the EBRI report allows further insight by reviewing the SCF data on *total average retirement portfolio account balance* for families in any plan or IRA. The SCF categorizes all families into five net worth percentiles. The average account balances again drop off considerably in the lower three net worth percentiles. These balances are \$69,144 for the 50-74.9% percentile, \$18,543 for 25-49.9%, and only \$10,458 for families with a net worth in the bottom 25%.⁴³ This data confirms what we know anecdotally that savings is *heavily* skewed to higher net worth families, and that everybody else needs to save more. Those families with a net worth in the bottom 50%, which would be most middle-income families, are in real financial trouble and need help.

³⁹ See Craig Copeland, *Individual Account Retirement Plans: An Analysis of the 2013 Survey of Consumer Finances*, EBRI Issue Brief, no. 406, November 2014, available at www.ebri.org.

⁴⁰ *Id.* at 7 (Fig. 2).

⁴¹ This negative trend is an ominous sign for savings in the middle-income market; Oliver Wyman recently found that 84% of more than 4,300 retail investors surveyed only began saving for retirement via a workplace retirement plan. See Oliver Wyman, *supra* note 35, at 5.

⁴² See Copeland, *supra* note 39, at 10 (Fig. 5).

⁴³ *Id.* at 11 (Fig. 6).

C. *Middle-Income Families Need Help to Understand the Need to Save and Invest*

In the *New York Times* bestselling book “Nudge,”⁴⁴ behavioral economist Richard Thaler and law professor Cass Sunstein draw from behavioral science research to propose ways that sensible “choice architecture” (the context in which people make decisions) can successfully “nudge”⁴⁵ people toward better decisions, without giving up their freedom of choice. One of the societal problems they examine is saving for retirement, and the choices that participants make, or fail to make, inside of employer-based retirement plans. In so doing, the authors provide their insights into why saving for retirement and other future goals is such a challenge for many people:

The standard economic theory of saving for retirement is both elegant and simple. People are assumed to calculate how much they are going to earn over the rest of their lifetime, figure out how much they will need when they retire, and then save up just enough to enjoy a comfortable retirement without sacrificing too much while they are still working.

As a guideline for how to think sensibly about saving, this theory is excellent, but as an approach to how people actually behave, the theory runs into two serious problems. First, it assumes that people are capable of solving a complicated mathematical problem in order to figure out how much to save. Without good computer software, even a trained economist would find this problem daunting. The truth is that we know few economists (and no lawyers) who have made a serious attempt at doing it (even with software).

The second problem with the theory is that it assumes that people have enough willpower to implement the relevant plan. Under the standard theory, flashy sports cars or nice vacations never distract people from their project of saving for a condo in Florida. In short, the standard theory is about Econs [previously described as the “textbook picture of human beings offered by economists”, that “think like Albert Einstein, store as much memory as IBM’s Big Blue, and exercise the willpower of Mahatma Gandhi”], not Humans [real people that “have trouble with long division if they don’t have a calculator, sometimes forget their spouse’s birthday, and have a hangover on New Year’s Day”].⁴⁶

We agree with the authors’ opinion that the decision to save for retirement is one where most people need help (in the form of both education and encouragement) to do the right thing. The authors explain that the act of saving for retirement tests one’s self-control, and that “self-control issues often arise when choices and their consequences are separated in time.”⁴⁷ This seems particularly relevant, as when a 37-year-old parent opts to put off saving for retirement, a decision that will not have consequences for 20 or 30 years, in order to buy a new car, a choice that generates immediate gratification. The authors also posit that it is particularly hard for people to make good

⁴⁴ Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Bks. (2009).

⁴⁵ The authors define a nudge as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.” *Id.* at 6.

⁴⁶ *Id.* at 6 and 106.

⁴⁷ *Id.* at 75.

decisions when they have trouble translating the choices they face into terms that they can easily understand.⁴⁸

Thaler and Sunstein conclude that saving for retirement is, for most people, a hard choice, and that people need a “nudge,” or help, to do the right thing. We completely agree, especially for people in the middle-income market with modest resources, where the decision to allocate current income to savings almost always giving up on a new consumer purchase or a current activity, such as a vacation or even a movie. We believe that our representatives, empowered with our educational materials, our philosophy of focusing on this market and our ability to successfully service small balance accounts, are this “nudge” helping Massachusetts residents and other American families to make the difficult decision to save on a daily basis.

D. People that Use Financial Professionals Report Better Savings Results

LIMRA Secure Retirement Institute published a Consumer Survey that shows that “advisors” (defined as paid financial professionals, such as brokers, financial planners, or advisors) add significant value to the customers they serve by encouraging them “to save holistically.”⁴⁹ For nearly every identified savings goal surveyed (except vacation), LIMRA found that “advisors’ customers are significantly more likely to save on a regular basis compared with people who don’t consult advisors.”⁵⁰

Another study conducted by consulting firm Oliver Wyman confirms that financial representatives add substantial value to their customers’ financial well-being.⁵¹ This study focused on the role of financial representatives in the U.S. retirement system, and primarily drew upon proprietary surveys of more than 4,300 retail investors (the “Retail Investor Retirement Survey”) and analysis of two datasets from IXI Services, a division of Equifax.⁵² Based on the Retail Investor Retirement Survey, the study found that on average, individuals that use a financial representative have more assets than non-advised individuals across all the age and income levels examined. For example, concerning individuals with \$100,000 or less in annual income (i.e., middle-income individuals), Oliver Wyman found that advised individuals have a minimum of 38% more assets than non-advised individuals.⁵³ Moreover, with respect to individuals in or approaching retirement, the differences in assets are even more significant. On average, advised individuals ages 55 to 64 had 51% more assets than non-advised individuals, and those 65 and older had 113% more assets (i.e., more than double) than the nonadvised.⁵⁴ These are meaningful differences in assets for middle-

⁴⁸ *Id.* at 74.

⁴⁹ *See Matters of Fact: Consumers, Advisors and Retirement Decisions (and Results)*, LIMRA Secure Retirement Institute, May 2015, <http://www.limra.com/>.

⁵⁰ *Id.* at 6. The identified savings goals were as follows: retirement (outside of the workplace), education, specific one-time large purchase (other than home), home purchase, vacation or travel, unexpected expenses/rainy day fund, home improvement, medical costs, and taxes.

⁵¹ Oliver Wyman states that it “was engaged to perform a rigorous investigation of the role of financial advisors in the US retirement market, and quantify differences in investing behavior and outcomes between advised and non-advised individuals.” *See* Oliver Wyman, *supra* note 35, at iii.

⁵² *See id.* at iii-iv.

⁵³ *Id.* at 16.

⁵⁴ *Id.*

income individuals that use advisors, which should translate into significant improvements in their ability to save and invest for future goals.⁵⁵

Oliver Wyman's analysis of the IXI dataset, representing approximately 20% of U.S. consumer-invested assets, substantiated its findings from the retirement survey. With respect to middle-income savers (\$100,000 or less in annual income), Oliver Wyman found that on average, individuals who employ the services of an investment professional, like a broker, have had "at least 50% more" in total invested assets than others since at least 2006, the first year of the dataset.⁵⁶ This advantage in total invested assets rose throughout the 2009 recession and its immediate aftermath, and remained at "more than 200% more" in total invested assets from 2011 through 2013, the last year of the dataset. Clearly, the results of the study during the 2009 recession and its immediate aftermath are a testament to the benefit of receiving the assistance of a financial representative during a period of extreme market turmoil.

Oliver Wyman also found that advised individuals more often displayed investing practices "commonly associated with long term investing success," which included having more diversified portfolios, staying invested in the market by holding significantly less cash, taking fewer premature cash distributions, and rebalancing their investments to a desired asset allocation more frequently.⁵⁷

We believe that the Regulation will have the unfortunate consequence of significantly reducing access (by undermining the viability of continuing to offer financial services through the brokerage model to this important market) to beneficial relationships with financial professionals for middle-income Massachusetts and other American households. Our focus is to ensure that these hard-working Americans will be able to save and accumulate enough assets to meet their future needs and the ability to buy and hold investments through a brokerage relationship is a pivotal part of that focus.

E. Brokerage Services Benefit Middle-Income Investors

Buy and hold middle-income investors benefit from and prefer the simplicity of streamlined brokerage over overly complicated and expensive bundled service advisory programs for the following meaningful reasons:

- ***Paying brokerage commissions can be less expensive than paying an ongoing advisory fee.***⁵⁸ The fact is for most middle-class Americans, an investment adviser representative

⁵⁵ The study states that their findings hold true, even when excluding survey respondents who anticipate receiving income from either an inheritance or trust fund.

⁵⁶ Oliver Wyman, *supra* note 35, at 17.

⁵⁷ *Id.* at 2.

⁵⁸ See, e.g., Staff of the U.S. Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers, at 152 (Jan. 2011) (stating that investors may face increased costs if the broker-dealer exclusion were eliminated, such as where commission-based accounts would incur lower costs compared to fee-based accounts due to infrequent trading); Fee-Based Compensation, NASD Notice to Members 03-68 (Nov. 2003) (reminding members that fee-based accounts must be appropriate for customers, considering among other things the cost of the accounts compared to alternative fee structures available, such as commission-based accounts); Report of the Committee on Compensation Practices (Apr. 10, 1995), <https://www.sec.gov/news/studies/bkrcomp.txt> (noting commenters' views that fee-based accounts can pose higher costs for small and low-activity accounts); Office of Investor Education and Advocacy, SEC, Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio (Feb. 1, 2014),

(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. Middle-income investors, who typically do not have large sums of money to invest, use simple asset allocations, do not trade frequently, and have little need for extensive ongoing monitoring of their investments. As buy-and-hold investors, their investment expenses will generally be less when paying a single commission than they would be if paying ongoing annual account fees that are based on a percentage of the account's assets.

Advisory program fees are typically higher because they support a full bundle of services including such services as ongoing portfolio monitoring and rebalancing, and more frequent meetings and consultations to discuss client investment objectives and financial circumstances.

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.

Average Financial Advisor Fees | 2017 Report⁵⁹

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

http://www.sec.gov/oiea/Article/ib_fees_expenses.pdf (demonstrating how fees can impact investments over time). See also Oliver Wyman, *Oliver Wyman Report: Assessment of the Impact of the Department of Labor's Proposed "Fiduciary" Definition Rule on IRA Consumers* (Apr. 12, 2011), at 21 (stating that "investors would pay an average of 73% to 196% more in direct costs in a fee-based advisory model").

⁵⁹ *Average Financial Advisor Fees & Costs | 2017 Report | Understanding Advisory & Investment Management Fees*, AdvisoryHG, <http://www.advisoryhq.com/articles/financial-advisor-fees-wealth-managers-planners-and-fee-only-advisors/>.

As the information above illustrates, the less a saver has to invest, the higher the fee a registered investment adviser typically charges on an ongoing basis (often in excess of 1% annually for accounts under \$1,000,000).

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

Average Fixed Fees (Annual Fees Per AUM)⁶⁰

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. In addition to charging hourly fees, some firms charge an additional annual retainer ranging from \$6,000-\$11,000 per year depending on location.⁶¹

More modest investors typically do not use or need all of the services offered through advisory programs, and thus would be paying for these services without any benefits. However, these investors still need access to a financial professional who will answer their calls, aid them through market downturns, help them choose investments from time to time based on their financial circumstances and needs, as well as to “nudge” them to save just a little bit more to help them move closer to financial independence and security—benefits that just are not available through execution-only platforms or impersonal robo-advisers.

The Regulation risks making transactional brokerage accounts inaccessible to Massachusetts investors, forcing them to choose to pay higher fees for advisory services, where they can meet the required account minimums, or preventing them from accessing investment services and assistance from a human financial professional.

- ***Many middle-income investors cannot access fee-only advice programs.*** Access to advisory programs is typically subject to having enough assets to meet the program’s account minimum. This is because investors must have sufficient assets to implement the program’s investment guidelines and asset allocations, and the assets must generate sufficient fees for the investment firm to support the services provided through the program, plus compensating the representative for the time and commitment necessary to educate the client in regard to the engagement. Further, it is well-understood that advisers who charge fees for services only have time to service a limited number of clients because

⁶⁰ *Id.*

⁶¹ *Id.*

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.⁶² Those who do serve individuals with less assets often have high account minimums, such as \$50,000 or higher.⁶³

Without access to a brokerage representative, many middle-income investors with small amounts to invest will not be eligible for advisory services and because of the different economics between the brokerage and advisory models, representatives have little to no incentive to actively and personally solicit small balance middle-income investor accounts.

By eliminating access to assistance from a financial professional through a brokerage account, the Regulation will leave middle-income investors who are not eligible for advisory services with a choice of execution only or online self-help robo-advice—vehicles that do not offer the one-on-one help and encouragement a financial professional can provide to an individual or family trying to achieve financial independence and security.

- ***Some investors prefer to pay commissions.*** Some investors do not desire, or want to pay for, ongoing advisory services and prefer to pay only for the services they use, when they use them. Fees are charged for advisory services for so long as the investor holds assets in the advisory account, regardless of whether he or she uses the all of the services in the bundle.

The Regulation has the potential to significantly reduce or eliminate brokerage in Massachusetts in favor of advisory services, depriving ordinary Massachusetts residents of access to financial professionals who offer, and are compensated for, investment services on a transaction basis. Massachusetts residents who meet the account minimum will be forced into a more expensive and less-efficient method of receiving financial advice. As such, the Regulation is likely to prevent many middle-income investors from accessing affordable help and assistance with choosing investments and saving for their future.

⁶² *Financial Planning for the Middle-Class*, Kiplinger, August 2011, <http://www.kiplinger.com/article/retirement/T023-C000-S002-financial-planning-for-the-middle-class.html>.

⁶³ Karen Damato, *3 Reasons to Pay Commissions, Not Fees, to a Financial Adviser*, Wall St. J., Feb. 18, 2015, <https://blogs.wsj.com/totalreturn/2015/02/18/3-reasons-to-pay-commissions-not-fees-to-a-financial-adviser/>.

**Addendum 2: Summary of Broker-Dealer and Adviser Obligations to Retail Investors
Under SEC Rulemaking**

Obligation	Broker-Dealers	Investment Advisers
<i>Act in the best interest of the investor</i>	Yes, at the time of the recommendation	Yes, over the course of the relationship
<i>Do not put interests ahead of the investor's interests</i>	Yes, at the time of the recommendation	Yes, over the course of the relationship
<i>Understand risks, rewards, and costs</i>	Yes	Yes
<i>Understand investor's investment profile</i>	Yes	Yes
<i>Address conflicts</i>	<ul style="list-style-type: none"> • All conflicts must be <i>disclosed or eliminated</i> • <i>Mitigate</i> conflicts that create an incentive for a representative to place firm's or representative's interests ahead of investor's interests • <i>Disclose and prevent</i> platform limitations from causing broker-dealer (or representative) to place interests ahead of investor's interests • <i>Eliminate</i> sales contests, quotas, bonuses, and non-cash compensation based on sales of specific securities or specific types of securities within a limited time period 	<ul style="list-style-type: none"> • All <i>material</i> conflicts must be <i>disclosed or eliminated</i> • Conflicts that cannot be fully and fairly disclosed should be <i>eliminated or mitigated</i> such that full and fair disclosure and informed consent are possible
<i>Disclose material facts about the relationship</i>	Yes	Yes
<i>Deliver Form CRS Relationship Summary</i>	Yes	Yes
<i>Provide ongoing advice and monitoring</i>	No, unless agreed	Yes, unless agreed to limited scope arrangement