

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

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PUBLIC HEARING
RETIREMENT SECURITY RULE: DEFINITION OF AN
INVESTMENT ADVICE FIDUCIARY

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WEDNESDAY
DECEMBER 13, 2023

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The public hearing met via Video-
Teleconference, at 9:00 a.m. EST.

PRESENT

LISA M. GOMEZ, Assistant Secretary for Employee
Benefits Security

ALI KHAWAR, Principal Deputy Assistant
Secretary, EBSA

TIMOTHY D. HAUSER, Deputy Assistant Secretary
for Program Operations, EBSA

MARCUS AZEVEDO, Office of the Solicitor

CHRIS COSBY, Director, Office of Exemption
Determinations

MEGAN HANSEN, Counsel for Regulations, Office
of the Solicitor

LYNN JOHNSON, Senior Economic Advisor, Office
of Research and Analysis

KAREN LLOYD, Office of Regulations and
Interpretations, Division of Fiduciary
Interpretations

SCOTT NESS, Office of Regulations and
Interpretations, Division of Fiduciary
Interpretations

SUSAN WILKER, Office of Exemption
Determinations, Division of Class
Exemptions
ROBIN PARRY, Office of the Solicitor
ELAINE ZIMMERMAN, Director, Office of Research
and Analysis

ALSO PRESENT

ELENA BARONE CHISM, Investment Company
Institute
MARC CADIN, Finseca
DAN DANFORD, Family Investment Center
CHUCK DIVENCENZO, National Association for
Fixed Annuities
BENJAMIN P. EDWARDS
KAMILA ELLIOT, Collective Wealth Partners
JOHN H. GRADY, Alternative and Direct
Investment Securities Association
PAM HEINRICH, National Association for Fixed
Annuities
DONALD K. JONES
DAPHNE JORDAN, National Association of Personal
Financial Advisors
TIMOTHY E. KEEHAN, American Bankers Association
KENDRA KOSKO ISAACSON, Insurance Coalition
MICHAEL KREPS, American Investment Council
PATRICK MAHONEY, Financial Planning Association
ADAM MCMAHON, SPARK Institute, Inc.
DANIEL MOISAND, Certified Financial Planner
Board of Standards, Inc.
NICHOLAS PALEVEDA, National Pension Partners
JOSEPH C. PEIFFER, Public Investors Advocate
Bar Association
MARK QUINN, Cetera Financial Group
THOMAS ROBERTS, National Association for Fixed
Annuities
JOSHUA RUBIN, Betterment
GEORGE SEPSAKOS, American Investment Council
JENNIFER SHAW, Public Investors Advocate Bar
Association
NORMAN P. STEIN, Pension Rights Center
KEVIN L. WALSH, Institute for Portfolio
Alternatives
JANICE C. WINSTON, Pension Rights Center

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2 (9:02 a.m.)

3 MR. HAUSER: Well, welcome to Day 2
4 of the hearings on the retirement advice rule.
5 We have six panels today, and as was the case
6 yesterday, I'd just like to thank everybody
7 who's appearing to testify today. We really do
8 benefit from your input and look forward to the
9 conversation today.

10 So the first panel includes one of
11 the -- one of the parties today has three
12 witnesses. So I'm just going to name the
13 groups and then if you all, could just make
14 sure the right people testify at the right
15 times. First up is the Certified Financial
16 Planner Board of Standards. The second will be
17 the Family Investment Center and the third is
18 the National Association for Fixed Annuities.

19 So, Certified Financial Planner
20 Board.

21 MR. MOISAND: Yes, thank you very
22 much. Can you hear me okay?

1 MR. HAUSER: Yes, perfectly. Thank
2 you.

3 MR. MOISAND: Fabulous. My name is
4 Dan Moisand. Thank you for allowing me the
5 opportunity to testify today. I'm a Certified
6 Financial Planner professional, senior
7 financial advisor at Moisand Fitzgerald Tamayo
8 out of Orlando, Florida. We are the only
9 registered investment advisory firm, and I
10 provide advice to my clients under a fiduciary
11 standard of conduct.

12 I've served in leadership roles in
13 three different national financial planning
14 organizations. I've served on the Board of
15 Directors of CFP Board, which issues the CFP
16 certification since 2019. In a few weeks, I'll
17 be completing my term as Board Chair. From
18 2003 to 2007, I served on the National Board of
19 Directors at the Financial Planning
20 Association, which is a membership organization
21 for financial planners as both President and
22 Chair of the FPA. I also served for five years

1 on the Board of the Foundation for Financial
2 Planning, which is focused on pro bono
3 financial planning.

4 CFP Board is a non-profit
5 organization whose mission is to credential
6 competent and ethical financial planners,
7 uphold CFP certification as the recognized
8 standard for financial planning and advance the
9 financial planning profession. Today more than
10 98,000 CFP professionals, approximately a third
11 of retail financial advisors in America from
12 across all business models including investment
13 advisors, broker dealers, and insurance agents,
14 and across all types of compensation models
15 voluntarily commit to abide by high standards
16 for competency and ethics.

17 The most significant of these
18 standards is the requirement to act as a
19 fiduciary and therefore act in the best
20 interest of the client at all times when
21 providing financial advice. The scope of CFP
22 Board's fiduciary duty is broad and it covers

1 any communication that reasonably would be
2 viewed as a recommendation. It also covers
3 recommendations about any kind of financial
4 asset, including securities, investment
5 products, real estate, bank instruments,
6 commodities contracts, derivative contracts,
7 collectibles, or other financial products.

8 CFP Board adopted this standard in
9 2018. And at the time, we were told that the
10 consequence of having a fiduciary duty that
11 applies to all financial advice would be that
12 we would have fewer CFP professionals. That
13 did not happen. In fact, the very opposite is
14 true. The number of CFP professionals has
15 grown by about a third since that time in just
16 five years. This is across all business
17 models, including registered representatives of
18 broker dealers, investment advisor
19 representatives, and those with insurance
20 licenses.

21 All of these CFP professionals are
22 providing financial advice to their clients,

1 while committing to CFP Board to act as a
2 fiduciary. Our requirements have not adversely
3 impacted their business. Today the firms at
4 which CFP professionals work tell us that they
5 don't have enough CFP professionals to meet
6 their clients' needs. Consumers also
7 increasingly demand to work with a CFP
8 professional. This is because we offer what
9 consumers want.

10 CFP professionals have demonstrated
11 their competence and made a commitment to CFP
12 Board to act as a fiduciary in their clients
13 best interest. The overwhelming majority of
14 American consumers want to work with a
15 financial advisor who will act in their best
16 interests. The disconnect -- and the reason I'm
17 here testifying today is that the law doesn't
18 always require advisors to act in their clients
19 best interest.

20 We support the Department's
21 proposal, which makes clear that the definition
22 of fiduciary and the obligations that flow from

1 it apply where investors reasonably believe
2 advice is being provided in their best
3 interests. This definition appropriately
4 applies fiduciary status to those in a
5 relationship of trust and confidence, including
6 in circumstances where the advisor is providing
7 one-time advice. This is consistent with CFP
8 Board standards where the fiduciary duty
9 extends to one-time advice such as rollover
10 recommendations.

11 There's good reason for the
12 fiduciary duty to apply to one-time advice.
13 For many retirement investors, the decision as
14 to whether and how to roll over employer-
15 sponsored retirement assets will be the single
16 most important financial decision they will
17 ever make. Billions of dollars of hard earned
18 retirement savings are being rolled from plans
19 into IRAs each year.

20 If a retirement investor receives
21 bad advice, then the consequences can be
22 enormous. They can have significantly fewer

1 assets a time when they're hoping to retire.
2 This may mean that investors have to retire
3 much later or that their standard of living
4 during retirement is significantly worse. This
5 damage is due to products that put the
6 retirement savings of the American worker at
7 risk, but pay high commissions to the seller.
8 Retirement savings must be protected regardless
9 of whether the assets are held in a 401(k)
10 account or in IRA because so much is at stake.

11 The bottom line is that requiring
12 all brokers, investment advisors, and insurance
13 professionals to always provide best interest
14 advice when making recommendations is a much
15 needed retirement protection reform. There's
16 no reason to believe that the proposal would
17 result in firms turning away clients. Firms
18 have been operating under Regulation Best
19 Interest since 2020. And despite industry
20 concerns about Reg BI causing them to leave
21 unprofitable relationships, we have seen no
22 evidence that broker dealers have been required

1 to turn away clients since Reg BI was
2 implemented.

3 Among other things, firms use
4 technology to economically serve moderate
5 income investors, including those saving and
6 investing for a secure retirement. We've also
7 heard some say that the DOL's proposed rule is
8 not needed because of the NAIC model regulation
9 for insurance producers recommending annuities.
10 We disagree. The NAIC model regulation does
11 not apply a fiduciary standard. It does not
12 rise to a Reg BI best interest standard, which
13 is not a fiduciary standard.

14 CFP Board submitted a comment letter
15 to DOL that attaches guidance comparing our
16 Code of Ethics and standards of conduct to the
17 NAIC model regulation. The CFP professionals
18 in my firm proudly act as fiduciaries when
19 providing financial advice. That's what our
20 clients want and what they deserve. We believe
21 that the retirement security rule will cause
22 more retirement investors to seek professional

1 investment advice because they'll be confident
2 that their advisors are required by law to act
3 in their best interest. Thank you.

4 MR. HAUSER: Thank you very much.
5 Mr. Danford of the Family Investment Center.

6 MS. WILKER: Mr. Danford, you might
7 be on mute.

8 MR. DANFORD: There we go. Sorry.
9 Can everybody hear me now?

10 MR. HAUSER: Yes. That's never
11 happened to me.

12 MR. DANFORD: I'm sorry.

13 MR. HAUSER: Thank you.

14 MR. DANFORD: Good morning. My name
15 is Dan Danford. I'm the founder, CEO, and
16 advisor at Family Investment Center. I'm
17 testifying today on behalf of my firm and
18 myself in support of the Department's adoption
19 of the proposed rule.

20 Family Investment Center is
21 registered with the Securities and Exchange
22 Commission as a registered investment advisor

1 and RIA. We are the only RIA serving mostly
2 blue collar and middle income clients from the
3 Greater Kansas City region through our offices
4 in Saint Joseph, Missouri and Lenexa, Kansas.
5 In addition, I hold the Certified Financial
6 Planner certification from the Certified
7 Financial Planner Board of Standards.

8 I'm also a proud member of the
9 National Association of Personal Financial
10 Advisors, NAPFA where I serve as the Chair of
11 the NAPFA Public Policy Committee. Through
12 NAPFA, I also hold the NAPFA Registered
13 Financial Advisor designation.

14 I started Family Investment Center
15 after spending almost 15 years in the trust
16 business since 1984 -- this is going to be hard
17 to believe, for almost 40 years, I have always
18 served as a professional fiduciary. I want to
19 share with you our views on the proposed rule
20 and the important protections it would provide
21 for retirement saver not only in the Kansas
22 City region, but across America.

1 Family Investment Center provides
2 financial planning services that cover
3 virtually every financial situation a family or
4 client may face. This includes retirement
5 planning, estate planning, tax planning,
6 insurance reviews, saving and investment
7 strategies, et cetera. As a financial planner,
8 we may charge our fees on an annual basis, an
9 hourly basis, or any other period mutually
10 agreed upon. An annual agreement allows us to
11 provide our clients holistic, comprehensive
12 financial planning for a fixed fee over the
13 course of a year.

14 We also manage investment portfolios
15 for individuals, families, and organizations.
16 As an investment advisor, we either manage
17 accounts for a percentage of the assets under
18 management or we charge a flat retainer.
19 Although our clients are free to use any
20 broker, insurance agent, or custodian they
21 choose, we do not receive any compensation from
22 sales, commissions, or transaction fees. We do

1 not charge or receive any commission for buying
2 and selling securities for our clients.

3 We are not insurance licensed, so we
4 don't sell insurance products. However, we
5 make referrals on insurance products and
6 monitor the annuities in our clients portfolio.
7 We offer all our services on a fee-only basis.
8 Our clients only choose the services they want
9 and need. There's no selling at all.

10 My colleagues and clients know that
11 I'm a plain spoken person so I will cut to the
12 chase. There are three main reasons why my
13 firm and I support the proposed rule and
14 believe that its adoption would promote
15 retirement savers trust and confidence in the
16 financial professionals that they choose.

17 First, the proposal rule would close
18 several big regulatory loopholes that exist
19 under the current rule and that harm retirement
20 savings. It would cover rollover
21 recommendations to ensure that retirement
22 savers receive strong protection when they are

1 most vulnerable to receiving conflicted advice.
2 Financial professionals often have strong
3 incentives to recommend rollovers because each
4 one can result in a big pay day for them.

5 Second, the proposed rule would
6 cover advice to employers who sponsor 401(k)
7 plans to ensure that the advice employees
8 receive about 401(k) plan investment options is
9 not tainted by conflicts of interest. A one-
10 time recommendation to a 401(k) plan sponsor
11 may include investments that have high costs
12 and low performance, which could erode
13 employees hard earned savings and investment
14 returns. This could cause a retirement saver
15 to lose tens of thousands, if not hundreds of
16 thousands of dollars over time.

17 Third, the proposed rule would apply
18 to all retirement advice and to all classes of
19 retirement investments, including securities,
20 non-securities, many insurance products, and a
21 wide range of other investments not covered by
22 the current rule. We believe that closing each

1 of these big loopholes is a major step in the
2 right direction to protect retirement savings,
3 hard earned savings.

4 In my firm, we believe that any
5 person who holds themselves out to the public
6 to everyday Americans as a professional who
7 gives financial advice, investment advice, or
8 retirement advice should be held to a clear
9 strong fiduciary standard like that under that
10 Federal Investment Advisers Act and under
11 ERISA. Practically speaking, that means the
12 financial professional must at all times act
13 solely in the clients best interest and must
14 take clear steps to mitigate and to eliminate
15 actual or potential conflicts of interest.

16 Most people, because our nation does
17 a poor job of teaching financial literacy
18 simply don't understand the financial
19 alternatives available to them. They need the
20 help of a financial professional with whom they
21 can have trust and confidence. A robust
22 fiduciary standard promotes trust and

1 confidence.

2 So how did my firm and our NAPFA
3 registered advisors operate its fiduciaries and
4 earn the trust and confidence of our clients?
5 As I mentioned earlier, at Family Investment
6 Center, we are business people who are
7 financial planners, CFP professionals, and
8 NAPFA members. We strongly support
9 organizations that work to promote the
10 financial planning profession. We believe that
11 through the work of NAPFA, CFP Board, and
12 others, financial planning will one day be
13 viewed by the public as a separate distinct
14 profession the same way that the public views
15 doctors and lawyers today. Financial planners
16 would operate under a robust fiduciary
17 standard. The public would expect that.

18 As CFP professionals, we have helped
19 the CFB Board develop the CFP standard. The
20 CFP standard are a set of workable, practicable
21 guidelines that frame how we do business at
22 Family Investment Center and how we deliver

1 services to our clients under a high fiduciary
2 standard. We believe that the proposed rule
3 aligns with the CFP standard. For these
4 reasons, we ask the Department to use the CFP
5 standards as a model to provide practical
6 guidance to fiduciary professionals on how to
7 implement the ERISA fiduciary definition.

8 My firm is a small business that
9 must comply with complex regulations that are
10 often overlapping and confusing and sometimes
11 just don't make sense or improve protection for
12 our clients. A large part of our time, money,
13 and effort is spent on legal and regulatory
14 compliance. Our compliance obligations are
15 burdensome, but we do it because we are
16 fiduciaries.

17 We ask the Department to carefully
18 assess the potential regulatory burdens and
19 compliance costs that the proposed rule would
20 impose on smaller firms like ours that do not
21 have a large Compliance Department and
22 resources that bigger firms have. We ask that

1 wherever possible, the Department consider and
2 adopt compliance guidance that do not increase
3 the already burdensome compliance obligations
4 that firms like ours already face.

5 In closing, my colleagues at Family
6 Investment Center and I thank the Department
7 for the opportunity to testify in support of
8 the Department's proposed rule. And I'm happy
9 to take any questions. One last note, when I
10 entered the trust business in 1984, I was an
11 employee benefits trust officer. So basically
12 that entire 40 years, I have been looking up to
13 the Department of Labor and working with
14 Department of Labor people, so I do consider it
15 an honor to be here today. And thank you very
16 much.

17 MR. HAUSER: Thank you very much.
18 Let's see, Mr. Roberts, are you kind of the
19 master of ceremonies for the next group?

20 MR. DIVENCENZO: I am, actually.
21 I'm Chuck DiVencenzo, CEO of NAFA. We
22 appreciate the opportunity to address the

1 Department of Labor on the proposed regulations
2 while continuing our outreach to our membership
3 about finalizing preparation of our comment
4 letter.

5 Today I'm pleased to represent the
6 National Association for Fixed Annuities, an
7 organization that represents independent
8 financial professionals, independent and field
9 marketing organizations, insurance carriers,
10 and others representing Main Street in the
11 retirement ecosystem. I'm accompanied by my
12 General Counsel, Pam Heinrich, and our counsel,
13 Tom Roberts of Groom Law.

14 First, I would like to address the
15 supposedly measured approach the Department
16 claims to be taking. In fact, the Department
17 has singled out fixed index annuities for
18 special criticism that is exceedingly
19 misinformed reflecting a fundamental
20 misunderstanding of what the products
21 accomplish for consumers. The announcement of
22 the proposed rule includes an outrageous

1 characterization of the many diligent members
2 of our industry to make available products that
3 American workers demand to enhance their
4 financial security, particularly in their
5 golden years.

6 The 2023 proposal is largely a
7 regurgitation of the previous DOL fiduciary
8 with modifications to broaden its scope and
9 breadth that cannot be reconciled with the
10 Fifth Circuit's Chamber of Commerce decision.

11 The 2023 proposal is deeply flawed and should
12 be withdrawn in its entirety. Second, the
13 economic analysis data reflected in the
14 preamble consist of flawed analysis based on
15 selective pieces of outdated academic research
16 and back in the envelope calculation to justify
17 a predetermined conclusion.

18 The analysis flies in the face of
19 the benefits a strategic product allocation may
20 achieve for the vast majority of individuals
21 the Department is trying to paternalistically
22 protect. The average household income of

1 annuity owners is \$76,000 and the median U.S.
2 income is \$63,000. And the average age of
3 annuity consumers is in their early 60s.

4 The remarks by some of the panelists
5 during yesterday's hearing reflect a cookie
6 cutter approach to understanding expenses in a
7 one size fits all that follow up to a 60/40
8 allocation amount or an age-weighted fund or a
9 10 basis point ETF. That model simply does not
10 address the specific risks that play out as one
11 ages from the accumulation stage to the de-
12 accumulation stages of investing.

13 It also reflects the complete
14 absence of understanding the risks that
15 insurance providers take on when offering these
16 products. The volatility, maintaining
17 principal protection, sequence of return risk,
18 and probably most importantly longevity risk
19 that retirement savers would otherwise be left
20 alone to face can be mitigated by the sale of a
21 guaranteed annuity product that addresses
22 consumers' needs by taking these risks or at

1 least a portion of those assets off of their
2 plates.

3 Third, the proposal mistakenly
4 identifies the number of independent producers
5 affected by this rule as around 4,000
6 individuals when in fact, it's 20 times that
7 number. This underestimates the effect of
8 these hardworking and diligent agents providing
9 education and understanding of the risks
10 associated with retirement and helping
11 consumers in most communities across this
12 country.

13 Fourth, a fundamental disconnect is
14 that ERISA not only created IRAs, but also
15 provided for rollovers. Congress could have
16 defined sales recommendations as fiduciary
17 advice had it intended that result. In fact,
18 the last iteration and current iteration of the
19 DOL fiduciary role inappropriately seeks to
20 continue the status of amounts distributed from
21 Title 1 plans as ERISA assets when the statute
22 does not provide for that result.

1 The mischaracterization attempt may
2 continue across multiple IRA rollovers, maybe
3 even to inherited IRAs, et cetera, et cetera.
4 The main purpose of the statutory intent of
5 ERISA was to protect employees and define
6 benefit plans and define contribution plans who
7 are removed from the ability control to their
8 respective assets. Once out of the plan, these
9 participants are able to exercise their own
10 consumer choice over the distribution of their
11 assets to a rollover and whether or not to
12 consult a sales professional at that time or
13 not.

14 Lastly, the DOL is mistaken by
15 taking the view that sales of fixed products
16 are only driven by incentives and reflect a lax
17 regulatory regime that needs to be buttressed.
18 Sales in 2022 of fixed annuities, MYGAs, were
19 in fact up 110 percent and are attributable
20 difficult markets in 2022 and a significant
21 rise in interest rates. Today, they're up 42
22 percent year over year for some of the same

1 considerations. On the FAA side last year, we
2 saw a 25 percent increase in sales with a
3 similar increase today. This is not due to
4 incentives, but an acceptance of the product
5 concept and a risk mitigation strategy that I
6 discussed earlier.

7 I will now turn it over to my
8 colleague Pam Heinrich for some additional
9 analysis.

10 MS. HEINRICH: Good morning. Thank
11 you for the opportunity to testify today. My
12 name is Pam Heinrich and I'm the general
13 counsel and Director of Government Affairs for
14 NAFA. I've been doing this work for NAFA now
15 for 13 years now and can speak to the evolution
16 of the standard of conduct for annuity
17 transactions over that time, as well as the
18 equally long effort by the Department to turn
19 Main Street insurance producers and other
20 annuity professionals into ERISA fiduciaries.

21 It is discouraging to have the good
22 work that they do and products that they

1 provide disparaged and disregarded during the
2 current rulemaking process. In fact, annuity
3 professionals help consumers save and prepare
4 for their retirement and help create financial
5 security. A 2022 survey found that nine and
6 ten annuity owners purchased annuities
7 primarily to provide peace of mind during
8 retirement. Over 80 percent intended to use
9 annuity distributions for income during
10 retirement.

11 Using annuities as a source of
12 guaranteed income in retirement is more
13 critical than ever, particularly as traditional
14 pension plans are no longer the norm. Over
15 one-third of annuity owners have never
16 participated in an employee-sponsored
17 retirement plan. This is more true for older
18 annuity owners than younger ones. And is
19 significantly truer for female annuity owners
20 than for males.

21 Owners of individual annuities are
22 predominantly middle class. Approximately one

1 half have a total annual household income under
2 \$75,000. And one in four are below \$50,000.
3 Only 10 percent have an annual household income
4 over \$200,000. The vast majority of these
5 individual annuity owners have a positive
6 opinion of them. Eighty seven percent believe
7 that annuities offer an effective way to save
8 for retirement. Eight-six percent say
9 annuities provide financial protection against
10 investment loss. Eighty-nine percent consider
11 annuities to be a safe purchase. And eighty-
12 four percent look at annuities as a financial
13 cushion in case they live beyond their life
14 expectancy. This is why annuity sales are up,
15 not because of nefarious sales practices. It
16 is because people need, want, and like our
17 products.

18 In seeking financial security,
19 Americans want the freedom to choose the
20 financial advice and the retirement products
21 that fit their individual needs. Implementing
22 this unnecessary rule will only hurt low to

1 middle income workers, retirees, and their
2 families. We want to make clear that NAFA
3 strongly supports the best interest standard
4 for annuity transactions. Annuity professions
5 should and do act in the best interest of their
6 clients when making recommendations to purchase
7 an annuity.

8 There was a lot of talk yesterday
9 about the NAIC best interest model regulation.
10 And many testifiers made erroneous observations
11 about it. NAFA worked closely with the NAIC as
12 it revised the suitability model regulation to
13 incorporate the best interest standard. The
14 process to develop the current model took over
15 2-1/2 years and benefitted from the input of a
16 wide variety of regulatory, industry and
17 consumer stakeholders. It was essential to
18 strike the proper balance between an enhanced
19 standard of conduct for annuity professionals
20 and a workable regulatory framework that would
21 support access to essential retirement advice
22 and products necessary to ensure a safe and

1 predictable retirement for the millions of
2 Americans who need and value annuities as part
3 of their retirement plan.

4 That 47 states have now adopted or
5 are in the process of adopting the best
6 interest standard without any significant
7 deviation from the 2020 model is a testament to
8 the fact that the NAIC got it right. The NAIC
9 best interest model establishes high standards
10 for the responsible sale of annuity products by
11 trained insurance professionals subject to
12 oversight by state insurance departments.
13 Criticism that the model regulation falls short
14 of a fiduciary standard is simply misplaced.

15 Now I'll turn it over to Tom
16 Roberts. Thank you.

17 MR. ROBERTS: Thank you. I'm Tom
18 Roberts with the Groom law group and I realize
19 we're over time, so I'll keep my remarks brief.
20 I just wanted to punctuate the remarks that my
21 NAFA colleagues made this morning by observing
22 that our co-panelists and many of yesterday's

1 panelists made the point repeatedly that they
2 are fiduciaries who are paid to render advice.
3 And that's fine. That's how it should be. The
4 mere fact that insurance producers are paid not
5 for their advice, but for completed sales does
6 not render them inferior, nor does the fact
7 that insurance producers who are well trained,
8 supervised, monitored, acting in accordance
9 with state regulatory standards, the fact that
10 they are compensated --

11 MR. HAUSER: Tom, I'm sorry to
12 interrupt, but if you could just wrap it up
13 because of the time here.

14 MR. ROBERTS: Yes. I will close
15 simply by saying that there are two models. We
16 respect that there are two models. Producers
17 as the Fifth Circuit said are not fee-based
18 investment advisors, nor should they be
19 characterized as such. Thank you.

20 MR. KHAWAR: So thank you all for
21 your testimony. Maybe starting with Ms.
22 Heinrich and Mr. DiVencenzo, how would you

1 characterize the nature of the relationship
2 between an insurance professional and the
3 customer? And how does the customer understand
4 as Tom was just indicating that this is more of
5 a sales relationship and not an advice
6 relationship?

7 MS. HEINRICH: Chuck, do you want to
8 go or I can take that?

9 MR. DIVENCENZO: Go ahead, Pam.

10 MS. HEINRICH: Well, part of the
11 conversation, Ali, between the producer and the
12 client is to understand their role -- their
13 role as it relates to the insurance carriers
14 whose products their representing. They
15 disclose how they're paid for their services
16 and their relationship with that carrier.
17 Certainly the client can ask greater questions
18 about that relationship and their compensation.
19 But I think that the conversation, the
20 transparency, the model's requirements that the
21 producer share with the client, why they're
22 making the recommendations that they do. And

1 the role that they play in the transaction, I
2 think makes it clear that there's an
3 understanding of that relationship and how it
4 works.

5 MR. DIVENCENZO: And I'll add to
6 that really quickly. The other fact that what
7 they get is the information from that
8 individual as to what they need in terms of the
9 associated risks that they're trying to sell
10 for. So I think that's a -- They'll ask those
11 questions and understand that dynamic, and the
12 make a recommendation.

13 MR. ROBERTS: If I could just jump
14 in. You know, I think when an insurance
15 producer appears before a perspective client,
16 it's crystal clear to the perspective client
17 that the insurance producer is selling. The
18 insurance producer has no agreement to be paid
19 any fee in the event that the customer does not
20 buy the product. That's clear. It's inherent.
21 And in that respect, I would analogize that
22 interaction to the interaction of fee-based

1 advisors, not when they've been engaged, not
2 post-engagement, but that at times they're
3 seeking to be engaged.

4 I would ask the fee-based panelists
5 who are presenting us today to ask themselves -
6 - they've made it clear that they are
7 fiduciaries after they've been hired. Recast
8 that picture. And ask yourself at the point
9 you're sitting down with the customer and
10 saying hire me and pay me this fee, are you a
11 fiduciary then? Are you a fiduciary when
12 you're deciding what compensation level you
13 want the client to pay? I don't think your
14 earlier remarks were intended to bring that
15 into the equation. Yet by depicting yourselves
16 as fiduciaries all the time and analogizing it
17 to insurance producers who are selling
18 products, you have muddied the waters. We need
19 to clear those distinctions up.

20 MS. HANSEN: Speaking of clearing
21 something up, I just have a follow-up on that.
22 Ms. Heinrich, you made a statement that said

1 that the NAIC 2020 model rule, that comments by
2 the Department claiming that, that model rule
3 misses the fiduciary mark -- that the
4 Department saying it missed the fiduciary mark
5 is simply misplaced. Thereby implying at least
6 as I understand that comment to say that the
7 NAIC 2020 model rule does place an appropriate
8 level of fiduciary supervision over
9 individuals. To me, that statement is directly
10 in conflict with the other aspects of your
11 testimony that says that both the producer and
12 the client -- and again, this is just my
13 understanding of what has been said -- have a
14 clear understanding that the producer is only
15 selling.

16 And so those to me don't -- can't
17 both be true. And so I'm asking if you can
18 clarify whether the NAIC 2020 model rule does
19 in fact implement a fiduciary standard? Or
20 whether your position is that both the producer
21 and the client understand this is purely a
22 sales transaction?

1 MS. HEINRICH: No and I -- Megan, I
2 would like to just say what I said was that
3 criticizing the best interest model regulation
4 that it's not a fiduciary standard is misplaced
5 criticism. Certainly not intended to convey
6 that it is a fiduciary standard. When the NAIC
7 embarked upon their nearly three year long
8 process to revise the old suitability model
9 regulation, they made it very clear during the
10 working group process that they wanted it to be
11 more than suitability, but not a fiduciary
12 standard. So it is not a fiduciary standard.
13 It is however a best interest standard. And so
14 --

15 MS. HANSEN: Can you clarify what
16 the difference between a fiduciary standard and
17 a best interest standard is? Is there a
18 difference? You're saying there's a difference
19 between those? Can you just clarify that
20 difference?

21 MS. HEINRICH: Yeah. Certainly a
22 fiduciary standard is to act in the best

1 interest of your client, but you don't have the
2 duty -- I think the loyalty duty. So it's a
3 best interest standard to act in the best
4 interest of the clients as is the fiduciary
5 standard, but it does not rise to the level of
6 the sort of liability exposure to be an ERISA
7 fiduciary in the context of insurance product
8 sales is not intended to be.

9 MR. ROBERTS: Yeah, I'd like to jump
10 in on that too, Pam. And just to buttress that
11 point, the NAIC model standard is not a
12 fiduciary standard and it is a best interest
13 standard. And it's a best interest standard
14 because it's a standard that supports
15 responsible selling activity. And there is
16 nothing wrong with that. And we need to be
17 clear that the mere fact that sales people who
18 are professionals and who sell for transaction-
19 based compensation are not fiduciaries, nor can
20 they easily be fiduciaries because of the fact
21 that they have an interest in the transaction.
22 Those two --

1 (Simultaneous speaking.)

2 MS. HANSEN: I'm sorry that I'm
3 having a hard time understanding this. I just
4 want to make sure I understand the point you're
5 making and the terminology is causing me just a
6 bit of difficulty. So what you are saying is
7 that they do have to act in the best interest
8 of their client. You are saying it is a best
9 interest standard --

10 MR. ROBERTS: Yes.

11 MS. HANSEN: -- so they have to act
12 in the way that is best for their client, but
13 that, that is not a fiduciary standard.

14 MR. ROBERTS: That's correct.

15 MS. HANSEN: So they do have to do
16 what is best for their client --

17 MR. ROBERTS: That's correct.

18 MS. HANSEN: -- but they don't have
19 to act as a fiduciary.

20 MR. ROBERTS: That's correct.

21 MS. HANSEN: And so what is the --
22 I'm still trying to understand where the --

1 what the action would be that would be both in
2 the best interest -- the thing that is best for
3 their client, but is not a fiduciary act. I'm
4 still trying to understand where that different
5 line is.

6 MR. ROBERTS: So I'd like to go back
7 to Chuck DiVencenzo's earlier remarks. I am an
8 insurance producer. I have available fixed and
9 fixed index annuity products. I am speaking
10 with a potential client. I'm trying to
11 evaluate is that client in a situation where
12 their personal circumstances suggest that they
13 would benefit or could benefit from the
14 insurance protections embedded in these
15 products. Protections against market
16 volatility, loss of principal, the risks about
17 living on one's assets. The best interest
18 standard that's embedded in the NAIC model is
19 calibrated about aligning the needs of the
20 client with the features of the product. It is
21 not a fiduciary standard, but it is a best
22 interest sales standard.

1 MR. HAUSER: So is -- and this is a
2 question, I guess for all three of the folks
3 from NAFA, but is the advice -- so as I
4 understand the testimony, the advice is
5 individualized. You get information from a
6 customer about their individual circumstances,
7 make an assessment of their needs. Is that
8 right? Is that how these transactions work?

9 MR. ROBERTS: Yes.

10 MS. HEINRICH: Yes. You gather --
11 you gather a host of information from the
12 consumer, yes.

13 MR. HAUSER: And to understand these
14 particular categories of contracts -- I think
15 to fully understand one of these contracts, you
16 have to understand what the index is. You have
17 to understand how the crediting rate works.
18 You have to understand how that index, you
19 know, tracks to the actual performance the
20 customer is likely to receive, what the
21 participation rate is, how that works. You
22 have to understand whether dividends are

1 included in the index. And you have to
2 understand a host of charges. And are these
3 all typically explained to the customer? And
4 is an assessment made of kind of what the right
5 combination is for their interest?

6 MR. DIVENCENZO: What ends up
7 happening is understand that analysis of the
8 needs of that client and then associating that
9 to your point, there are various indices in
10 these issues that solve for different problems,
11 different market situations in terms of being
12 able to retain principal and then allow that
13 individual to have a certain rate of return
14 associated with that product. And then
15 additionally understanding what they're trying
16 to accomplish. In terms of that product
17 allocation across their -- across their various
18 assets to mitigate some of those risks
19 associated. They might want to retain
20 principal. So they're able to say okay, I want
21 to have this kind of a situation where I can
22 have some upside, but I know that I have no

1 downside.

2 The other issue becomes one of the
3 associated -- the issues for instance, sequence
4 of return or longevity risk associated with
5 that particular product. And yes, if there is
6 an add-on for particular withdrawal benefits or
7 what have you, then those are explained and set
8 forth for the client.

9 MR. HAUSER: And when you said they
10 have no risk of downside, is part of the
11 discussion explaining to them the risk they
12 face during, you know, the period to which they
13 might be subject to a surrender charge and the
14 like?

15 MR. DIVENCENZO: Certainly surrender
16 charges are addressed and that is an
17 appropriate discussion with that and obviously
18 disclosed.

19 MR. HAUSER: In your experience, do
20 the typical investors, are they able to
21 navigate their way through all these
22 complexities, the different indexes, the

1 participation rates, the various charges, the
2 caps and buffers and all the rest without
3 expert help from the folks you represent?

4 MR. DIVENCENZO: That's part of the
5 job of an individual is to explain the product,
6 yes --

7 MS. HEINRICH: Right.

8 MR. HAUSER: So what's confusing to
9 me, I guess, and this is maybe following up on
10 -- I'm sorry, I don't mean to interrupt, you
11 were going to say something.

12 MS. HEINRICH: I was just going to
13 say, Tim, that one of the obligations under the
14 best interest regulation is that the producer
15 has a reasonable basis to believe that the
16 consumer understands the benefits and the
17 features of the annuity. And I would just say
18 that, you know, I think somebody said yesterday
19 it's, you know, a solution in search of a
20 problem. I mean clearly people are satisfied
21 with the products. The proof's in the pudding
22 there.

1 MR. HAUSER: I appreciate that.

2 MR. ROBERTS: I'd like to turn the
3 question around, Tim. You know --

4 MR. HAUSER: I'd like to pose the
5 question first, Tom, and then let you turn it
6 around.

7 MR. ROBERTS: Very quickly though,
8 when a financial planner advises a 60/40
9 portfolio, do they advise against the risks of
10 outliving one's assets? I don't think that
11 they do. So the questions need to go both
12 ways.

13 MR. HAUSER: The questions -- So
14 yeah, I'd like to actually complete my
15 questioning --

16 MR. ROBERTS: Sure, of course.

17 MR. HAUSER: -- and then I'll be
18 happy to respond. But the question I guess I
19 have and what's confusing to me -- and this
20 really, I think is following up on Megan
21 Hansen's line of questions, which is I mean it
22 appears to me as I understand the way this

1 relationship works, the advice -- there's
2 advice, it's individualized. It's about a
3 fairly complex set of products that ordinary
4 investors can't really understand without this
5 expert assistance. And the people they're
6 dealing with hold themselves out as acting in
7 the customer's best interest.

8 And so from all of that, what is the
9 thing that makes this not a relationship of
10 trust and confidence, at least in those
11 circumstances where the advisor is making a
12 recommendation. They're talking to an in-
13 expert customer. They're giving individualized
14 advice based on the individual circumstances,
15 and they're literally holding themselves out as
16 acting in the customer's best interest. What
17 is the investor supposed to take away in that
18 circumstance other than they're trust and
19 confidence relationship, do you think?

20 MR. ROBERTS: I would like to answer
21 this. There is a difference, and we all know
22 there's a difference between a fiduciary

1 relationship of trust and confidence and a
2 professional sales interaction. A professional
3 sales interaction is one where the transaction-
4 based producer seeks to understand the
5 individual circumstances and seeks to determine
6 whether or not a product that, that individual
7 has available for sale meets the customer's
8 needs. That is a best interest interaction
9 that is short of a fiduciary interaction.

10 The relationship of trust and
11 confidence, Tim, that you describe all the time
12 and that you're trying to fit fee-based sales
13 people into is one that requires the
14 transaction-based producer -- the producer
15 who's compensated on a transaction basis to set
16 aside his or her compensation interests. We do
17 not do that. We do not seek to do that. We do
18 not hold ourselves out as fiduciaries who are
19 in a fiduciary relationship with trust and
20 confidence. So we want to make that
21 distinction clear. It's imperative. And we're
22 concerned that this rulemaking seeks to

1 extinguish it.

2 MR. HAUSER: So in what part of the
3 conversation does that go on between a
4 representative who is recommending a fixed --
5 you know, a fixed index annuity and the
6 customer -- What part of the time do you think?
7 And if you have any data, it would be great.
8 Are people told hey, you really do need to
9 think of me as a sales person? I'm just here
10 to sell you this product and I have an
11 obligation to make sure it's good enough. But
12 I could actually sell you a worst product
13 because it's better for me financially. I mean
14 is that what I'm understanding you're saying as
15 the relationship? Because I don't think that
16 it's probably how people hold themselves out at
17 these communications.

18 MR. ROBERTS: You're scripting a
19 conversation that bears no relationship with
20 any commercial interaction of any kind. What I
21 would say is do they understand that they're
22 dealing with a commissioned sales person? Of

1 course they do. Of course they do. They
2 received the explanation of the product. They
3 receive a disclosure of the fact that the
4 person who they're speaking to is compensated
5 only if a product is purchased. More often
6 than not, Tim, that producer walks out of the
7 room having completed no sale. And so they are
8 not compensated at all for any of the advice
9 that they gave the consumer.

10 MR. HAUSER: So can I just ask --

11 (Simultaneous speaking.)

12 MR. ROBERTS: -- folks in the same
13 boxes to fee-based advisors who are compensated
14 for their advice.

15 MR. HAUSER: Understood. Can I ask
16 two more questions on this line?

17 MR. ROBERTS: Sure. Sure.

18 MR. HAUSER: So the first is, I mean
19 so is it your view that the distinction comes
20 from the fact that they're paid on a commission
21 basis and that fact is known to the customer
22 and essentially nothing else? That's the key

1 driver. They can otherwise hold themselves out
2 as acting in the customer's best interest.
3 They can give individualized recommendations.
4 They can let the customer believe that they're
5 getting advice that's based on what's best for
6 them. But the customer should know because
7 they're being paid on a commission basis that
8 they're not dealing with someone they should
9 treat as part of a trust and confidence
10 relationship. Is that the position NAFA is
11 taking?

12 MR. ROBERTS: I would say that, that
13 conversation you're describing, I would turn it
14 around and say when a fee-based advisor is
15 pitching their services, at that moment when
16 they're selling themselves, before the customer
17 accepts that engagement, are they in a trust
18 and confidence relationship at that point?

19 MS. HANSEN: Okay. Given the time -
20 - Do you have more? Okay, go ahead.

21 MR. HAUSER: Yeah, just one more
22 thing. I mean so to the extent you're basing

1 this line on the fact that it's a commissioned-
2 based transaction, could you just explain to me
3 why is that different than an attorney that's
4 paid on a -- on a contingent basis? Don't they
5 have a -- You know, aren't their clients
6 entitled to think they're getting
7 representation that is based upon their
8 interests? And isn't the service they're being
9 compensated for -- They're not being paid for
10 delivering a win by any means possible.
11 They're being paid for their services, aren't
12 they, as lawyers -- as professional lawyers
13 obligated to act in their client's interest.
14 Zealously and loyally. Why do you think the
15 clients view it differently?

16 MR. ROBERTS: I'm not sure I
17 understand the analogy and I am not prepared to
18 discuss fee-based attorney arrangements this
19 morning.

20 MS. HANSEN: Yeah. Given that we
21 are over time, I would like if at all possible,
22 Mr. Moisand, there was one comment you made

1 that I -- that if you either have it off the
2 top of your head or if there's a way in your
3 written comment -- you mentioned -- you made a
4 statement, "the overwhelming majority of
5 Americans want to work with an advisor acting
6 in their best interest as a fiduciary" or
7 something along those lines, I was writing
8 quickly. And I was curious where you got that
9 statistic where you -- where that came from. I
10 don't know if you happen to have it. Or I know
11 we are over time, but I'd be interested to see
12 that if you happen to have it.

13 MR. MOISAND: Yeah. CFP Board staff
14 can get you the source on that. I just want to
15 make one comment about this entire discussion.
16 To me it illuminates exactly why this rule is
17 so important. The American public should not
18 need a glossary to be properly protected with
19 their retirement savings. And here we are,
20 professionals deep into all of this stuff,
21 talking about the fiduciary means acting in the
22 best interest -- within their best interest

1 standards.

2 At the end of the day, if there's a
3 dispute, we have to determine what standard
4 should apply. And it's very clear to me from
5 this conversation that the standard that should
6 apply is the fiduciary standard. Much of what
7 has just been discussed about the process for
8 insurance sales is exactly the same type of
9 thing that a fiduciary goes through to
10 determine what products are necessary or needed
11 for their client.

12 So I don't see how this could
13 possibly be a burden on the producers that are
14 out there trying to help the American public.
15 And there are many, many, many insurance
16 professionals -- I use the word "professionals"
17 specifically that do a very good job of being
18 clear with their clients. These rules need to
19 be in place for the ones that don't. So I
20 applaud the DOL for going down this path.
21 Thank you.

22 MR. HAUSER: Okay, thank you.

1 MS. HANSEN: We are over time now.

2 MR. HAUSER: Yeah, we need to -- we
3 need to end this panel now. And I know that
4 I'm a big contributor to why we're over. I
5 apologize for that. But thank you very much
6 for your comments and we'll come back at 10:00,
7 okay, with the second panel for the day.

8 MR. DANFORD: Thank you.

9 MR. HAUSER: Thanks.

10 (Whereupon, the above-entitled
11 matter went off the record at 9:53 a.m. and
12 resumed at 10:00 a.m.)

13 MR. HAUSER: Okay. I think we're
14 ready for Panel 2. Can you all hear me? Which
15 will be Patrick Mahoney for the Financial
16 Planning Association, Mark Cadin for Finseca,
17 and Daphne Jordan from the National Association
18 of Personal Financial Advisors. So Mr.
19 Mahoney, the floor is yours.

20 MR. MAHONEY: Thank you, Tim. Can
21 you hear me all right?

22 MR. HAUSER: Yes, perfectly. Thank

1 you.

2 MR. MAHONEY: Great. Good morning.
3 Thank you for the opportunity to testify today.
4 My name is Patrick Mahoney. I'm the CEO of the
5 Financial Planning Association or FPA.

6 FPA is a trade association and the
7 leading membership organization for certified
8 financial planner professionals and those
9 engaged in the financial planning process. Our
10 core members are certified financial planner
11 professionals who pride themselves on being
12 held to high standards of professional
13 competence, ethical conduct, and clear,
14 complete disclosure when serving their clients.

15 Notably, our core members as CFP
16 professionals are required to act in the best
17 interest of their clients at all times when
18 providing financial advice. So it's pertinent
19 for me to note that the majority of FPA members
20 by virtue of holding the CFP designation are
21 already voluntarily committed to act in the
22 best interest of their clients under CFP

1 Board's fiduciary standard.

2 To that end, FPA believes all
3 consumers are deserving of objective,
4 personalized financial advice that is in their
5 best interest. And we share the Department's
6 concern that many consumers lack understanding
7 of how the financial industry is regulated and
8 therefore may be challenged to discern among
9 professionals who are legally required to act
10 in their best interest, putting themselves at
11 risk of being taken advantage of by individuals
12 who may not adhere to the high standards to
13 which our CFP professional members comport.

14 We know that the Department has
15 worked tirelessly over many years to find a
16 workable solution to its concerns regarding the
17 security of retirement savers. At the same
18 time, our members are keenly aware of the
19 complexity of the already existing state and
20 federal laws governing various aspects of the
21 financial planning profession. And conflicting
22 interpretations of the term "fiduciary" among

1 various agencies and regulators. This
2 complexity forms the basis of the concerns and
3 the request for clarification we want to share
4 with you today.

5 Others have already expressed
6 concern with the short comment period. We
7 equally share concerns regarding the proposed
8 60-day implementation period. This morning, I
9 seek to call to your attention the fact that
10 our members range from single-planner solo
11 practitioners to business owners to mid-sized
12 shops to financial planners working with large
13 firms across the country.

14 Many of our members are dually
15 registered and carry multiple licenses to meet
16 the client's needs and they operate as either
17 independent contractors or employees. Members
18 in these varying categories are going to
19 experience different burdens in implementing
20 the proposed rule. They will require
21 significantly more time to review and fully
22 understand any proposal, which must be

1 considered in light of all the other existing
2 regulatory obligations at play in our industry.

3 For these reasons, a two-month
4 implementation period following any final rule
5 is simply not enough time for those who might,
6 for example, need to review and re-write
7 policies and procedures or update their
8 disclosure documents and client agreements.
9 Especially if they're a small business or
10 single planner operators who lack in-house
11 counsel and have significantly fewer resources
12 to help them understand the requirements and
13 commend the compliance.

14 We do respectfully encourage the
15 Department to consider an extension of the 60-
16 day effective date and request a commitment
17 from the Department to implement any final
18 proposal using a phase-in approach with
19 education, rather than punitive enforcement.
20 For the regulated community to be successful in
21 complying with any new requirements and changes
22 to their obligations, there must first be

1 clarity and mutual industry-wide understanding
2 of the proposal, as well as sufficient time to
3 implement any necessary changes.

4
5 We also respectfully request that
6 the Department provide more detail and clarity
7 around how compliance with existing fiduciary
8 standards and best interest obligations already
9 in place under other agency's regulatory
10 schemes will or will not ensure compliance with
11 the Department's proposed rule. While the
12 Department has done a noteworthy effort to
13 harmonize the rule with existing industry
14 regulations, it does remain unclear how these
15 competing frameworks would interact in
16 practice.

17 For a better understanding
18 in advance of enforcement of any final rule and
19 provide greater clarity for our members and the
20 industry as a whole, we respectfully request
21 that the Department provide clear
22 implementation guidance and compliance tools
such as a succinct list of new documentation

1 requirements, turnkey forms, templates, as well
2 as FAQs ahead of or along with and parallel any
3 final rule. At a minimum, this guidance should
4 identify work compliance with existing
5 regulatory requirements will satisfy the
6 Department's proposed requirements and more
7 importantly, where financial professionals are
8 going to need to take steps beyond seeking to
9 comply with their existing regulatory
10 obligations.

11 Due to the fact that FPA has a
12 strong interest to protecting our members from
13 inconsistent regulation and that the Department
14 shares jurisdiction of the retirement plan
15 industry with both state and federal security
16 and insurance regulators, we do strongly
17 encourage the Department to consider working
18 closely with the SEC, the NAIC, and other
19 credibly relevant agencies who combined are
20 best suited to provide effective, clear
21 standards for consumer protection, while
22 avoiding excess compliance burdens.

1 Undoubtedly coordinating efforts among
2 regulators will help to ensure consistency, not
3 just for the industry, but for consumers who
4 are negatively impacted by the plethora of the
5 complexity that is our industry's landscape.

6 Another concern FPA has is how
7 compliance costs may impact consumer access to
8 advice that our members recognize consumers
9 desperately need and want. Notwithstanding our
10 strong belief that consumers would benefit from
11 objective advice, we would be remiss to turn a
12 blind eye to the industry's concerns that the
13 even more narrowed current proposal may
14 increase costs as to inadvertently decrease
15 Americans' access to much needed advice, which
16 would only create a new problem for Americans.
17 What is missing from the proposal's current
18 timeline is simply adequate time to determine
19 if such concerns remain valid.

20 Indeed in so much as the regulatory
21 landscape for both the securities and insurance
22 industry has drastically changed since the

1 Department's formal proposals, it does seem
2 axiomatic that the Department and the industry
3 would benefit from reexamining the impact
4 analysis that pre-dated the new best interest
5 standards we now have enforced as we gather
6 here this morning.

7 Finally, I want to address DOL's
8 request for input related to the use of various
9 titles and how the use of a title may impact a
10 consumer's assumption of its trusted
11 relationship and retirement advice that is in
12 their best interest. Many of our members view
13 their role as financial planners as a vocation
14 to which they have been called to serve their
15 fellow citizens.

16 Everywhere I go, every FPA chapter I
17 visit, it comes up time and time again from our
18 members. They tell me I'm a certified
19 financial planner. You can look me up online.
20 You can verify my credentials and see that I'm
21 required to act as a fiduciary under CFP
22 Board's code and standards. But that person

1 down the street who has no financial planning
2 education or experience and can only offer
3 insurance products as an example, they also
4 call themselves a financial planner as well.
5 So FPA does agree that titles can and do mean
6 something and can often be misleading to
7 consumers, which is why we applaud you for
8 recognizing the issue and we look forward to
9 providing additional input as part of our
10 ultimate comment letter.

11 I want to thank the Department again
12 for the opportunity to testify. Although our
13 larger concerns raised this morning are around
14 the short-term implementation timeframes at
15 issue and the need for guidance and compliance
16 tools, the FPA certainly supports measures that
17 enhance investor protection. Provided they are
18 understandable by our members, workable, and
19 will not impede consumer access to products and
20 services that are consistent with retirement
21 savers best interest.

22 Our CFP professional members stand

1 ready to serve retirement savers under a
2 standard that puts their clients interest and
3 all American retirement savers interest first.
4 We look forward to continuing to analyze the
5 proposal to ensure it aligns with their ability
6 to continue to do so. And with that, I yield
7 the remainder of my time and I'm happy to
8 answer any questions. Thank you.

9 MR. HAUSER: Thank you. Mr. Cadin
10 and I apologize if I'm mispronouncing your
11 name.

12 MR. CADIN: Cadin, thank you.

13 MR. HAUSER: Cadin, thank you.

14 MR. CADIN: Before I get into my
15 testimony, I'd first like to express a Happy
16 Hanukkah to everyone, particularly members of
17 the Department, my fellow panelists, all of our
18 teams that are members of the Jewish faith.

19 And I'd like to start by stating a
20 few simple truths. First, it's incredibly
21 disheartening that you, the Department of Labor
22 have decided to jam this rule through the

1 holiday season. Second, while we've repeatedly
2 tried to engage and construct a dialogue over
3 the course of the last several years, just as
4 many of our industry partners we have, we have
5 found the lack of responsiveness and disregard
6 for the undeniable consequences of this rule to
7 be unfortunately consistent.

8 And third, it seems clear that you
9 are determined to pursue a rule that is perhaps
10 well intended, but one that will unquestionably
11 harm the financial security of the American
12 people. And it will make it harder to bring
13 professionals into the financial security
14 profession at a time when we desperately need
15 to grow it. Because of those reasons, Finseca
16 strongly encourages the Department to withdraw
17 this offensively framed and substantively bad
18 fiduciary rule.

19 My name is Marc Cadin. I'm the CEO
20 of Finseca. Finseca was created in 2020 to
21 reunify the financial security profession. The
22 men and women who believe that holistic

1 financial advice is the key to advancing the
2 cause, which is the inspiration behind our
3 name. Financial security for all.

4 Finseca has brought together four
5 different organizations over the last three
6 years. GAMA, which represented the career
7 agency leadership, NAILBA, which represented
8 independent distribution in the brokerage
9 market place, AALU, which represented advisors
10 and was the advocacy organization for many in
11 the profession, and the Forum 400, which
12 represented the top advisors in the profession.

13 We are blessed to have the most
14 diverse board in the entire industry, which
15 includes representatives from every role within
16 the profession. And our north star unifying
17 principle is best captured by independent
18 research conducted by Ernst and Young, this
19 research which we've shared with the Department
20 multiple times proves that holistic financial
21 plans, which include permanent life insurance,
22 investments, and annuities are objectively

1 better for consumers.

2 When consumers have holistic plans,
3 they get better outcomes. But unfortunately
4 the regulatory burden under this proposed rule
5 will make it impossible for millions of
6 Americans to access the products and advice
7 that they need to truly become financially
8 secure. This proposed rule will take us in
9 exactly the wrong direction at exactly the
10 wrong time. Americans face a \$7 trillion gap
11 in retirement savings. We're facing the
12 insolvency of social security and Medicare in
13 the next decade. And according to estimates by
14 LIMRA, we have a \$12 trillion protection gap.

15 Now at Finseca, we support a
16 regulatory environment that provides the best
17 outcomes for consumers. It provides them with
18 protections, as well as enables our members and
19 the profession at large to work to serve their
20 clients. We were a constructive force that
21 brought real world examples during the SEC's
22 process to adopt a best interest standard, as

1 well as the NAIC's adoption of Model Rule 275,
2 which as you have heard has been adopted by
3 more than 40 states.

4 Now I know some have said these
5 rules don't go far enough. They're not
6 sufficient in their consumer protections. But
7 I would submit that anyone who makes this point
8 is almost certainly pushing their own agenda,
9 not the financial security of the American
10 people, and they certainly don't have a clue of
11 what actually happens in the real world.

12 Now in preparation for this hearing,
13 I've had the opportunity to talk with dozens
14 and dozens of our members. One conversation in
15 particular needs to be shared. Jacob, a
16 financial security professional from Indiana
17 was describing the compliance burden on his
18 shoulders and how significant it is since this
19 profession as you know is regulated by the
20 states, by FINRA, the SEC, the Department of
21 Labor. And all of these rules are filtered
22 through the different compliance departments at

1 the companies he works with. When I talked to
2 Jacob, he described the regulatory burden as
3 being more disruptive to his business than was
4 COVID. Jacob said COVID was more of a delay in
5 terms of income. Sure, things slowed down, but
6 business still got done. He still had the
7 ability to meet with his clients digitally and
8 nothing stopped him from moving forward or
9 maintaining relationships.

10 On the contrary, he described the
11 regulatory process as a hindrance in moving
12 clients forward. He noted how intimidating it
13 is to have potential clients when they first
14 meet and they expect to form a relationship and
15 instead, they had a lengthy complex contract
16 filled with legalese placed in front of them
17 with the explanation that signing this allows
18 us to pursue a relationship. Now Jacob and the
19 tens of thousands of advisors like him continue
20 to navigate the challenging regulatory
21 environment. And as I said, Finseca,
22 we support smart regulations that protect

1 consumers. We support smart regulations that
2 protect consumers. But what we don't support
3 is regulations that are going to inhibit the
4 access to the advice and products that
5 consumers need to be financially secure. Now
6 your latest fiduciary proposal seems designed
7 to make it impossible for millions of Americans
8 to get the advice and products they need.

9 Now we're still working through the
10 specific impacts of this proposal and its
11 intersection with a myriad of regulatory
12 regimes and the broad diversity of business
13 models within our membership during the busiest
14 time of the year with some of the biggest
15 holidays of the year, but I'd be remiss if I
16 didn't give you a couple of specific examples
17 on why your rule is so problematic.

18 First, this framing of the rule is
19 offensive, misleading, and factually
20 inaccurate. Commissions are not junk fees.
21 State regulation is not inaccurate. And your
22 stated reason as to why fixed indexed annuities

1 are up 25 percent is entirely wrong. Now I
2 could point on a bunch of those different
3 pieces, but I'm going to focus on commissions.
4 A commission, which as you know is regulated as
5 part of a product approval process by the
6 states. It offers consumers a more efficient
7 and effective way to access insurance products
8 and related advice.

9 Now implied within testimony of many
10 yesterday and today is that fees are better and
11 commissions are somehow worse. But what they
12 don't say is that almost all fee-only advisors
13 have minimum amounts of investable assets for
14 them to take someone on as a client. Now often
15 fee-only advisors focus exclusively on
16 securities investments, and ignore the
17 mortality and longevity risk of their clients.
18 That these risks are protected through life
19 insurance and annuities products essential for
20 the holistic financial plan that EY proved to
21 be in consumers best interest. And last and
22 certainly not least on buy and hold solutions

1 such as insurance products, commissions are
2 almost always the more cost efficient option
3 for a consumer.

4 But the rule isn't just offensively
5 framed, it's substantively bad. The new
6 proposed 84-24 is so restrictive that we
7 believe that almost no one will use it. And
8 the few who will use it will be restricted to
9 offering their clients such a limited set of
10 solutions that it undermines the holistic
11 financial plan.

12 Now 2020-02 is built on a securities
13 and investment model that's ill-suited and
14 limiting to many annuity and insurance
15 solutions. The definition in the proposal are
16 clearly designed to force the maximum number of
17 professionals in the 2020-02. Now buying a
18 publicly traded security costs the same to any
19 consumer based on what the market value on that
20 security is on a given day.

21 However, insurance products are
22 different than securities. Professionals who

1 are forced to use 2020-02 often offer their
2 clients insurance solutions from competing
3 carriers. These products compete directly with
4 each other to consumers benefit and on price,
5 feature, service, and underwriting. This makes
6 the co-fiduciary requirement of 2020-02
7 impractical to almost impossible.

8 Now the list of these problems with
9 the proposed rule goes on and on and we'll be
10 sure to document all of our issues in our
11 comment letter. But I'd like to close with a
12 couple of final thoughts. The work done by the
13 Department stands in stark contrast to the will
14 of Congress. A broad bipartisan coalition
15 passed and President Trump signed secure 1.0
16 into law in December of 2019. At the same
17 time, that was the most sweeping legislation --
18 retirement legislation enacted in a generation.

19 But not to be outdone, another broad
20 bipartisan coalition passed and President Biden
21 signed SECURE 2.0 in December of 2022. Two
22 sweeping pieces of legislation passed within

1 three years. This is because most of the
2 members of both parties of both houses and both
3 administrations understand we need to get more
4 Americans saving earlier. We need to open up
5 access.

6 Our elected representatives
7 understand that defined benefit plans no longer
8 exist. Our elected representatives understand
9 that we have a looming crisis with
10 entitlements. Our elected representatives
11 understand that people like Jacob and the
12 thousands of people like them, they understand
13 they're here to serve their clients. They
14 understand that they want to help their clients
15 make better financial decisions. That they're
16 essential in the financial decision making
17 process. And yes, the members of Congress and
18 our elected representatives understand that
19 people like Jacob and the thousands of people
20 like him want to take care of his family and
21 his employees.

22 For all of those reasons and

1 countless others, we urge the Department to
2 withdraw the rule. And thank you for your time
3 today.

4 MR. HAUSER: Thank you, Mr. Cadin.
5 Ms. Jordan.

6 MS. JORDAN: Hello. My name is
7 Daphne Jordan. I'm a senior wealth advisor at
8 Pioneer Wealth Management Group in Austin,
9 Texas. I'm testifying today on behalf of the
10 National Association of Personal Financial
11 Advisors, NAPFA, where I serve as Chair of the
12 Board of Directors.

13 NAPFA appreciates this opportunity
14 to testify in support of the Department's
15 proposed rule to expand the definition of the
16 term "fiduciary" under ERISA. My testimony
17 today consists of two parts. First, I will
18 describe NAPFA and why NAPFA advisors who
19 provide fiduciary level financial planning
20 services to American retirement savers support
21 the Department's proposed rule. Second, I will
22 share some of my professional experiences as a

1 NAPFA member at Pioneer Wealth Management
2 Group. My testimony will make it
3 clear why NAPFA urges the Department to adopt
4 the proposed rule. It would establish a level
5 playing field for all retirement advice and
6 retirement investments. It would require that
7 all retirement advice and retirement
8 investments meet ERISA's stringent fiduciary
9 standards. And it would provide other urgently
10 needed regulatory protections for retirement
11 savers.

12 NAPFA was founded 40 years ago in
13 1983 and is the nation's leading organization
14 at the only comprehensive financial planning
15 professionals. There are more than 4,600 NAPFA
16 members across the country serving clients from
17 all backgrounds. NAPFA members adhere to
18 standards of professional conduct that are
19 widely recognized among the highest in the
20 financial planning profession.

21 Each year, a NAPFA member must sign
22 a fiduciary oath and code of ethics, which

1 generally require a NAPFA member always act in
2 good faith, to be proactive in disclosing
3 conflicts of interest, and to not accept
4 commissions, referral fees, or compensation
5 that is contingent upon the purchase or sell of
6 a financial product. NAPFA members must truly
7 be fee-only financial professionals.

8 A NAPFA registered financial advisor
9 must be registered with the Securities and
10 Exchange Commission or SEC or with a state
11 securities regulator as a registered investment
12 advisor or RIA. Under the securities law, the
13 Investment Advisers Act imposes fiduciary duty
14 on all RIAs. A NAPFA registered financial
15 advisor also must the certified financial
16 planner of CFP designation from the Certified
17 Financial Planner Board of Standards. A CFP
18 professional must comply with the CFP
19 standards, which reflects the commitment of CFP
20 professionals to high standards of competency
21 and ethics.

22 As a result, a NAPFA registered

1 financial advisor operates under three
2 complimentary sets of ethical standards. One
3 set under NAPFA's fiduciary oath and code of
4 ethics, a second set under the Investment
5 Advisers Act, which imposes securities law
6 fiduciary requirements on all RIAs.

7 And a third set under CFP standards.
8 You might ask why NAPFA advisors are fee-only
9 and do not accept commissions. Simply put,
10 financial professionals who receive commissions
11 are paid based on their financial products that
12 they sell to their clients. This can lead to a
13 conflict of interest between the financial
14 professional whose compensation must be tied to
15 the recommendation of the financial product and
16 the client who in this relationship of trust
17 and confidence reasonably expects financial
18 advice that is solely in the client's best
19 interest.

20 Because of this conflict of
21 interest, financial professionals who are paid
22 for commissions may have difficulty placing the

1 client's best interest above the financial
2 professional's personal financial interest.
3 NAPFA's position is that the fee-only method of
4 compensation is the most transparent and
5 objective compensation method available in
6 today's marketplace.

7 Fee-only compensation minimizes
8 conflicts of interest and allows NAPFA advisors
9 to act as true fiduciaries. It is our hope
10 that retirement savers in the public
11 increasingly recognize the similarities between
12 the updated and strengthened fiduciary
13 standards contained in the proposed rule and
14 how NAPFA advisors provide financial advice to
15 retirement savers every single day.

16 Since the year 2010 when the
17 Department first proposed updating the 1975
18 five-part test to determine ERISA fiduciary
19 status, NAPFA has consistently called for an
20 unambiguous fiduciary standard to apply to all
21 persons who provide advice to retirement
22 savers. NAPFA advocated in favor of the

1 Department's successful adoption of the 2016
2 investment advice rule. We recognize that
3 unlike the past when traditional pension plans
4 assured financial independence in retirement,
5 today's retirement savers increasingly are
6 responsible for making these key decisions in
7 how their retirement savings are invested.

8 Fiduciary level advice is
9 particularly critical when Americans roll over
10 their 401(k) plan assets into IRAs. For many
11 Americans, whether to roll over and how to
12 invest that nest egg are among the most
13 important financial decisions they will ever
14 make. NAPFA believes that financial
15 professionals who provide retirement advice,
16 especially advice concerning ERISA-qualified
17 plans must always act in a fiduciary capacity.

18 NAPFA also called for the SEC to
19 include strong fiduciary standards and other
20 such as those under the CFP standards in its
21 2019 regulation best interest known as Reg BI.
22 NAPFA has continued to urge the SEC to do more

1 to protect retail investors and retirement
2 savers. Reg BI however does not solve the
3 problem of conflicted retirement advice since
4 Reg BI only applies to securities
5 recommendations, transactions involving non-
6 securities are not covered.

7 Equally as important, Reg BI does
8 not apply to ERISA retirement plan advice.
9 NAPFA believes that the protections available
10 to retirement savers under ERISA should exceed
11 those available under the SEC's Reg BI and
12 should apply to all retirement assets.

13 Critics argue that the proposed rule
14 would reduce access to retirement advice,
15 especially to middle income retirement savers.
16 We disagree with this assertion. The proposed
17 rule would not reduce access to retirement
18 advice to American households. NAPFA advisors
19 provide financial planning services and
20 retirement advice to clients from all
21 backgrounds and income levels.

22 I would like to also note that NAPFA

1 believes that financial planning is not just
2 for the wealthy. NAPFA and the NAPFA
3 Foundation have partnered with advisors to give
4 back a platform that allows NAPFA advisors to
5 provide pro bono financial planning services to
6 qualifying clients at no cost. Our advisors
7 can also volunteer to provide pro bono services
8 from the underserved communities through the
9 Foundation for Financial Planning.

10 I would now like to mention working
11 at Pioneer Wealth Management Group, which has
12 been servicing clients for 19 years and is
13 registered with the SEC as an RIA. Our team of
14 eight practice holistic financial planning and
15 investment management. We always act solely in
16 the best interest of each client we serve. We
17 provide financial planning services, ongoing
18 investment advice, and retirement advice based
19 on the individual needs of the clients. We
20 also provide consulting services for small
21 businesses.

22 We don't have asset minimums, which

1 makes it easier for us to offer our services,
2 including retirement advice to clients from a
3 range of income levels in a fiduciary manner.
4 How are we paid? Typically, we charge a flat
5 fee for financial planning and we charge an
6 asset management fee based on the amount of
7 assets the client would like for us to manage
8 for them. And in other circumstances, we may
9 charge an hourly fee. To minimize conflicts of
10 interest, we are all paid a salary. In other
11 words, we at Pioneer Wealth, we provide
12 fiduciary level services to clients that's
13 consistent with the Department's proposed rule.

14 So in conclusion, NAPFA believes
15 that the CFP standards are aligned with the
16 proposed rule and provide a workable framework,
17 which is used by CFP professionals today to
18 help the Department develop and implement the
19 proposed ERISA fiduciary definition. We
20 encourage the Department to adopt new
21 regulations that do not merely mirror language
22 from the SEC's regulation best interest, but

1 instead would establish and strengthen
2 safeguards under ERISA to protect retirement
3 savers against conflicts of interest.

4 The proposed rule is a major step
5 forward to update and strengthen the fiduciary
6 standard of care for the millions of
7 hardworking Americans with retirement plans.
8 NAPFA commends the Department for taking this
9 important step to protect retirement savers.

10 I thank you for this opportunity to
11 testify in support of this proposed rule. I'm
12 happy to take your questions.

13 MR. KHAWAR: So Ms. Jordan, I had a
14 couple of questions for you. And thank you to
15 all the witnesses for your testimony. You
16 know, one of the things we heard earlier this
17 morning and certainly yesterday is the concept
18 of a sales person that is providing best
19 interest recommendations that are based on the
20 individualized circumstances of the customer.

21 And I have two questions for you
22 about this. The first is when you're

1 interacting with clients, is it your experience
2 that they understand the difference between the
3 kind of services you're providing and what they
4 should expect from a sales person?

5 MS. JORDAN: Sure. So we do have
6 clients who come to us directly who are looking
7 for the fee-only experience. We often have
8 clients who come to us after having an
9 experience with a sales person. There are
10 times when after I understand their
11 circumstance, maybe I will refer them to a
12 trusted sales person to get them the life
13 insurance they need, et cetera.

14 There is general confusion sometimes
15 with clients, so that's why NAPFA consistently
16 works to help consumers understand the
17 difference of compensation methods. And the
18 last thing I will say is I do take the time to
19 educate clients so everything is transparent
20 and so they have an understanding and they can
21 see the differences. I hope that answered your
22 question.

1 MR. KHAWAR: Yeah, it's fine. My
2 other question is when you're dealing with
3 perspective customers, are you providing -- how
4 are you interacting with them? Are the
5 potential recommendations that you're making at
6 that stage before you formally execute an
7 agreement in the client's best interest?

8 MS. JORDAN: So there's usually a
9 discovery meeting or an engagement meeting
10 where there's lots of questions answered. I'm
11 listening to the clients and hearing their
12 goals, et cetera. And there's also data
13 gathering where we see a lot of primary details
14 that we analyze. So that all helps us to make
15 recommendations and build models and show the
16 clients things, but to give them
17 recommendations that are in their best
18 interest. So it's not in isolation or in
19 darkness. We have to see information. We have
20 to talk to them and get to know them.

21 MR. KHAWAR: Okay, thank you.

22 MS. WILKER: Ms. Jordan, I'll

1 actually follow up on that. You mentioned the
2 fiduciary oath and the code of ethics also
3 involving a disclosure. I'm wondering if you
4 could speak a little bit about how you think
5 about the disclosure. We have some request for
6 comment about what disclosures are effective
7 and if you have any thoughts on that.

8 MS. JORDAN: So your question is how
9 do we disclose any possible conflicts of
10 interest?

11 MS. WILKER: And how to make sure
12 that the disclosures are effective to the
13 investor receiving the disclosure. We had some
14 testimony yesterday about the amount of
15 disclosures that investors receive.

16 MS. JORDAN: Yeah. So I'm a former
17 educator, so I try to put things in a simple
18 way for my clients, but I realize that they're
19 professional adults. So for example, if I'm
20 referring a client to an estate attorney, I use
21 the simple example of if I'm related to this
22 estate attorney, he's my uncle, that I'm going

1 to disclose that to you so you're aware of that
2 and you're going to get three choices to make
3 so you can vet and see who you like best.

4 Secondly, there's a lot of
5 documentation in our corner of the world. So
6 disclosures are made verbally. They're also
7 placed in writing in our notes. And also given
8 to the clients in writing in an email as well.
9 Does that answer your question?

10 MS. WILKER: Yes, thank you.

11 MS. JORDAN: Okay, great.

12 MR. HAUSER: This question is for
13 Mr. Mahoney. Thank you very much for your
14 clear and thoughtful testimony. As I
15 understood what you were saying, you'd like
16 more compliance, assistance, and guidance up-
17 front. You'd like us to speak to the extent to
18 which satisfaction of other regulatory
19 requirements can count as satisfaction of this
20 regulatory package. You'd like a longer
21 transition period. And I assume all of this
22 will be elaborated upon in your written

1 comments.

2 But one comment you made I wasn't
3 quite sure what you had in mind and maybe I
4 just need to wait to read your written
5 submission. But you mentioned that you thought
6 a phased-in kind of approach to the rule might
7 make sense. And I was wondering what you had
8 in mind there or if you could be any more
9 specific just yet?

10 MS. WILKER: Mr. Mahoney, you might
11 be on mute.

12 MR. MAHONEY: There you go.
13 Technology always wins. So yeah, Tim, it
14 depends upon the perspective upon which you're
15 viewing it. Our members vary across the
16 nation. Some are solo practitioners, some are
17 small three or four person shops like my friend
18 here, a little bit bigger, seven or eight
19 folks, then the larger firms. And depending
20 upon the perspective that you're coming at,
21 some of this can be easier than others.

22 As mentioned in my testimony, there

1 are different interpretations for example of
2 the term "fiduciary", which is part of the
3 problem of conflict. If it meant the same
4 thing everywhere to everybody and was clear,
5 those who already held to a standard would
6 likely have no issues with the proposal and not
7 even have to bother to read it. But that's the
8 problem because it's not necessarily universal.

9 Indeed our members who are
10 fiduciaries have concerns despite reviewing it.
11 That's the biggest reason that we think it
12 would be helpful for the Department to help us
13 with the understanding of its intent with a
14 side by side comparison. It comes down to
15 defining what's required and what's required to
16 adhere it. The same to best interest, the
17 distinctions between the two is dictated more
18 by the Agency, as well as the specific rule
19 requirements, which might be the cause of the
20 confusion not just within the industry, but for
21 the consumer.

22 For example, one agency can call

1 something a fiduciary standard but has less
2 requirements than those best interest standard.
3 And at the end of the day, it's a long way of
4 staying that this underscores the need for help
5 from the Department on reconciling the
6 patchwork. And I really commend the Department
7 for taking this on because it's sorely needed.
8 And to help the patchwork and the financial
9 professionals around the country that are
10 serving them, that gives us clarity to serve
11 them better.

12 But it depends on what patch of the
13 garden you're coming from. If you have a lot
14 of deep compliance infrastructure already in
15 your shop, not such a big problem. If you're
16 on your own, you're a mom and pop operator on
17 Main Street in Iowa, it's a little bit more of
18 a challenge. And we're trying to be equally
19 considerate of everybody.

20 MR. HAUSER: Thank you. That's very
21 helpful.

22 MR. MAHONEY: You're welcome.

1 MR. HAUSER: I don't think I have
2 anything further.

3 (Simultaneous speaking.)

4 MS. LLOYD: You talked in your
5 testimony about the use of titles and what that
6 conveys to consumers. And in our proposal, we
7 asked for a comment on whether there are other
8 types of conduct that we should, you know,
9 think about or consider that similarly conveys
10 to consumers, you know, what the nature of
11 their relationship is. I'm wondering if you
12 can expand on your discussion in that way or at
13 least put that in your comment or think about
14 that for your comment.

15 MR. MAHONEY: Yeah, we intend to
16 expand upon that in our comment letter.

17 MS. LLOYD: Thank you.

18 MR. MAHONEY: You're welcome.

19 MR. HAUSER: Are there any additional
20 questions for the panel? Okay. Well, thank
21 you all very much for your testimony. We're
22 back at 11:00, I think. Thank you.

1 (Whereupon, the above-entitled
2 matter went off the record at 10:40 a.m. and
3 resumed at 11:00 a.m.)

4 MR. HAUSER: Welcome back,
5 everybody. We'll get started with Panel 3,
6 which is I think Benjamin Edwards is first up.

7 MR. EDWARDS: Yes. Can you hear me?

8 MR. HAUSER: Yes, thank you.

9 MR. EDWARDS: Excellent. So first,
10 thank you so much for the opportunity to come
11 and speak today. My name is Benjamin Edwards,
12 I'm a law professor at the William S. Boyd
13 School of Law at the University of Nevada, Las
14 Vegas where I research and write about
15 securities law, you know, business
16 organizations, corporate governance. And much
17 of my research and work focuses on the
18 regulation of investment advice. And so this
19 is a topic I have followed, you know, fairly
20 closely for the entirety of my career.

21 So at the outset, I would like to
22 deliver sort of a big warning to the Department

1 of Labor that you are likely to face, you know,
2 a flood of dubious arguments. You know, in
3 this space, what we've seen in the past is
4 whenever you try to do something about
5 conflicting investment advice, the industry
6 will often flood the zone with these kinds of
7 arguments.

8 I'm going to give you an example
9 from Nevada's history. We have a state
10 fiduciary statute, which other states do not
11 have. And at the, you know, initial effort to
12 create some rules under that statute, the
13 industry, including some of the, you know,
14 organizations testifying here today, you'll
15 sent it letter after letter, you know, opposing
16 any kind of rulemaking. And arguing that under
17 the, you know, NSMIA statute that the states
18 were precluded from making any rule because it
19 would interfere with the SEC's sole authority
20 for record keeping.

21 Essentially the statute says that
22 the SEC is the only entity that can make rules

1 for how brokerages are to keep the records.
2 And letter after letter poured in citing the
3 same provision. And what you did not see was
4 the entirety of the provision that was being
5 cited. The industry had, you know, across the
6 board truncated the very last sentence, you
7 know, of that section that said that the SEC
8 had to consult with the states as to the
9 adequacy of the record schools.

10 And the lesson I would encourage you
11 to take from this is just because you are
12 presented with something that reads a
13 particular way, don't assume that it is
14 actually correct. You're going to need to go
15 and look at the statute yourself. You're going
16 to need to read the case yourself. I've seen,
17 you know, things miscited, you know, so often.
18 And this is the sort of thing that people would
19 never be able to get away with in ordinary
20 litigation where the other side gets a reply
21 brief. But in a notice and comment process,
22 you will likely get flooded with these kinds of

1 dubious arguments.

2 So another dubious argument you're
3 already undoubtedly receiving is that making
4 this kind of rule would restrict people's
5 ability to access advice and would harm people
6 because it would deprive them of access, you
7 know, to advice. So at the outset, you need to
8 know that the disposition is -- and at the very
9 least, highly disingenuous when many of the
10 organizations testifying here today were
11 appearing before the Fifth Circuit and arguing,
12 you know, that the prior iteration with
13 fiduciary rulemaking needed to be struck down.

14 They told the courts that the people
15 who were selling products were mere sales
16 people and that they were just sales people.
17 And it was just a sales relationship, an arm's
18 length relationship. This is simply, you know,
19 not true. Ultimately, you know, the advice,
20 you know, people get really matters. But often
21 times what people are not getting under their
22 current system, it's not actually advice. It's

1 a sales pitch. So they may, you know, no
2 longer getting a particular sales pitch, but it
3 should not be read to mean that they're not
4 getting, you know, thoughtful, useful advice,
5 you know, for their circumstance.

6 And here it is really important that
7 we get make sure we get advice right. The
8 advice in this context, you know, really
9 matters because people don't just try to go out
10 and do this themselves. They understand that
11 they don't know enough about the area and so
12 they will often, you know, seek out people who
13 portray themselves, you know, as experts who
14 portray themselves as knowledgeable. And you
15 know, the reason they're doing this is because
16 they don't know, you know, what they're doing.
17 In this kind of context, what you're looking at
18 is a relationship of trust and confidence.
19 Ordinarily you would expect state law to
20 automatically imply some kind of fiduciary duty
21 in that circumstance where you have vulnerable
22 people reaching out. But that simply, you

1 know, hasn't been the case.

2 So the other thing that's really
3 critical is at the point where people are
4 beginning to seek to access their retirement
5 assets, when you're thinking about, you know,
6 401(k) plans, IRAs, and these other assets,
7 they've accumulated in a largely fiduciary
8 environment for a long time. This often
9 coincides with the beginning of a more
10 significant cognitive decline for many people.

11 So you have, you know, folks who've
12 accumulated assets in a fiduciary environment
13 who are now no longer as able to fend for
14 themselves in a free market as they might
15 otherwise, you know, be, who are ripe to be
16 fleeced as they are beginning to experience
17 cognitive decline. So one of the things we
18 know is that the rates of dementia after, you
19 know, roughly 65 double essentially every five
20 years. And so, you know, when you have people
21 trying to manage those funds, it's really
22 critical that they get advice that's in their

1 best interest. We should not assume that they
2 are, you know, able to effectively, you know,
3 fend for themselves for a variety of reasons.
4 You know, diminished capacity, limited
5 financial literacy, you know, there's a whole
6 host of reasons.

7 Rulemaking in this space is also
8 critically important because it's an area where
9 courts have largely not been able to get
10 involved for decades. So the industry,
11 particularly the securities industry, you know,
12 by and large has required everyone who has
13 these kinds of accounts or wants to open a
14 brokerage account to sign, you know, a pre-
15 dispute arbitration agreement. And
16 functionally what this means is that all
17 disputes over how the account was handled or
18 what happened are going to be resolved through
19 arbitration.

20 That does not give an opportunity
21 for ordinary courts of first impression to
22 update the law, you know, as time passes to

1 account for changing circumstances. And so
2 here, this is the world we live in now where
3 you have, you know, dispute after dispute being
4 decided, which an ordinary common law (audio
5 interference) which actually generate, you
6 know, more law and more guidance around what's
7 appropriate. But we don't have that because it
8 all goes through arbitration.

9 You know, you may ultimately have
10 some contact with the court system with these,
11 you know, provisions or you know, being
12 affirmed or you know, you have awards being
13 affirmed or vacated, but that doesn't get you
14 to, you know, any real meaningful
15 interpretation of the law. So the law here has
16 largely been stagnant for 20+ years. And so
17 rulemaking is a way to change it that's
18 critical.

19 I would also encourage you to
20 recognize that fiduciary rulemaking and
21 managing conflicts of interest are absolutely
22 critical for capital flows and for how, you

1 know, our nation as a whole is able to allocate
2 capital. So the way to think about this is,
3 you know, people who are offering investment
4 products or securities to the public, they
5 compete against other businesses that are
6 looking to raise capital as well. Now they
7 compete on, you know, the merits and the risks
8 of their particular offerings and that's, you
9 know, ideally how the system would work.

10 Unfortunately, they also have to
11 compete along another access, which is how much
12 of a kickback or how much of a transaction fee
13 they're willing to pay someone in order to get
14 the capital they need. So here in this, you
15 know, conflict ridden system, you have, you
16 know, businesses raising money that are being
17 forced to pay more and more in order to compete
18 with others who are also paying more and more,
19 you know, to the intermediaries.

20 And one general rule of thumb that
21 you should always remember in this context is
22 that, you know, the bigger the commission or

1 the bigger the payout on a particular product
2 for the person selling it to an investor, the
3 less good it is likely to be for the investor
4 or the terms are not as likely to be as
5 generous. And the idea here is simply that,
6 you know, that money being used to pay the
7 Commission has to come from somewhere.

8 So in a situation like we see today
9 where you have an enormous amount of, you know,
10 fixed indexed annuities or other products being
11 sold, you know, sadly the current best interest
12 regulation from the National Association of
13 Insurance Commissioners doesn't even treat that
14 as a conflict even though that is the reason
15 why people want to sell those products over
16 other products because if they don't, they'll
17 get pushed out of the industry by people who
18 make the money. The people who actually do
19 sell the conflicts with the kickbacks and the
20 commissions.

21 So with that, I thank you for the
22 opportunity to speak and testify today. And I

1 will yield the remainder of my time.

2 MR. HAUSER: Thank you. Let's see,
3 I think Ms. Chism, I think you're up next with
4 the Investment Company Institute.

5 MS. CHISM: Yes. Can you hear me
6 okay?

7 MR. HAUSER: Yes, thank you.

8 MS. CHISM: Great. Good morning.
9 Thank you for the opportunity to testify today.
10 My name is Elena Barone Chism and I am the
11 Deputy General Counsel for Retirement Policy at
12 the Investment Company Institute.

13 So ICI strongly supports efforts to
14 promote retirement security for U.S. workers.
15 Our members play a significant role in helping
16 retirement savers by making available the
17 investment products through which pension
18 plans, defined contribution plans, and IRAs
19 invest. As fiduciaries, our members manage
20 retirement assets to the highest standard,
21 whether it be ERISA fiduciary standards for
22 plan asset vehicles or as investment advisors

1 registered under the Advisers Act managing
2 regulated funds and client accounts.

3 We support the principle underlying
4 the proposal that a financial advisor should
5 put the interest of its clients first when
6 providing advice. But there's a difference
7 between this principle and what the proposal
8 would appear to do, which is to impose ERISA
9 fiduciary status on a wide range of investment
10 communications by anyone in the financial
11 services business.

12 The fiduciary standard should apply
13 only in the context of an established
14 relationship of trust and confidence. By
15 applying that standard too broadly, the rule as
16 proposed will limit investors access to needed
17 financial information and could ultimately
18 raise the cost they bear while saving and
19 investing for retirement.

20 Before discussing some of the
21 specifics, I want to make a point up front
22 about process. The Department has not provided

1 ICI, our members, and the rest of the regulated
2 community sufficient time to properly review
3 and analyze this proposal. The 60-day comment
4 period limits the ability to develop meaningful
5 input on a proposal with such far reaching
6 implications. As we explained in our extension
7 request, the Department had provided much
8 longer comment periods in prior iterations of
9 this proposal. And in this case, the
10 Department has given only 39 work days. And
11 then holding the hearing just six weeks into
12 that comment period detracts from the comment
13 development process and limits the utility of
14 the hearing itself.

15 We think these process concerns
16 alone warrant the Department withdrawing the
17 proposal, but I want to highlight a few other
18 factors that weight against proceeding with it.
19 First, only a few years ago, the Department
20 issued a new protective exemption, PTE 2020-02
21 setting parameters around advice to retirement
22 investors. It has not provided any evidence

1 demonstrating that the exemption is not working
2 as intended. The Department should let the
3 regulated community continue implementation of
4 that exemption without prematurely making
5 significant changes to it. And we do view the
6 changes -- the proposed changes as significant.
7 As the Department stated just three years ago,
8 PTE 2020-02 provides clear regulatory standards
9 that ensure American workers and retirees have
10 access to high quality, affordable investment
11 advice.

12 Second, as the proposal notes, the
13 regulatory landscape today is very different
14 than it was even just five years ago. Other
15 regulatory changes have resulted in the broader
16 application of best interest standards. In
17 2019, the SEC adopted regulation best interest
18 for broker dealers, recommending securities,
19 transactions, or strategies to retail
20 customers. Firms have put substantial
21 resources into implementing Reg BI. And in
22 2020, the National Association of Insurance

1 Commissioners adopted a model best interest
2 standard for annuity product sales, which in
3 turn has been adopted by the vast majority of
4 states.

5 These standards, particularly when
6 added to the existing 5-part test under ERISA
7 in the duties applicable to investment advisors
8 under the Federal Securities Law collectively
9 cover recommendations involving most types of
10 investment products commonly offered to
11 retirement investors. Consequently, any
12 supposed benefits associated with expanding the
13 application of the Department's fiduciary
14 definition are greatly and necessarily
15 diminished compared to 2016.

16 These supposed benefits would be
17 outweighed by the cost of reducing access to
18 financial information and the burdens of
19 complying with the proposed revisions to PTE
20 2020-02. Despite this, the Department's
21 regulatory impact analysis fails to
22 comprehensively account for the significant

1 changes that have occurred since 2016 or to
2 provide a benefit estimate. Additionally,
3 while estimating significant costs of
4 implementation, the Department still
5 significantly underestimates these costs.

6 Another crucial factor to consider
7 is the recent judicial scrutiny of the
8 Department's prior attempts to expand the
9 fiduciary advice definition. We believe that
10 the proposal does not adequately account for
11 the Fifth Circuit decision and once again
12 exceeds the trust and confidence standard. As
13 written, the regulations language is no more
14 narrowly tailored than the 2016 regulation. If
15 this rule is finalized, it's strong resemblance
16 to the 2016 rule leaves the rule vulnerable to
17 another successful legal challenge.

18 We note that the new proposal could
19 be plagued by additional vulnerability relating
20 to the regulatory impact analysis, which as I
21 mentioned earlier has considerable flaws.
22 There would be a strong basis for a court to

1 find that this RIA fails to meet the standards
2 applicable under the APA. Under the APA, it's
3 incumbent upon the Department to show that the
4 benefits of a proposal will outweigh the costs.
5 We are concerned that this RIA fails to
6 quantify any purported benefits, while grossly
7 underestimating the cost of the changes in
8 terms of both the direct costs of
9 implementation and the cost to investors for
10 loss of access to information and assistance.

11 The IRA does not provide a basis for
12 sound rulemaking that is consistent with the
13 requirements of the APA. If the Department
14 moves forward with the changes to the advice
15 definition, the proposal must be narrowed and
16 provide clear guidelines. It must ensure that
17 typical marketing and financial education
18 related communications are not subject to
19 fiduciary standards.

20 Some of the areas that must be
21 addressed include platform providers, assisting
22 plan sponsors with platform selection, RFP

1 responses, and other "hire me" situations, call
2 center representatives responding to questions
3 from plan participants, and communications
4 between asset managers and financial
5 institution intermediaries.

6 On that last point, while we do
7 appreciate the Department's commentary,
8 attempting to clarify that it does not intend
9 to cover wholesaling activities by product
10 manufactures, the text of the rule itself must
11 be clearer. One way the Department might
12 address these concerns is through the provision
13 of clear examples in the regulation itself.
14 Our written comments will also address several
15 concerns with the proposed changes to PTE 2020-
16 02 and the other existing exemptions available
17 in the advice context.

18 We disagree with the Department's
19 stated intention of providing a one size fits
20 all or fits most exemption. Exemptions are
21 more effective at both protecting the rights of
22 participants and enabling the provision of

1 necessary services to plans if they are
2 tailored to apply to specific situations. The
3 Department has used this more tailored approach
4 for decades. Rather than leveling the playing
5 field, the application of one set of conditions
6 to all instances of advice, especially the
7 broad range of activities contemplated by this
8 definition will result in less assistance to
9 plans, plan participants and IRA owners and
10 fewer options in the marketplace.

11 In conclusion, ICI strongly urges
12 the Department to reconsider this rulemaking in
13 light of the changes to the regulatory
14 framework since 2016 and the potential that
15 finalizing the rule could introduce another
16 round of regulatory instability. We appreciate
17 the opportunity to present these views. Thank
18 you.

19 MR. HAUSER: Thank you. Mr.
20 Peiffer.

21 MR. PEIFFER: Yes. Thank you very
22 much. Today I'm here on behalf of investors,

1 myself and my colleagues at PIABA have
2 represented. PIABA is a bar association of
3 hundreds of attorneys around the country that
4 have dedicated their lives to representing
5 investors that have been the victim of
6 financial misconduct.

7 Our clients are people who
8 invariably trusted their financial
9 professional. After all, the vast majority of
10 these investors gave their entire life savings
11 to their broker. None of the people that
12 myself or my colleagues have ever represented
13 realized that their broker might be held to a
14 standard anything below that of a doctor or an
15 attorney. It's not like people come out of the
16 womb believing that brokers have a fiduciary
17 duty to them. No, it's because they've been
18 told time after time by the financial services
19 industry that their advisor has to live up to
20 that duty.

21 For years, brokerage firms
22 advertisements have said things like "they will

1 not rest until their client knows she comes
2 first" or stating flatly, "our advisors are
3 ethically obligated to act with your best
4 interest at heart." There's dozens and dozens
5 of examples of advertising like this that go
6 back decades.

7 And it's no surprise that academic
8 studies that have looked at this issue
9 concludes what is obvious to anyone who's ever
10 met an investor that's been the victim of
11 conflicted advice. That is, investors do not
12 know the duties that their financial
13 professionals owe to them. One thing is clear,
14 right now the very same brokerage firms that
15 advertise like fiduciaries routinely dispute
16 that they owe a fiduciary duty to their clients
17 in litigation. Brokerage firms advertise like
18 they have the duties of doctors, but they
19 litigate like they have the duties of used car
20 salesmen.

21 A Department of Labor rule would go
22 a long way toward holding firms accountable in

1 retirement accounts for the duty they already
2 say they have and investors already think they
3 have.

4 What does this mean on an individual
5 level to investors? Almost every week, we see
6 a retiree come into our office who lost a
7 substantial amount of their life savings.
8 They're often proud, strong workers. These
9 people if they go on vacation at all, they go
10 on vacation in a car like I did when I was
11 growing up. They've saved to pay off their
12 house, put their children through college, and
13 they built a nest egg all on a blue collar
14 wage.

15 Now these proud, strong Americans
16 break down in my office when I explain to them
17 how their investment was lost to conflicted
18 advice. I've had clients live with me because
19 they couldn't afford the fuel and the lodging
20 to go back and forth for a long trial. I've
21 had a client who lost all his money and had to
22 rent a room from his ex-wife. And if that

1 isn't that the worst thing that you ever heard,
2 I've had clients who've attempted suicide after
3 they lost their life savings.

4 I know and my colleagues know the
5 devastation that losing your life savings can
6 have on hard working Americans. And this rule
7 will make it better. As an example of how this
8 would help, I want to tell you about a group of
9 Niagara Mohawk employees that are represented
10 in upstate New York. These blue collar workers
11 have built up enough years of service that they
12 can live out their days taking monthly pension
13 checks and supplementing that with other money
14 that they've saved.

15 However, the broker advised them to
16 pull their money out of the traditional pension
17 plan and roll that out into the brokerage firm
18 where they were subject to conflicted advice.
19 If these investors had left their money in the
20 pension plan, the broker would have made no
21 commission, but the investors would have had
22 guaranteed monthly income.

1 After following the broker's advice,
2 my clients lost more than half their life
3 savings, had no pension income, but the broker
4 made large commissions. And when called to
5 account for his advice, the broker in his firm
6 denied that they had a fiduciary duty. And in
7 that case, the Arbitration Panel bought it. My
8 clients lost that case and they're living on
9 social security and the small amount of money
10 they have left.

11 Now this rule doesn't just help
12 investors, it also helps ethical advisors. One
13 of my best friends, and this is real, is a
14 financial advisor. He describes -- He's a good
15 guy. I don't just say that even just for the
16 jokes. He really is. He's my best friend and
17 he's a good person. And he describes his job
18 as protecting his clients from the firm he
19 works for. This rule will give good brokers a
20 tool to say to their firms when they come to
21 them with unscrupulous sales tactics, no, I
22 have a fiduciary duty to these retirees. And

1 it evens the playing field for advisors who
2 already do the right thing by acting in their
3 clients best interest. So it helps investors
4 and it even helps advisors.

5 I urge the Department to implement
6 this rule and I appreciate the time and I yield
7 the rest of it. Thank you.

8 MR. KHAWAR: So Ms. Chism, just a
9 threshold question for you. Are there
10 instances where members of your association are
11 acting as sales people when they're engaged in
12 a retail relationship? I understand your point
13 from your testimony about the sophisticated
14 counter party piece, but when they're dealing
15 with a retail customer, are there instances
16 where they are acting as a sales person?

17 MS. CHISM: Yeah, I mean I think
18 there are a lot of different context in which
19 this could come up. You know, call centers
20 participants calling into plan call centers
21 asking for help. You know, a lot of different
22 context. But you know, I think that the basic

1 issue here is that the proposal casts a lot of
2 doubt over the ability to discuss specifics of
3 an investment strategy or an investment without
4 crossing the line. I think you should be able
5 to explain who or what your product is intended
6 for and even promote its attributes, but with
7 the subjectivity of the facts and circumstances
8 test and the preambles explicit rejection of,
9 you know, the dichotomy between sales and
10 advice, it's hard to interpret the proposal as
11 allowing some of these conversations. And so,
12 you know, in our comment letter, I think we'll
13 provide more detail on some of the situations
14 that you're asking about.

15 MR. KHAWAR: I appreciate that. So
16 a follow-up for all three of you. Could you
17 talk a little bit about how you see from the
18 retail customer perspective, an understanding
19 of the distinction between a sales
20 relationship? And we heard earlier today about
21 this concept of a sales relationship that's in
22 the customer's best interest. But how they can

1 distinguish between that kind of best interest
2 relationship and the fiduciary relationship.
3 And what are the ways in which those consumers
4 are kind of educated and understand that no,
5 this is a -- this is a sales relationship or
6 this is a fiduciary relationship? What are the
7 ways in which that happens? And again, that's
8 really for all three of you.

9 MR. PEIFFER: I mean I'll start. I
10 don't think they do know. You know? I really
11 don't think anyone that -- I've represented
12 thousands of clients and collectively the
13 members of PIABA have represented tens of
14 thousands, if not hundreds of thousands of
15 investors -- retail investors. And there's not
16 a one of them that comes into our office and
17 understands well, gees. This person is just a
18 sales person. Nobody thinks that.

19 These people, you know, often --
20 Look, I've represented everybody from
21 illiterate plant workers, all the way up to
22 neurosurgeons. And so it's not even an

1 education issue. It's just, they don't know
2 because they're not in the investment space.
3 And they're told repeatedly through marketing
4 that the brokerage firm will act in their best
5 interest and that is why they give them all
6 their money. You wouldn't give everyone --
7 these people all your money if you thought it
8 was a sales relationship. So they don't really
9 know.

10 And the firms and the brokers, you
11 know, will talk about how they're going to do
12 things like they would do it for their mom or
13 do things how they would do it for their
14 grandpa or whoever. So they're implying that
15 they have a fiduciary duty. But the problem is
16 when they're called to account on it -- for it,
17 when the advice is conflicted and wrong and
18 harms the investor, is that's nowhere to be
19 seen anymore. We're just a salesperson.

20 And so from my experience, and I've
21 got a decent finger on this pulse because I
22 meet with a lot of investors, nobody

1 understands the difference between a sales
2 person and the different duties that they're
3 owed. But somebody else might have a different
4 experience.

5 MR. KHAWAR: Okay, thanks. Ms.
6 Chism, from your perspective, same question.

7 MS. CHISM: Sure. So I would
8 hesitate to comment on any particular
9 individual's understanding of sales versus
10 advice. But I would say simply that, you know,
11 if the person across the table is not getting
12 any compensation unless the sale takes place,
13 then I would understand that to be in the sales
14 context.

15 MR. KHAWAR: Okay. Can I slightly
16 reframe the question just to make sure I'm kind
17 of getting at the point? So appreciate, you
18 know, you can't get in someone's head. I think
19 what I'm trying to understand is how does --
20 are there ways in their practices in that sales
21 context? Because a lot of what we've heard in
22 testimony are practices that look actually very

1 similar between the fiduciary best interest
2 relationship and the sales best interest
3 relationship. And is the thing that we should
4 be kind of hanging our hat on is that consumers
5 should understand that if this is a commission
6 relationship and the individual won't get paid
7 unless they purchase that product that, that's
8 a sales relationship. And therefore kind of
9 the consumer protections and the regulatory
10 framework are going to be different as a
11 result. And that's kind of the way we should
12 view the world. That's kind of my question.

13 MS. CHISM: So I mean for me it just
14 goes back to kind of the relationship that
15 exists, you know, going into the conversation.
16 There are just so many different, you know,
17 specifics, different hypotheticals. And you
18 know, I just think that it really depends on,
19 you know, the specific circumstances. And
20 again, is there an existing relationship of
21 trust and confidence when the conversation is
22 taking place?

1 MR. KHAWAR: And Mr. Edwards, that's
2 not a question, but I would say particularly
3 your fairly alarming comments about cognitive
4 decline. I mean how should we be thinking
5 about this distinction between the sales
6 relationship and the fiduciary relationship?

7 MR. EDWARDS: So at the outset,
8 people have a very hard time distinguishing. I
9 can speak to this both as an academic who's
10 reviewed a lot of literature and also someone
11 who's represented investors. I used to run a
12 pro bono law clinic, you know, focused on
13 helping investors who had been harmed by
14 conflicting financial advice. So in those
15 circumstances, what we, you know,
16 overwhelmingly see is that people simply do not
17 understand at the outset. Like they don't
18 understand how the advice giver is compensated.

19 They don't understand, you know,
20 differential commission. So they may
21 understand that maybe there's a -- you know,
22 they get paid if you sell something. But they

1 don't understand that you get paid five times
2 as much for selling a non-traded REIT or
3 indexed annuity versus, you know, an ordinary
4 mutual fund. They simply don't understand
5 that.

6 There's a lot of, you know,
7 evidence. You can look back at the, I think it
8 was the 2010 SEC study on the difference
9 between brokers and investment advisors.
10 There's a RAND study. You know, all those
11 things, you know, overwhelmingly found that
12 people simply, you know, do not understand
13 differences between brokers, registered
14 investment advisors, and insurers.

15 Practically speaking, it's also very
16 easy to see how people aren't going to
17 understand the difference because you have
18 different best interest standards that mean
19 different things. This is, you know, it's such
20 double talk that, you know, best interest means
21 one thing in a securities context. Best
22 interest means another thing in the insurance

1 context. But, oftentimes, it's the same person
2 selling both insurance and securities. So if
3 you've got someone with a license to sell
4 securities and a person with a license to sell
5 insurance, they just sort of switch their hats
6 as the conversation goes along. And the person
7 on the other side simply, you know, really
8 doesn't understand.

9 The SEC tried to address this with
10 it
11 Form CRS, you know, reform around the time of
12 Reg BI. To my knowledge, there has not been
13 any research showing that Form CRS has made any
14 difference at all in terms of how investors
15 understand the relationship between brokers and
16 advisors. I recall seeing -- and I'll try to
17 include this in my written comments, you know,
18 some research showing that an astonishing
19 percentage of people who work with financial
20 advisors have no understanding of how their
21 financial advisor is compensated.

22 And so, ultimately, you know, in

1 this kind of context, there just is not any
2 kind of clarity on the back. You know, like
3 retail investors do not understand this. And
4 financial advisors and product sales people
5 also do a very bad job of educating their
6 clients about these issues. And they have an
7 incentive to do a bad job because if you
8 understand that you're sitting at a table with
9 a shark who's going to take a bite out of you,
10 you're going to leave. You know, so
11 investors are not -- if they understood that,
12 you know, they're going to put their money in
13 prison for a decade in order to, you know,
14 access this product and the guy was going to
15 walk away with a \$10,000 payment right away and
16 no continuing obligation to them, you know,
17 they wouldn't even go through with it. But you
18 know, that's how the market stands right now.

19 MR. KHAWAR: Okay. Thank you all
20 three for your testimony and your answers.

21 MR. HAUSER: Ms. Chism, I had maybe
22 just one question, I think. And that's, you

1 made a reference to a belief that maybe there
2 should be more exemptions for those people that
3 are fiduciaries that are tailored to the
4 specific markets in which they operate as
5 opposed to, you know, 2020-02 and 84-24
6 standing alone. And I guess, I mean as I view
7 both those exemptions, they're mainly just
8 about prudence, loyalty, not overcharging
9 people, and not making misleading
10 communications. And outside of those broad
11 parameters and having policies and procedures
12 to make sure those thing happen, they kind of
13 leave the operationalizing of those things to
14 the firms. And I'm wondering, I mean are there
15 specific market segments that you think
16 shouldn't have prudence, loyalty, not
17 overcharging, not making misleading statements
18 requirements? What did you mean and what did
19 you have in mind by more specific exemptions?
20 And why are these four particular duties
21 problematic for any one market segment?

22 MS. CHISM: No, sorry. I didn't

1 mean to imply -- I don't think that we would
2 have a problem applying the impartial conduct
3 standards, which I think is what you're getting
4 at, in the context of the other exemptions. I
5 think it's more the other specific compliance
6 obligations, especially as PTE 2020-02 is
7 proposed to be revised that I don't think, you
8 know, fit well with every situation. And I
9 think our comment letter will, you know,
10 provide more detail on that.

11 MR. HAUSER: Okay. Yeah, whatever
12 you can provide us in the comment letter on
13 that score would be helpful, I think. And just
14 a couple times in your testimony -- I said one
15 question, but of course, I thought of a second
16 one. But in your testimony, you referred a
17 number of times to an established relationship.
18 And I'm just wondering what work are those
19 words meant to convey? I mean so are you
20 suggesting that it's not possible for somebody
21 to have the right kind of relationship of trust
22 and confidence if for example, this is the

1 first recommendation of a plan of how to invest
2 plan assets that they've ever received from
3 this particular person. Do they have to have
4 had a preexisting relationship to place trust
5 and confidence in the advisor? What do you
6 have in mind there?

7 MS. CHISM: Yeah, I don't in fact in
8 principle that a one-time recommendation to be
9 protected. And I think that they are, you
10 know, at least when it comes to securities
11 recommendations, they are protected by best
12 interest standard. But you know, in terms of
13 applying the ERISA fiduciary standards, I think
14 getting there is frankly tough under the
15 current statutory framework, you know, as
16 interpreted by the Fifth Circuit.

17 So, you know, I think it's just
18 there's sort of, you know, a jurisdictional
19 issue and a statutory authority issue. You've
20 got a federal appellate court opinion kind of
21 laying out what the, you know, what the ERISA
22 fiduciary context requires. And you know, so I

1 think that definitely one-time recommendations
2 would be tough. But I think again, many of
3 them are covered by best interest standard.

4 MR. HAUSER: Okay. But just
5 conceptually, so putting aside for the moment
6 one's interpretation of the Fifth Circuit's
7 opinion, which you know, obviously we do think
8 can be square with first time advice --
9 assuming you have the right kind of
10 relationship. I mean but putting aside the
11 legal issue, I guess I'm just asking do you
12 have any reason to believe any data to support
13 the proposition that people can't have, you
14 know, that same kind of trust and confidence
15 relationship with somebody based on, you know,
16 their first time interactions with somebody on
17 a major decision like a rollover decision?

18 MS. CHISM: No. I think, you know,
19 again, when you're talking about a first-time
20 interaction, you know, a lot of times what I'll
21 call the advice provider, the provider will be
22 talking about their services and you know, what

1 they can offer. And I think the perspective
2 client, you know, will often times have
3 questions about, well what would you do for me?
4 You know, what strategies would you use if I
5 hired you? You know, they have some
6 expectation to talk about customization, you
7 know, and just what exactly would your plan
8 look like.

9 And I think, you know, that's a
10 context, you know, involving a first time
11 discussion. And I just don't -- I think that,
12 you know, again, there a lot of different
13 hypotheticals or scenarios that you could come
14 up with. But I think that it's difficult to
15 apply a fiduciary -- to apply fiduciary status
16 before the relationship is actually established
17 and you have been hired.

18 MR. HAUSER: Would it matter if the
19 person had previously been given advice with
20 respect to other assets that the person had
21 while you're thinking of it?

22 MS. CHISM: It could.

1 MR. HAUSER: Or with respect to non-
2 plan assets?

3 MS. CHISM: Yeah. I think it
4 depends on the situation.

5 (Simultaneous speaking.)

6 MR. HAUSER: What if -- I don't know
7 if you heard yesterday's testimony or some of
8 the conversations even today with the folks
9 that actually make, you know, make annuity
10 recommendations in this context. But they
11 described a fairly individualized assessment of
12 people's needs coupled with a recommendation.
13 But sometimes the individualized -- the
14 conversations occur multiple times. I mean is
15 that the -- do you think those things should be
16 ruled out from the trust and confidence sort of
17 standard? Or do you think it's just varied
18 facts and circumstances?

19 MS. CHISM: Yeah, I think it's
20 varied facts and circumstances. I did hear
21 that conversation yesterday. But you know, I
22 don't think that I could give you a full

1 answer, you know, just based on one
2 hypothetical. I think it does come down to,
3 you know, is there an established relationship
4 with trust and confidence?

5 MR. HAUSER: Okay. Fair enough.
6 Thank you. And do either of the other two
7 panelists have any thoughts on this issue?

8 MR. EDWARDS: I'll jump in here.
9 This is Benjamin Edwards. My thought is by
10 having a rule in place that protects trust and
11 confidence might lower costs and make it easier
12 for advice to get out to people. Essentially,
13 you know, if you know in an initial interaction
14 -- and this is assuming that people are fully
15 informed, which they are not -- but if you know
16 that in an initial interaction, you can't trust
17 anything they tell you, you're going to have to
18 do a lot more diligence and a lot more work before
19 you decide whether or not to trust someone.

20 Whereas if you have a rule in place
21 that provides that they owe you some real
22 obligations, you can trust them from the get-go

1 relying on the strength of that rule. Which
2 makes it easier for people to give advice and
3 for people to trust advice. And so, you know,
4 in my view, if you exclude initial
5 interactions, you know, from the rule, you're
6 going to basically turn your entire industry of
7 sales people into, you know, pick up artists.
8 And you know, essentially what they're trying
9 to do is use every psychological trick they can
10 to manipulate people into trusting them quickly
11 before they can be held accountable for what
12 they do.

13 And so, essentially, you know, we
14 have modern psychology. Enormous amount of
15 study has gone into how to, you know, convince
16 people to trust you, how to buy particular
17 things, how to sell particular things. You
18 know, for example, if you just go Instagram and
19 you type in "indexed annuities" and scroll
20 through it, you're going to see lots of people
21 talking about oh, you've got this old 401(k)
22 lying around. It's almost as though there's a

1 centralized training hub for how to convince
2 people to trust you quickly and buy -- get them
3 to buy indexed annuities. So ultimately, we
4 need a rule in place that protects trust across
5 the board, whether it's an initial relationship
6 or a continuing one.

7 MR. PEIFFER: And I just agree
8 completely. And I won't use up too much time,
9 but I will say that, that is something I agree
10 with absolutely. You know, I've seen it all
11 over the country where they come in and they
12 try and sell people these insurance products
13 and they call it "turbo charging your 401(k)".
14 But what they're not telling you is you're
15 turbo charging it right into the ground.

16 And that happens sometimes in the
17 first meeting. It happens sometimes in the
18 second meeting. But people are entitled to
19 trust the people they are trusting their money
20 with. This is money that they have saved over
21 the course of 20 or 30 or 40 years. And
22 they've gone without so that in their golden

1 years, they can have this money. And they
2 really ought to be able to trust somebody from
3 jump street that's giving them advice on that.
4 And so that's all I've got to say about that.

5 MR. HAUSER: Thank you. Nothing
6 further from me.

7 MS. GOMEZ: Just two quick things
8 from me. More of an ask than a question. I
9 mean I had many of the same questions that Tim
10 raised for Ms. Chism on the established
11 relationship of trust and confidence. And I
12 think it would be helpful when you're providing
13 us feedback to give examples of, you know, when
14 you get into that realm and when you don't.

15 And then separately for Mr. Peiffer,
16 you've noted a lot of different worker
17 examples. And that would also be helpful for
18 us to, you know, be able to get more
19 information about that in your feedback.

20 MR. PEIFFER: Absolutely.

21 MR. HAUSER: So I'd just like to
22 thank all of the members of this panel and

1 everybody else that's testified this morning,
2 all very helpful. And we'll be back at 1
3 o'clock. Don't miss out. Thank you all.

4 (Whereupon, the above-entitled
5 matter went off the record at 11:46 a.m. and
6 resumed at 1:00 p.m.)

7 MR. HAUSER: Welcome back. I think
8 we're ready for Panel 4, which should be the
9 American Investment Council, Cetera Financial
10 Group, the Insurance Coalition, and the Pension
11 Rights Center. And I think the American
12 Investment Council is first up.

13 MR. KREPS: Well, thank you very
14 much. Afternoon, everybody. I'm Michael
15 Kreps, and I'm joined by my colleague
16 hopefully, George Sepsakos.

17 And we very much appreciate the
18 opportunity to testify today on behalf of the
19 American Investment Council, regarding the
20 Department's proposed changes to the regulatory
21 definition of investment advice, and the
22 related examples.

1 I'll go ahead and get started. And,
2 George, I will tag team at the end that we're
3 happy to respond to questions.

4 But by way of background, the
5 Council is an advocacy and resource
6 organization established to develop and provide
7 information about the private investment
8 industry and its contributions to the long term
9 growth of the U.S. economy, and the retirement
10 security of American workers.

11 Our member firms include the
12 country's leading private equity and growth
13 capital firms, united by successful
14 partnerships with limited partners in American
15 businesses.

16 In our testimony today we're going
17 to make two basic points. Point 1 is that the
18 Council shares the concerns of others about the
19 Department's rushed notice and comment process.
20 In our view the process is fundamentally flawed
21 and counterproductive.

22 Our second point is that the

1 proposal's definition of investment advice is
2 simply too broad and ambiguous to be workable.
3 It pulls in many of the communications that
4 should not reasonably be considered fiduciary
5 advice. And it's going to unnecessarily
6 disrupt both the institutional and retail
7 market.

8 So, let's tick through those two
9 concerns. And we'll start with process. As
10 the Department is aware, the proposal is a
11 sweeping regulatory overhaul that would change
12 how much of the retirement services industry
13 interacts with retirement plans, participants,
14 and IRA owners.

15 It seeks to convert many non-
16 fiduciary communications into fiduciary
17 investment advice, subject to the rules and
18 restrictions under Title 1 of ERISA, and
19 Section 4975 of the Internal Revenue Code.

20 That's going to have a major impact
21 on the retirement system. And there's a very
22 material risk of unintended consequences.

1 Despite this the Department has
2 provided a mere 60 day comment period, simply
3 not a sufficient amount of time for interested
4 parties to comment on the proposal,
5 particularly when the comment period is held
6 during a time when people have significant
7 familial and religious obligations.

8 We note that the comment period is
9 significantly shorter than the comment periods
10 for related proposals in 2010 and 2015. To
11 make matters worse, the Department has made the
12 unprecedented decision to hold this hearing
13 three weeks before the close of the comment
14 period.

15 I can't think of an instance when
16 the Department has held a hearing on a
17 rulemaking before the close of the comment
18 period. And at the very least, the Department
19 could have released the thousands of comments
20 the Agency has received to date, to inform this
21 hearing.

22 It took the Department several years

1 to develop and release this proposal that we're
2 now discussing. But now that the proposal's
3 been released the Department's rushing to push
4 it through.

5 A number of stakeholders raised
6 concerns with the process, and asked for the
7 comment period to be extended and the hearing
8 postponed. But the Department rejected those
9 requests. And that decision is perplexing to
10 us, as there's no statutory or other deadline
11 for this project.

12 Finally on this point I'll just note
13 that the accelerated process puts the
14 Department at risk of regulating without the
15 benefit of thoughtful and considered
16 stakeholder feedback.

17 And equally important, the flawed
18 process contributes to depressed engagement and
19 a deepening skepticism within the regulated
20 community about the Department's commitment to
21 objectively considering comments and concerns
22 about the proposal.

1 George, can you tackle the substance
2 for us?

3 MR. SEPSAKOS: Sure. Thank you,
4 Mike. As for the substance, the Council agrees
5 with the 5th Circuit that the fiduciary
6 standard of care in ERISA should apply in the
7 context of an established relationship of trust
8 and confidence.

9 To be clear, the Council would
10 support a narrowly tailored change to the
11 existing five part test if those changes better
12 reflected the legitimate expectations of those
13 providing and receiving fiduciary investment
14 advice.

15 But the Department hasn't proposed
16 narrowly tailored changes. Instead the
17 Department has proposed a completely replace a
18 bright line test, one that's been in place for
19 nearly 50 years, with a test that is highly
20 dependent on the recipients interpretation of
21 the particular facts and circumstances
22 surrounding discussions that in many cases are

1 not recorded or documented.

2 This can be particularly troublesome
3 given the known unreliability of eye witness
4 testimony.

5 The issue is particularly
6 problematic for fund managers, because these
7 managers discuss a myriad of issues associated
8 with investment strategy and funds before a
9 plan, retirement plan makes an investment,
10 including on how the investment fits within the
11 plan's overall portfolio, the fund strategy,
12 and its investment process.

13 The proposal's test here is so
14 ambiguous that it is very difficult, if not
15 impossible for managers to know when they cross
16 the line from providing non-fiduciary marketing
17 to fiduciary advice.

18 The breadth and ambiguity of this
19 proposal could lead to absurd results. Just
20 consider the situation where a plan sponsor
21 issues an RFP for a new private fund credit
22 manager.

1 Manager X responds and, you know,
2 says that his funds have an excellent track
3 record. It fits the plan's investment mandate.
4 And, you know, suggests that the plan sponsor
5 use those funds.

6 However, unbeknownst to either party
7 an affiliate of the manager has discretionary
8 authority to manage a small portion of one of
9 the plan's collective investment trusts.

10 That relationship, one that the
11 sponsor isn't even aware of, is enough to
12 convert that manager's RFP response into
13 investment advice. That can't possibly be what
14 Congress expected when defining investment
15 advice as fiduciary.

16 So, we caution that if the
17 Department moves forward with this proposal,
18 this could have negative impacts on the
19 retirement system. It could completely upend
20 existing sales and marketing practices in the
21 institutional space for no discernable benefit.

22 And it will unnecessarily interfere

1 not only with parties' settled expectations
2 about their responsibility, it will also
3 override parties' ability to engage in arm's
4 length dealings, which is a hallmark of
5 transactions occurring under ERISA.

6 So, make it harder for plan
7 fiduciaries due diligence manager to collect
8 funds and negotiate annuity purchases.

9 It will, you know, even negatively
10 impact the good work that the Labor Department
11 did when they issued the Breyfogle letter in
12 2019 to help fiduciaries diversify into, you
13 know, asset funds by incorporating different
14 private funds.

15 In a 2016 rulemaking, the Department
16 recognized the risks of an over-broad
17 definition, and included carve-outs for
18 sophisticated investors. That carve-out was
19 omitted here because the Department now
20 believes there's no compelling evidence that
21 wealth and income are strong proxies for
22 financial sophistication.

1 However, the Department itself has
2 highlighted, in the preamble to Proposed Rule
3 in 2015, that there are many instances when
4 plan size has been used as a proxy for
5 sophistication.

6 For instance, the Department's QPAM exemption
7 uses network and assets under management as a
8 criteria for relief. So, Mike, if you want to
9 go and finish this up, that would be great.

10 MR. KREPS: Thanks, George. So, you
11 know, and so the Council's still reviewing the
12 proposal and formulating comments. However,
13 preliminarily the Council believes that the
14 Department should withdraw the rule, the
15 proposed rule and reformulate it in a manner
16 consistent with the following core principles.

17 First, the Department should only
18 move forward after conducting a thorough review
19 of the marketplace to determine whether there
20 is actually a problem that needs to be solved.
21 And that the medicine isn't worse than the
22 disease.

1 This review must take into
2 consideration changes to the market since 2016,
3 such as the impact of Reg BI and the NAIC model
4 law.

5 Second, any changes to the
6 definition of investment advice should provide
7 clear lines between advice and sales, and
8 comport with the 5th Circuit's decision, as the
9 consequences of inadvertently crossing a line
10 can be severe.

11 Any changes should also be cognizant
12 of the vast number of unintended consequences
13 that changes in the law may have on the
14 regulated community.

15 Third, parties to the transaction
16 should be permitted to define the terms of
17 their own relationship by, for example,
18 agreeing contractually as to what fiduciary
19 advice will or will not be provided.

20 And fourth and finally, any new
21 definition of advice should show proper
22 deference to existing state and federal

1 regulations, including state regulations of
2 insurance.

3 So in conclusion, the Council
4 believes that the proposal is fatally flawed,
5 and should be withdrawn. We very much
6 appreciate the opportunity to present these
7 comments. And we'd be happy to take questions.

8 MR. HAUSER: Thank you. Next up is
9 Cetera Financial Group, Mark Quinn. Is Mr.
10 Quinn on and able to participate?

11 MS. WILKER: Mr. Quinn, I can see
12 you. It looks like you might be muted.

13 MR. QUINN: Can you hear me now?

14 MR. HAUSER: Yes, yes. Thank you.

15 MR. QUINN: Okay. Thank you. Sorry
16 about the technical difficulties. I'm still
17 dealing with one eye. Good afternoon,
18 everyone. My name is Mark Quinn. I'm the
19 Director of Regulatory Affairs for Cetera
20 Financial Group.

21 Thank you for providing us this
22 opportunity to offer our views regarding this

1 retirement security rule, and the important
2 impact it will have on your time and financial
3 advisors.

4 Through our 12,000 financial
5 professionals Cetera serves more than 1 million
6 customers, almost all of whom are individuals
7 with small businesses.

8 Creating a financially secure
9 retirement is often their primary investment
10 objective. And our mission is to assist them
11 in their journey by providing high quality
12 investment advice and products.

13 Retirement savings are critical for
14 individual investors and the health of our
15 economy and society in general. In order for
16 this market to function effectively, regulation
17 must maximize investor access to information,
18 products, and advice, and not place unrealistic
19 burdens on providers of those services.

20 Revisions to the current
21 regulations, no matter how well intentioned
22 must be undertaken with caution, and in full

1 appreciation of the collateral impacts that it
2 can cause.

3 We will address our concerns about
4 specific aspects of the proposal. But we do
5 not believe it is legal and viable in its
6 current form. The Department should withdraw
7 it and start over.

8 The proposed rule would vastly
9 expand the categories of individuals who are
10 deemed investment advisors and fiduciaries in a
11 way that exceeds the Department's jurisdiction
12 under the ERISA statute.

13 I would note that Cetera proudly
14 acknowledges fiduciary status in connection
15 with recommendations to undertake rollovers and
16 assets from employer-sponsored retirement plans
17 to IRAs.

18 That being said, we are concerned
19 that the proposed expansion of the standards is
20 inconsistent with both the text of ERISA and
21 the decision of the 5th Circuit Court of
22 Appeals in the Chamber of Commerce case.

1 The key aspect of the 5th Circuit's
2 decision is that in order to be named a
3 fiduciary our service providers must be in a
4 relationship of trust and confidence with the
5 investor.

6 The current standard is embodied in
7 the five part test, which establishes an
8 appropriate compilation of the elements
9 necessary to create such a relationship.

10 The Department is attempting to do
11 something that the 5th Circuit said was not
12 permissible, creating a presumption that the
13 level of trust and confidence necessary to
14 establish fiduciary status under ERISA exists
15 under a much wider set of interactions between
16 service providers and retirement investors.

17 As I mentioned, Cetera acknowledges
18 fiduciary status in connection with investment
19 recommendations to retirement investors. And
20 to that extent we do not necessarily have a dog
21 in this particular fight.

22 We are however concerned any time an

1 administrative agency attempts to expand its
2 jurisdiction beyond the boundaries established
3 by Congress. And that's what's happened here.

4 Turning now to the proposed
5 revisions for prohibited transactions in
6 exemption 2020-02 we have a general comment,
7 and several addressing specific provisions.

8 First, we note that many providers
9 of investment advising products are already
10 subject to comprehensive regulatory regimes
11 established and enforced by other agencies.

12 These agencies are experts in how
13 regulated entities interact with customers, and
14 the impacts that their regulations may have on
15 other important issues, such as capital
16 formation.

17 For example, SEC Regulation Best
18 Interest establishes standards of conduct for
19 broker-dealers, investment advisors, and their
20 agents that are substantially similar to those
21 in PTE 2020-02.

22 However, despite the similarities,

1 they are not identical, which creates a
2 potential for confusion among standards of
3 conduct applicable to individuals performing
4 the same activities.

5 In order to minimize the potential
6 for this confusion, we urge the Department to
7 incorporate a carve-out to the conduct
8 standards in PTE 2020-02 for entities that are
9 regulated by the SEC and comply with the
10 conduct standards in Rule Best Interest.

11 Turning to specific provisions of
12 PTE 2020-02, the proposal seeks comments on the
13 advisability of requiring service providers to
14 create websites to deliver disclosure material
15 to customers and potential customers prior to
16 transactions.

17 This idea has merit, but if this is
18 adopted it should be termed as an alternative
19 as opposed to additional requirement. If firms
20 offer comprehensive disclosures on websites,
21 they should not also be required to deliver the
22 same material directly to customers or

1 prospective customers prior to transactions.

2 Consistent with this, we suggest
3 that the Department utilize this rulemaking as
4 an opportunity to thoroughly review its
5 standards for delivering disclosure material to
6 customers and prospective customers.

7 The Department has been more
8 progressive than many other agencies on how
9 it's used this issue. For example, it
10 specifically approved of the idea that
11 electronic delivery may be utilized as the
12 default option for certain disclosures to
13 participants in employer sponsored retirement
14 plans. Electronic delivery of everything to
15 everyone is the future. You have a historic
16 opportunity to be a leader in this space.

17 The proposal would also make
18 significant additions to the requirements for
19 firms to maintain policies and procedures
20 designed to ensure compliance with the
21 standards in PTE 2020-02.

22 In particular, it mandates adoption

1 on policies and procedures to mitigate material
2 conflicts of interest. This is a far-ranging
3 topic, and probably worthy of an hour in
4 discussion by itself.

5 I would, however, be remiss if I did
6 not mention a specific reference to travel by
7 financial professionals to attend conferences
8 and invitation events. This is a bit of a
9 fraught topic, primarily because it's been the
10 subject of an incredible amount of
11 misinformation over the years. But let us be
12 clear: any form of compensation or other
13 benefit that may create a material conflict of
14 interest between the customer and the financial
15 professional or the firm, must be managed
16 conscientiously and in good faith by the firm.

17 Singling out this specific practice
18 only serves to reinforce an inaccurate
19 narrative in ways that are neither enlightened
20 (audio interference).

21 Next, in order to be able to rely on
22 PTE 2020-02, a firm must correct instances in

1 which it determines that it is not held to the
2 requirements of the exemption. In theory, this
3 makes sense. But it ignores the practicality
4 of taking corrective action for a large number
5 of customers in instances where there is no
6 tangible economic harm.

7 For example, if a firm delivers a
8 rule to require disclosure to a large number of
9 customers one-day late, it could be required to
10 take corrective action in notifying (audio
11 interference).

12 Any requirements to take corrective
13 action should be subject to a materiality scan.
14 The cost is considerable. And the benefits to
15 investors minimal, if non-existent in many
16 instances.

17 Rule 4530 contains a requirement for
18 member firms to report and take corrective
19 action in cases where they violate applicable
20 law on recommendations or cause material harm
21 to significant numbers of customers. PTE 2020-
22 02 should include a similar materiality

1 threshold.

2 Our final comments relate to the
3 economic analysis performed by the Department
4 in connection with the proposal. The
5 requirement to perform this analysis in
6 enshrined in federal law for a good reason. A
7 fundamental principle in adopting any
8 regulation is that it must balance costs to the
9 regulated industry and the economy at large
10 against the benefits to the class of
11 individuals it was designed to protect.

12 We understand that estimating the
13 potential costs and benefits of a regulation
14 this significant is difficult and often
15 imprecise. That being said, the analysis in
16 this case falls woefully short of what is
17 required. In many instances, the estimated
18 costs that would be incurred by service
19 providers are grossly understated. We will
20 offer specific examples in our written
21 comments, but we have a suggestion that we
22 believe would be helpful and not overly

1 controversial.

2 Before moving forward with the
3 proposal, the Department should engage directly
4 with service providers to better understand the
5 type and magnitude of costs and benefits that
6 will result from this regulation. Industry
7 members have extensive experience with respect
8 to the costs and logistics of implementing
9 compliance programs that could be beneficial to
10 all.

11 One final note: the proposal
12 provides for an implementation period as short
13 of 60 days after the new regulations become
14 effective. We will address this in more detail
15 in our written comments, but for larger
16 organizations 60 days is basically equivalent
17 to a long weekend. A minimum of 12 to 24
18 months would be required to make all of the
19 necessary changes.

20 Thank you again for your opportunity
21 to -- for this opportunity to offer our views.
22 I'm happy to answer any questions that you may

1 have.

2 MR. HAUSER: Thank you, Mr. Quinn.
3 Next up, Kendra Isaacson.

4 MS. ISAACSON: Thanks so much. Good
5 afternoon, everyone. I'm grateful for this
6 opportunity to share the views of the Insurance
7 Coalition on the Department's proposed
8 retirement security rule and amendments to the
9 prohibited transaction exemption, which I'll
10 refer to collectively as the proposal.

11 My name is Kendra Kosko Isaacson,
12 and I'm a principal with Mindset. Prior to
13 that, I had the honor of working at the Health
14 Committee for Senator Murray. And before that
15 I worked with so many of you in EBSA here at
16 DOL.

17 As a former Hill staffer who worked
18 on all of the big retirement bills over the
19 past several years I can provide a first-hand
20 account of congressional intent as it relates
21 to the laws implicated by this proposal.

22 While Congress has a reputation for

1 partisan impasse, retirement remains one of the
2 few areas of bipartisan agreement, which is why
3 we were able to pass two major retirement bills
4 in three years.

5 The impact of the shift from DBs to
6 DCs has long been a concern. Congress has
7 worked to optimize savings in DC plans. And
8 the next frontier of innovation is ensuring
9 that individuals don't outlive their assets, as
10 we are finding that retirees are quick to spend
11 down their retirement savings, and vastly
12 underestimate their life expectancy.

13 With retirees on average spending
14 their entire lump sum distribution in just a
15 few years.

16 The 2020 census found that one in
17 six people were age 65 or older, which marked a
18 38 percent increase over the previous decade,
19 and continues to trend upward.

20 We are not talking about a small
21 problem here, which is why Congress has been so
22 focused on it.

1 In 2019 with the first Secure Act
2 Congress helped retirement savers think about
3 their retirement savings differently by passing
4 the Lifetime Income Disclosure Act, which would
5 require DC plans to provide an estimate of the
6 monthly lifetime income their retirement
7 account balance would provide.

8 Additionally plan sponsors were
9 concerned about the fiduciary liability of
10 selecting an insurer to provide lifetime income
11 options.

12 So Secure also included a safe
13 harbor that plan sponsors could use to
14 determine the financial capacity of an insurer.

15 Finally, Congress included a
16 provision to provide for portability of
17 lifetime income options. And just last year
18 Congress passed Secure 2.0, which also
19 facilitated lifetime income solutions with a
20 provision aimed at increasing the use of
21 qualified longevity and annuity contracts.

22 Secure 2.0 also eliminated

1 regulatory barriers to the availability of life
2 annuities in qualified plans and IRAs stemming
3 from the RMD rules.

4 And finally, Secure 2.0 eliminated a
5 penalty on partial annuitization. Congress
6 wants to provide more options for retirement
7 savers when it comes to the accumulation.

8 And while Congress sometimes
9 presents a muddled message on an issue,
10 congressional intent is clear here. Lifetime
11 income is a critical component of retirement.

12 Last year Secretary Walsh and other
13 Labor officials kicked off an initiative to
14 make retirement security part of the social
15 justice movement.

16 In a DOL press release touting this
17 initiative transforming lump sum payments to
18 lifetime income that is affordable and easy to
19 understand was highlighted as a focus. The
20 members of the Insurance Coalition agree
21 wholeheartedly with this initiative.

22 The proposal we are discussing

1 today, however, takes us away from those goals,
2 making it more difficult and expensive for
3 plans to offer lifetime income.

4 The only practical way to
5 incorporate lifetime income into DC plans is
6 through insurance products like annuities.
7 Efforts that would restrict or nearly eliminate
8 the use of such products in DC plans are
9 contrary to congressional intent.

10 Despite the significant input the
11 Department has received since 2010 it still had
12 180 questions in the proposal. As members of
13 the Insurance Coalition have earnestly grappled
14 with it, they too are wrestling with a
15 considerable number of questions that would
16 make implementation difficult if not
17 impossible.

18 So to that end I'd like to spend the
19 rest of my time raising some of these
20 questions. But first I must note the herculean
21 task of compliance and implementation cannot be
22 completed within 60 days of a final rule as the

1 proposal currently states.

2 And now our questions, starting with
3 the exemptions. In 84-24 there is a
4 fundamental issue with insurance companies
5 supervising independent agents, as the
6 insurance company can provide training on their
7 products, they can control their products
8 position, and manage compensation.

9 But they cannot truly supervise the
10 activities of independent agents. Even state
11 insurance laws do not ask for such supervision,
12 because the agents are independent and this may
13 raise worker classification issues. To what
14 end would the Department require supervision of
15 independent agents?

16 Then to correct any violations of
17 the exemption conditions a financial
18 institution must pay its excise tax related to
19 the prohibited transaction.

20 Currently insurers are not
21 considered fiduciaries according to the
22 preamble for 84-24, nor are they included in

1 the 14 types of entities who must file the Form
2 5330.

3 How can an entity that is not a
4 fiduciary that did not commit a prohibited
5 transaction, and is not listed among the
6 entities eligible to file Form 5330, file such
7 form and pay an excise tax covering a
8 prohibited transaction it did not commit?

9 And our last question for 84-24 is,
10 though the Department claims to level the
11 playing field it effectively prohibits almost
12 all variations of compensation under 84-24
13 allowed under state law. Why is non-cash
14 compensation allowed under 2002 but not in 84-
15 24?

16 And now shifting to 2020-02. In a
17 multi-vendor situation, if an individual has
18 some money with financial institution A, and
19 some money with insurance company B, how is a
20 company supposed to get all of the relevant
21 information?

22 Do you have to amend your advice

1 once you receive information from the other
2 financial institution? How is company A
3 supposed to obtain the information from company
4 B?

5 Companies may now have to rely on
6 that individual who may or may not be in a
7 relationship of trust and confidence with them.
8 What if that individual doesn't bring the
9 information?

10 Is the financial institution stuck
11 until it receives the information which may
12 prevent such company from providing timely
13 investment advice?

14 Proprietary annuity sales by captive
15 agents may not be covered by the revised 2020-
16 02, given the definition of covered principle
17 transactions, and the lack of relief for the
18 purchase and sale of an annuity if the insurer
19 is deemed to be a fiduciary. Was this
20 intended?

21 By limiting the investment types in
22 covered principle transactions are you

1 prohibited from representing that type of
2 investment?

3 Have the revisions to 2020-02 with
4 respect to foreign convictions been coordinated
5 with the final QPAM rules that are currently
6 sitting at OMB?

7 Will a company with a foreign
8 affiliate facing a conviction have to apply for
9 a QPAM exemption, and also for an individual
10 exemption to continue using 2020-02? How
11 should a company reconcile these rules?

12 Finally, how does the Department
13 respond to the concerns that these changes
14 would allow hostile foreign governments to
15 potentially interfere in the retirement
16 marketplace for supposed wrongdoing that's
17 wholly unrelated to managing retirement assets?

18 And our final question for 2020-02
19 is, it is unclear how the self-correction would
20 work in 2020-02. A financial institution must
21 notify the Department of its self-correction
22 where there has been a violation of the

1 exemptions conditions.

2 How would a financial institution
3 make a retirement investor whole for any
4 revoking losses related to a violation? For
5 example, if a condition was violated and a
6 rollover occurred, is that rollover then to be
7 returned to the plan?

8 And now moving to our questions
9 related to the proposed rule. The line between
10 sales, education, and fiduciary advice is quite
11 fuzzy based on a facts and circumstances test.

12 It is impossible to build policies
13 and procedures, and train a workforce around
14 such unclear standards. Interpretive Bulletin
15 96-1 has long defined investment education.

16 Will the Department provide updated
17 examples as to what constitutes education? And
18 will the bulleting be amended to include plan
19 sponsors?

20 Record keepers, their support and
21 call centers do not provide advice. They
22 provide education. They can't adopt a 2020-02

1 strategy, as they don't have the infrastructure
2 to adapt to the proposed PTE. What is the
3 Department's intention to eliminate these basic
4 conversations?

5 DOL states that they do not think
6 that wealth and income are strong proxies for
7 financial sophistication, but then suggest, to
8 the extent counter parties wish to avoid
9 fiduciary status they can avoid structuring
10 their relationships to fall within it.

11 This is also after the DOL notes
12 that investment advice providers' fiduciary or
13 non-fiduciary status would depend on the
14 parties understanding under the particular
15 facts and circumstances.

16 This suggests a subtle,
17 sophisticated parties' exemption. But the
18 proposal also explicitly states that
19 individuals cannot disclaim fiduciary status.

20 Congress and other regulators
21 typically treat sophisticated investors
22 differently than your average retirement saver.

1 Does the Department not differentiate between a
2 retail and an institutional investor?

3 Would the Department differentiate
4 between an investor not represented by a plan
5 fiduciary or other advisor versus one that is?
6 And should the provider become a fiduciary to a
7 plan that already has someone serving as a
8 fiduciary or independent advisor to it?

9 Two more questions, and then we're
10 in the home stretch. It is unclear what the
11 definition of investment property includes as
12 it relates to insurance products issued in a
13 group versus a retail setting.

14 Does the Department intend to apply
15 this where such products have an associated
16 funding arrangement or premium stabilization
17 reserve, or PSR for short? Term life insurance
18 --

19 MS. WILKER: Ms. Isaacson, it's been
20 ten minutes. So, if you could wrap up quickly?

21 MS. ISAACSON: I'll go very quick.
22 Okay. Term life insurance policies are

1 excluded from the definition of investment
2 property. Does the Department agree that group
3 term life insurance policies should also be
4 excluded?

5 And would the Department agree that
6 employer group term life insurance issued with
7 a PSR that inures to the benefit of the
8 employer also be excluded because group term
9 life policies don't contain an investment
10 component?

11 And can I ask my last one very
12 quickly? I'll go fast. Did the Department
13 intend for an insurance company to be deemed an
14 investment advice fiduciary merely because the
15 company is affiliated with an institutional
16 asset manager?

17 The institutional asset manager and
18 plan agreed to the scope of a fiduciary duty,
19 but yet negotiated the spoke investment
20 management agreement. As the parties have
21 agreed to the scope of the asset managers'
22 fiduciary duties it seems wrong to expand that

1 scope extra contractually to the entire
2 consolidated group.

3 And with that I am finally done.
4 Thank you so much for the opportunity to
5 testify. Thank you for your consideration of
6 our issues and questions. And I welcome any
7 questions you might have.

8 MR. HAUSER: Okay. Thank you. And
9 then the final group for this panel is the
10 Pension Rights Center, Norman Stein and Janice
11 Winston.

12 MR. STEIN: Yes, okay. So good
13 afternoon. And thank you for inviting us to
14 present testimony on behalf of the Pension
15 Rights Center on this incredibly important
16 regulatory project to protect retirement savers
17 from conflicted investment advice.

18 The Pension Rights Center is a
19 nonprofit consumer organization that has been
20 working since 1976 to protect and promote the
21 retirement security of American workers and
22 their families.

1 I'm Senior Policy Consultant at the
2 Pension Rights Center. Janice is a retired
3 telecommunications engineer who will relate her
4 personal experience with investment advice
5 following her retirement.

6 After Janice concludes I will offer
7 some comments on the proposed rule. And I
8 promise to not use the word robust, making us
9 the first panel I think where that word hasn't
10 appeared in the, during the hearing. So,
11 Janice.

12 MS. WINSTON: Thank you, Norman.
13 Hello. As Norman said my name is Janice
14 Winston. I am here as a retiree, talking about
15 the challenges facing real people. And let me
16 briefly tell you my story.

17 I worked for Verizon for, I worked
18 for 29 years as a telecommunications engineer
19 for Verizon Corporation, from 1973 until 2002,
20 when I retired.

21 Verizon had a defined benefit
22 retirement plan and a 401(k) plan. The

1 retirement plan offered me a choice of an
2 annuity or a lump sum payout, which I could
3 then roll over to an individual retirement
4 account.

5 The 401(k) plan gave me a choice of
6 leaving my assets in the plan or rolling them
7 over to a IRA.

8 Figuring out what to do was a
9 complicated financial decision for me.
10 Something that my work as a telecommunications
11 engineer had not prepared me for.

12 I was faced with a range of
13 questions that I could not answer on my own.
14 Where do I get good investment advice? Who can
15 I trust to give me objective and impartial
16 advice?

17 If I take the lump sum from the
18 retirement plan, or make a rollover from the
19 401(k) plan, how do I invest the money so I can
20 maintain a good quality of life throughout my
21 retirement?

22 After some agonizing days and nights

1 I picked an advisor based on various
2 recommendations from coworkers, family, and
3 friends, and relatives.

4 But my most important concern was
5 trust. What I thought was that anyone I paid
6 to advise me would be guided by what was best
7 for me, given my retirement and savings goals.

8 The person I chose advised me that I
9 should take a lump sum from my defined benefit
10 plan, and roll it and my 401(k) plan into two
11 individual retirement accounts.

12 The advisor then steered me toward
13 investing a quarter of my total assets in a
14 variable annuity product, whose complexity and
15 calls were neither apparent nor explained very
16 well to me. It was very hard to understand.

17 In 2013 Ron Rhoades, who is a
18 fiduciary investment advisor and a financial
19 planning dispenser, who I believe testified at
20 yesterday's hearing, evaluated my investment
21 portfolio, and showed me that I was paying fees
22 that I didn't even know about, let alone

1 understand.

2 I felt that this was not right. Mr.
3 Rhoades also concluded that even without the
4 high fees my total investment portfolio was not
5 well designed in accordance with my best
6 interests.

7 Although Mr. Rhoades was critical of
8 my investments as high cost, and my overall
9 asset allocation as inappropriate to my goals,
10 he was most critical of the approximately 25
11 percent of my assets that I was advised to
12 place in a variable annuity, which he estimated
13 had annual fees equal to 3.3 percent of my
14 investment.

15 Some of those fees purchased complex
16 features that had no value to me. He believed
17 that because of the high annual cost of
18 maintaining that investment the annuity would
19 have an annual rate of return of barely zero
20 percent after taking into account inflation.
21 And there were financial penalties,
22 unfortunately, if I decided to move out of the

1 annuity.

2 I worked long and hard, and saved
3 over my career so that I could enjoy a decent
4 retirement. And I should have been able to
5 assume that investment advice given to me was
6 crafted solely in my best interest.

7 I've since learned that there are
8 investment advisors who put aside their own
9 monetary interests and focus on the best
10 interest of their clients.

11 And so, these are advisors that are
12 considered fiduciaries. They are considered
13 fiduciaries. The word fiduciary sounds
14 complex. But it boils down to one simple
15 complex.

16 When regular people like me are
17 getting advice about how to access and invest
18 our money in retirement we should be able to
19 depend on our financial advisors acting in our
20 best interest, even if that sometime means that
21 they cannot recommend a product that pays them
22 the most compensation.

1 And honestly, I don't see how anyone
2 could argue with that, or who would want advice
3 from someone not subject to that standard.

4 I understand that the regulation you
5 propose would ensure that all ERISA retirement
6 investment advice would meet this standard.
7 Every retirement saver should enjoy that basic
8 protection, not matter what they invest in.

9 For the current and future
10 generations of retirement savers I ask you to
11 please adopt these proposed regulations so that
12 those who give my daughter, my grandchildren,
13 my great-grandchildren investment advice must
14 put their client's interest ahead of maximizing
15 their own profit.

16 And I'm going to turn it back over
17 to Norm.

18 MR. STEIN: Thank you, Janice. In
19 the time remaining I want to make some general
20 comments and then turn to the issue of rollover
21 advice.

22 We will further discuss rollovers

1 and other issues in our written statement,
2 which will also provide specific answers to
3 questions posed by the Department and the
4 preamble to the guidance.

5 We first want to thank the
6 Department for its hard work on the proposed
7 rule and related prohibited transaction
8 exemptions.

9 Although some members of the
10 investment community act as if the rule would
11 require all investment advisors to model
12 themselves after the Macy's Santa from A
13 Miracle on 34th Street, that's the 1947 version
14 of the movie, not the 1994 version.

15 The proposed rule is incredibly
16 nuanced and thoughtfully designed structure
17 that will accommodate a wide variety of advisor
18 compensation models, will not inhibit the
19 introduction of new and innovative investment
20 products that would help retirement savers, and
21 should move us closer to a world in which
22 conflict free investment advice is an accepted

1 norm rather than a contested ideal.

2 We also think the Department
3 deserves great credit for carefully crafting
4 the proposed rule and exemption amendments to
5 take account of the concerns raised by the two
6 judges who authored the opinion of the 5th
7 Circuit in Chamber of Commerce versus DOL.

8 Even though we agree with Judge
9 Stewart who dissented, that the majority
10 decision was ahistorical, and ignored both
11 clear statutory language and seismic changes in
12 the retirement savings world that occurred
13 since the 1975 five-factor test was
14 promulgated. And we commend the Department for
15 its intent (audio interference) yesterday's and
16 this morning's panel.

17 I will now to turn to distribution
18 rollover advice. The decision whether to move
19 assets out of a retirement plan solution and
20 invest them in an IRA or elsewhere is often the
21 most consequential investment decision a plan
22 participant will make.

1 At its heart a recommendation to
2 remove assets from a plan and invest them
3 elsewhere is a judgment about the relative
4 merits of the plan options compared to options
5 outside the plan.

6 In a defined contribution plan
7 setting an individual will often end up paying
8 much higher investment and other fees if they
9 transfer their assets to an IRA. And they will
10 lose access to the curatorial function of the
11 plan's investment platform, which is assembled
12 by plan fiduciaries.

13 In the case of the defined asset
14 plan decisions to forego an annuity in favor of
15 a lump sum payout deprives the participant and
16 the participant's spouse of a lifetime income
17 vehicle.

18 Distributions from both types of
19 plans strip away important ERISA rights. And
20 an advisor making a distribution recommendation
21 will have financial interests biasing them
22 toward distribution.

1 I also want to mention a paper that
2 I wrote with two economists, John Turner and
3 Bruce Klein of the Pension Policy Center. In
4 the paper we engaged in a secret shopper
5 exercise in which 15 investment advisory firms
6 were asked whether they would advise a rollover
7 from the Federal Thrift Savings Plan to an IRA.

8 At the time, the fees for the plan's
9 investment option was under three basis points.
10 And the options generally outperformed the
11 benchmarks, even before netting the fees. Yet,
12 ten of the representatives with whom we spoke
13 affirmatively recommended a rollover. And four
14 firms, while declining to advise over the
15 phone, suggested that rollover would be a very
16 good idea. Almost --

17 MS. WILKER: Mr. Stein, it's been
18 ten minutes. Could you wrap up your remarks?

19 MR. STEIN: Yeah, I only have
20 another paragraph. Only one of the advisors
21 cautioned against a rollover. This suggests
22 that 14 of the (audio interference) were either

1 poorly trained to offer competent advice, which
2 is unlikely. Or that they were primarily
3 motivated, consciously or subconsciously (audio
4 interference).

5 In conclusion, as Upton Sinclair
6 recognized in his famous epigram, that it's
7 hard to get someone to understand something
8 when his salary depends on his not
9 understanding it. That it is human nature for
10 people to put their own interests first, while
11 managing at the same time to convince
12 themselves that they are not doing so.

13 There are, of course, major
14 exceptions to this aspect of human behavior. A
15 parent sacrificing for child, a soldier
16 displaying bravery in combat, an activist
17 seeking to make the world a more just place.
18 But an investment advisor giving advice across
19 the desk, it is too often only effective
20 regulation, such as the proposed rule here,
21 that can ensure that the advisor is working for
22 the exclusive interest of his client. That, or

1 perhaps advisors all taking a lesson from Kris
2 Kringle.

3 MR. HAUSER: Okay. Thank you all.
4 We're just about at the end of this time
5 period. So, I'm just going to ask maybe two or
6 three questions that I think are probably
7 pretty quick.

8 The first I would direct to the --
9 sorry, I have to remember the group names --
10 the American Investment Council and the
11 Insurance Coalition. And that's just, a number
12 of the concerns expressed went to -- oh, the
13 panel goes until 2:00 p.m. Never mind. I'm
14 going to ask all kinds of questions.

15 The first question is just, a number
16 of the concerns expressed as I took it related
17 to what the line is between advice and other
18 categories of communication. There, I think
19 it's probably worth noting that we said quite a
20 bit on those issues in the preamble to the
21 rule. For example, we discussed kind of the
22 normal communications between HR personnel and

1 employees about their plan.

2 We talked about general investment
3 communications. We discussed swap
4 transactions, hire me discussions, wholesaling
5 issues, platform providers. Evaluation
6 services were excluded. And also made clear
7 that the line between, you know, education and
8 advice remains a sound one.

9 And so, one question I have is just,
10 do you have a view on whether or not first any
11 of those provisions ought to be expanded or
12 elaborated upon, and second, should any of them
13 make it into the text of the rule, as opposed
14 to the preamble? Or does it make a difference
15 in your mind?

16 MR. KREPS: So, let me just quickly
17 take that second question, Tim. Because I
18 think that one has the clearest answer. And
19 that's, although preamble language can be
20 helpful, it is not law but it is the
21 Department's interpretation.

22 And so, courts can agree or disagree

1 with it. So anything that's not in the law is
2 instructive and helpful in articulating and
3 helping us understand the Department's views.
4 But it isn't controlling. So any
5 clarifications on these issues really need to
6 be in the base rule.

7 Now, the second piece, I think we
8 fully recognize that the Department in the
9 preamble tries to provide some clarification in
10 those particular circumstances.

11 The challenge though is that those,
12 all of those clarifications are heavily
13 dependent on the specific facts and
14 circumstances of any particular conversation.

15 And they still don't provide a
16 dividing line. Hire me, for example. I can
17 tout my own services. And I can say, I am the
18 world's best investment advisor. At least as I
19 read your rule, without crossing the line.

20 But once I talk about what I
21 actually do, and how that could benefit a
22 client, well, all of a sudden that's in the

1 gray area where it's impossible or very
2 difficult to tell whether it's in bias.

3 And that world where the vast
4 majority of routine kind of interactions with
5 investors, for example, are in that gray area.
6 It's just not a place where it's reasonable for
7 the industry to find any comfort whatsoever.

8 They just need clear lines. And so
9 the more we can clarify things and make it very
10 clear that particularly in the institutional
11 space we're very clear what the expectations
12 are, what the relationships are, I think that
13 would go a long way to helping.

14 MR. HAUSER: Okay, thank you. And I
15 probably should have mentioned it too. But,
16 you know, you and a number of folks that have
17 testified have mentioned requests for a
18 proposal kind of communications.

19 And I assume you would include that
20 in the kind of discussion we should include
21 maybe in the text of the rule. Is that right?

22 MR. KREPS: For sure. And I would

1 say that if we, we can't just look at the
2 request for proposal. Because that -- not all
3 of them are as formal as that right at those
4 routine communications that happen between
5 general partners and limited partners, between
6 plan fiduciaries and managers about these
7 services and products being provided. Those
8 need to be, it needs to be clarified to ensure
9 that those aren't fiduciary in nature.

10 MR. HAUSER: Right. So one approach
11 to comments is, in addition to just underlining
12 those issues when you make your submission.
13 And any suggestions you'd like to make to us on
14 what the proper placement of guidance on those
15 issues is, what the proper format is. Whether
16 it's reg text or preamble text, whether it
17 should be done in the form of examples or FAQs,
18 or the like would be helpful.

19 And I think it would be helpful too
20 if you could think about if there are
21 particular scenarios, even if you essentially
22 took all of our preamble discussion and kind

1 of, you know, took it to the bank.

2 If there are still, you know,
3 specific scenarios for a specific hypothetical
4 kind of fact patterns that you think are
5 especially concerning, if you could even just
6 identify those for us, that I believe would be
7 helpful.

8 Kendra, kind of the same questions
9 to you.

10 MS. ISAACSON: Yes. And I think we
11 would have a lot of the similar answers, you
12 know. Members of our coalition really want
13 clarity on what the line is.

14 And so, to the extent DOL can add
15 more illustrations and provide clarifying text,
16 I think that would be incredibly helpful and
17 instructive.

18 And I do think that there is
19 probably a general preference for putting this
20 language in the text of the rule, rather than
21 the preamble, for all the reasons that Michael
22 outlined earlier.

1 And we are happy to provide
2 additional scenarios. If you can believe it, I
3 had to cut down a lot of my scenarios in my
4 testimony to make my almost timely response.

5 So we'll be sure to follow-up in
6 comments on this. But I do think more guidance
7 is better on that front.

8 MR. HAUSER: Thank you. And I guess
9 the other thing I'd say, I mean, you asked, you
10 had many questions you posed to us. One of the
11 witnesses yesterday did that as well.

12 It's not the nature of a proceeding
13 like this that we are now going to answer all
14 your questions. But what I would say is, I at
15 least understood from virtually every one of
16 the questions what your group's preferred
17 answer was.

18 And what I would suggest is that
19 when you're thinking of your comments as well,
20 you know, if you can, to the extent these are
21 all important issues to you, if you could just
22 repeat those issues in your comment, as well as

1 what you think the revolution ought to be, or
2 whether it's a question where you just need
3 clarity or, you know, whatever.

4 But having spotted the issues it's
5 enormously helpful if then just flag them and
6 tell us what you think the answer should be.

7 MS. ISAACSON: Very happy to do
8 that.

9 MR. HAUSER: Okay. Thank you. And
10 let's see, Mr. Quinn, the only, thank you for
11 your testimony. The only question I think I
12 wanted to ask you is, at the very start of your
13 testimony I think you said that your folks, at
14 least on the rollover context, are fiduciaries.

15 And I was just, it's curiosity as
16 much as anything I guess. But are they ERISA
17 fiduciaries? Is that communicated to the
18 client at the outset of the relationship?

19 MR. QUINN: That's correct.
20 Particularly in connection with rollover
21 recommendations from employer-sponsored plans,
22 we meet the, you know, requirements of PTE

1 2020-02, and give them a relatively fulsome
2 discussion of the standard of conduct that
3 we're subject to, and the relative costs and
4 benefits of engaging in the rollover
5 transaction.

6 MR. HAUSER: Okay. And then, can I
7 assume, or I, well I shouldn't assume anything.
8 But one part of this reg says well if you tell
9 somebody you're a fiduciary, and certainly if
10 you tell them you're an ERISA fiduciary, then
11 you are one with respect to the recommendation.

12 Is that a part of the proposal you
13 have an objection to? Or is it more the, more
14 facts and circumstances sort of provisions of
15 the definition?

16 MR. QUINN: Well, it's a little bit
17 of both, Tim. As I mentioned during our
18 testimony, since we acknowledge fiduciary
19 status we don't particularly have a dog in this
20 fight.

21 We've already crossed that Rubicon.
22 But we are concerned that in trying to extend

1 the definition of fiduciary for these purposes,
2 in the way that it is, that the Department's
3 exceeding both its statutory text of ERISA and
4 what the 5th Circuit said in the Chamber of
5 Commerce decision.

6 And once you open that door and
7 start down that path, we're afraid that, you
8 know, it could be redefined in ways that would
9 be problematic even for those who do
10 acknowledge fiduciary status like we do.

11 I will say that I would echo a lot
12 of what Michael and Kendra's comments about
13 language in the preamble versus that which is
14 in the actual text of the regulation.

15 To give credit where credit is due I
16 think the Department did a pretty good job of
17 discussing what the scope of a recommendation
18 is in the preamble, particularly to the extent
19 that it talks about the necessity for a call to
20 action on the part of the investor. And that's
21 something that's quite often glossed over or
22 missed in other context.

1 But the text of the regulation
2 leaves considerably more room for
3 interpretation, based on the subjective
4 understanding of the communication on the part
5 of the investor.

6 And as Kendra mentioned, anything
7 that leaves substantial room for interpretation
8 after the fact by an investor or, you know,
9 prospective investor, is potentially
10 problematic for us to comply with. Because we
11 don't know where the line is.

12 MR. KREPS: For what it's worth, and
13 I won't belabor this point, because I know
14 we're coming up at the end here. But that, as
15 long as we're talking about fiduciary
16 acknowledgment we'll point out that it is a bit
17 ambiguous. And we do believe the Department
18 should provide clarity.

19 There are lots of advisors who have
20 Advisers Act duties to funds, not to the
21 underlying investors necessarily, to the funds
22 themselves. And they acknowledge those duties.

1 And it would be inappropriate to
2 apply this test in such a way that made
3 anything those people say a fiduciary
4 recommendation, just because they have a duty
5 to the fund that they are managing.

6 MR. HAUSER: Thanks. And just, but
7 I'd like to follow-up on my question to Mr.
8 Quinn, which is, just focusing solely on the
9 piece of the reg that says, look if you tell
10 the customer you're a fiduciary then you are
11 one.

12 And my question is just, do you
13 support that provision at least? Because at
14 least right now under the five part test
15 certainly a literal reading of the test, one
16 could have that conversation say in the
17 transaction of one-time advice.

18 One could say, I'm your fiduciary,
19 make the recommendation, you know, as in the
20 circumstance even that Ms. Winston described,
21 and not be a fiduciary just as a literal
22 application. I'm just wondering do you, I

1 mean, would you support that much of a change
2 to the rule?

3 MR. QUINN: Well, if I understand
4 your question correctly the answer is yes with
5 a caveat. When we make a rollover
6 recommendation we give a disclosure, written
7 disclosure about the facts and circumstances
8 surrounding the disclosure, why it may or may
9 not, or what aspects of it may or may not be in
10 the interest of the customer, and then allow
11 them to make a decision.

12 +We acknowledge fiduciary status
13 specifically in that context. But it's limited
14 to that context. In other words, it's limited
15 to the rollover recommendation.

16 Now depending on the nature of the
17 relationship with the client going forward, we
18 may be a fiduciary, we may not.

19 MR. HAUSER: Yes, see --

20 MR. QUINN: Or it's a multi part,
21 you know. We probably are. But I wouldn't
22 want to just say as a blanket statement one

1 fiduciary acknowledgment at some point in time
2 creates an ongoing similar fiduciary
3 relationship.

4 MR. HAUSER: Yes. Understood.
5 Appreciate that point. Thank you. Just two
6 other quick things. One, I just want to thank
7 you in particular, Ms. Winston, for stepping up
8 and participating.

9 It's sometimes easy for all of these
10 lawyers and investment professionals to come
11 testify at something like this. I know it can
12 be a little intimidating or daunting for
13 someone like you, that you refer to yourself as
14 a regular person. You're nothing of the sort.
15 But I appreciate you coming here and
16 testifying. And very grateful for it.

17 And then, the last thing I'd like to
18 express is just, you know, Mr. Kreps, at the
19 start of your testimony you indicated that
20 you'd preliminarily made a decision, you know,
21 concluded that we should withdraw.

22 But by the end of your testimony

1 you'd concluded that it was hopeless, and we
2 just need to withdraw the rule. And I felt
3 like, what happened in the course of your
4 testimony to --

5 (Simultaneous speaking.)

6 (Laughter.)

7 MR. KREPS: But, no, there was no
8 change. The position remains the same. I
9 should have used, I will then just incorporate
10 into my remarks, pepper through there
11 preliminarily. How about that? And we'll put
12 that up before the comment letter goes in.

13 MR. HAUSER: All right. Does anyone
14 else have any questions for the folks who
15 testified?

16 MS. WINSTON: I don't have a
17 question. But I just want to say thank you for
18 having me. And thank you for listening.

19 MR. HAUSER: You're very welcome.
20 Thank you. All right. With that we'll break
21 until 2:15 p.m. See you all then. Take care.

22 (Whereupon, the above-entitled

1 matter went off the record at 2:00 p.m. and
2 resumed at 2:16 p.m.)

3 MR. HAUSER: Hello, everybody.
4 Panel 5, let's see, we have John Grady leading
5 us off.

6 MR. GRADY: Do we just want to make
7 sure everyone can hear me?

8 MR. HAUSER: Yes, thank you.

9 MR. GRADY: Perfect. Great, thank
10 you. Good afternoon. As he said, my name is
11 John Grady. I serve as Vice President and the
12 Director of the Alternative and Direct
13 Investment Securities Association, or ADISA.
14 We're a member association focused on
15 alternative investments. ADISA is the largest
16 trade association in retail alternatives with
17 other, over a thousand firms and 5,000
18 individual members.

19 We're pleased to provide input to
20 the Department of Labor on this proposal to
21 update the definition of an advice fiduciary
22 for purposes of Titles I and II of ERISA.

1 I want to go on record as noting
2 that the comment period is relatively brief and
3 does come, as others have mentioned, at a
4 particularly busy time of the year.

5 To that end, we're still gathering feedback
6 from our members, but wanted to participate and
7 are glad to have been given the chance to
8 participate in these hearings.

9 So our membership includes retail
10 and managing broker-dealers, SEC registered
11 advisors, state-registered advisors and firms
12 that sponsor/manage and distribute various
13 alternative investments including non-listed
14 REITs, BDCs, interval funds and energy programs
15 many of which are publicly offered and others
16 of which are privately placed.

17 Our members are impacted by laws
18 passed by Congress and rules adopted by
19 regulators with jurisdiction rhythm including
20 the SEC, FINRA, the states and a respective
21 individual retirements accounts or IRAs.

22 The Department, ADISA takes pride in

1 the fact that as an association that tries to
2 work with the various regulators and agencies
3 with oversight of its members' activities, our
4 goal is to provide objective information
5 particularly about the market place for
6 alternatives and the firms that make up the
7 alternative investment industry in order to
8 enhance the overall regulatory process.

9 In this instance, many ADISA members
10 would be impacted by the proposed rulemaking.
11 It would transform many broker-dealers and
12 advisors into investment advice fiduciaries
13 when recommending alternative investments to
14 IRA holders and would require them to comply
15 with PTE 2020-02 in order to receive variable
16 compensation.

17 As I said, we're focused on
18 alternative investments and especially in the
19 retail space. The essence of alternative
20 investments is that they provide returns that
21 are generally uncorrelated to stock and bond
22 markets and may be sold by a public

1 registration statement or privately placed.
2 But they are typically not traded on an
3 exchange and hold assets that are also not
4 market traded, things like real estate, energy
5 assets, and debt.

6 This is particularly relevant to
7 this proposed rulemaking because these
8 investments are typically sold as products that
9 will have a lengthy holding period and will not
10 be easily sold or transferred in the period
11 prior to there being a liquidity event.

12 These investments are not in any
13 sense though a portfolio for the investor.
14 They are components of a portfolio adding
15 important diversification benefits to a
16 client's portfolio of investments and other
17 assets.

18 To put it another way, alternative
19 investments are sold into accounts as component
20 parts to provide important diversification
21 benefits, but they are not themselves advised
22 portfolios. Because of their typically less

1 liquid and long-term nature as holdings, these
2 products are particularly well suited to a
3 commission model of compensation for those who
4 recommend them.

5 Turning to the proposal itself,
6 there's no doubt that there are gaps where
7 current law or regulation leave retirement
8 savers vulnerable to overreaching behavior.
9 Closing these gaps is a worthy aim.

10 Under this rubric, however, the Department's
11 proposed approach involves a wholesale revision
12 to the definition of investment advice
13 fiduciary.

14 One that will impose fiduciary
15 status on financial service providers engaging
16 in a wide-range of transactions. Once labeled
17 an advice fiduciary, such providers will then
18 have to comply with a host of requirements
19 under PTEs adopted and updated by the
20 Department as part of the proposal.

21 This would be particularly true with
22 regard to broker-dealers that make

1 recommendations regarding alternative
2 investments for commission-based compensation.
3 Accordingly, ADISA does not support the
4 proposal in its current form. The Department,
5 in our view, is sweeping all manner of
6 relationships that touch IRAs into the
7 investment advice with fiduciary rubric
8 including those that involve a one-time
9 recommendation of an alternative investment.

10 The understanding for this is the
11 belief that retirement investors rely on
12 persons with whom they have these
13 relationships.

14 And this approach is being proposed despite
15 legal and practical differences involving
16 compensation. As we've heard time and again,
17 some financial advisors get paid for their
18 advice, others get paid only if there's a
19 transaction.

20 The distinction is important
21 however, for it lies at the heart of how
22 Congress separated investment advisors and

1 broker-dealers under the Federal Securities
2 laws ensuring that the latter did not come
3 within the definition of investment advisor
4 under the Advisers Act where the advice was
5 incidental to the security sales efforts.

6 At bottom, it appears that the
7 Departments' motivating mantra is as stated in
8 the release, sales equals advice. But as the
9 Fifth Circuit pointed out, in its opinion in
10 the Chamber of Commerce decision, this is
11 simply not the case.

12 I don't want to liken those who are
13 selling financial products to car dealers and
14 the like for that overlooks and down plays the
15 duties placed on broker-dealers when making
16 recommendations. And as I have said and as
17 others have echoed in this hearing, the
18 difference however between sales and advice is
19 real and provides a meaningful basis for not
20 treating all sales as advice.

21 And this point about the difference
22 between sales and advice is particularly

1 relevant to the world of ALTs or alternative
2 investments as they typically do not involve a
3 wholesale decision of where or how to hold
4 assets or how the investor's overall portfolio
5 should be shaped to meet his or her goals.

6 The hallmarks of advice in the way the term is
7 understood and used by investors and investment
8 professionals alike is portfolio management.

9 The process whereby a financial advisor
10 recommends an alternative investment isn't
11 viewed with the sales element since it is a
12 single or isolated sales process relative to a
13 specific product.

14 Pulling these types of
15 recommendations into the advice fiduciary
16 standard will have, in our view, several
17 harmful consequences. First, there's the
18 matter of costs.

19 We've noted previously in reference
20 to the prior fiduciary rule proposal, any
21 approach that subjects financial advisors to
22 additional costs will result into having those

1 costs passed along to those seeking this advice
2 or worse, result in an unwillingness to provide
3 services to IRA holders without imposing higher
4 fees or even establishing higher minimums.

5 Making it more expensive for
6 retirement savings using IRAs is not
7 justifiable where the existing regime provides
8 protections to clients of both broker-dealers
9 and investment advisors.

10 We acknowledge that ERISA takes a
11 more restrictive approach to protecting covered
12 plans and accounts than the disclosure focused
13 federal securities laws. But the SEC's recent
14 efforts to enhance protections for clients or
15 brokers and for that matter, the advisors has
16 created a more substantive set of protections
17 than existed previously.

18 We think it should be relied upon by
19 the Department in lieu of its proposed top to
20 bottom reform proposal. Too, this approach in
21 our opinion, will lead to the practical
22 elimination of the ability of broker-dealers to

1 serve IRA holders.

2 The proposed approach would make
3 broker-dealers into advise fiduciaries subject
4 to a common uniform standard. This standard is
5 from the standpoint of broker-dealers more
6 stringent than Reg BI and for all intent and
7 purposes, is unworkable.

8 The Department asserts that
9 conflict-ridden recommendations made by
10 broker-dealers can actually be mitigated by
11 subjecting them to this uniform fiduciary
12 standard. But the entire purpose underlying
13 the careful crafting of Reg BI by the SEC was
14 to address as mandated by Dodd Frank whether a
15 common standard should apply as routine
16 broker-dealers and investment advisors. And
17 with the adoption of Reg BI, the SEC responded
18 to congressional and public interest by
19 effectively raising the bar for broker-dealers,
20 but without subjecting them to appear fiduciary
21 duty.

22 The SEC clearly understood that

1 unconditionally applying a fiduciary standard
2 to broker-dealers would spell the end of the
3 commissioned approach to compensation which is
4 a hallmark of broker-dealers.

5 The Reg BI exists because the SEC's
6 judgment as required by Congress that a single
7 fiduciary standard for broker-dealers and
8 advisors was not workable and would lead to the
9 likely disappearance of the commission-based
10 compensation.

11 Now the Department does make several
12 efforts to dispel this concern, but we don't
13 think they really address the point. First the
14 Department states the SEC has adopted
15 regulatory standards for broker-dealers in Reg
16 BI that are based on fiduciary principles with
17 care and loyalty.

18 This is true but ignores the fact
19 that the SEC deliberately implemented a
20 best-interest standard that as many in this
21 hearing have noted does not constitute a
22 fiduciary standard.

1 The Department goes further in this regard
2 though saying that holding broker-dealer
3 representatives to fiduciary standards at the
4 state level does not impair access to their
5 services.

6 But with all due respect, the SEC's
7 considered adoption of Reg BI, a best interest
8 standard consciously not a fiduciary standard,
9 demonstrates the need for a different regime
10 for broker-dealers.

11 The experience of Massachusetts,
12 which dealt with the issue extensively in the
13 context of Robinhood, an online brokerage
14 platform, is not very informative as to how a
15 single standard would work in the world of
16 alternative investments and IRAs generally.

17 Third and most importantly, there's
18 the likelihood that the Department's approach
19 will substantially diminish if not eliminate
20 the commission-based model used by
21 broker-dealers by serving IRAs. Brokers are in
22 the business of selling securities. They

1 provide advice pertinent thereto, but not a
2 special compensation and only is incidental to
3 their sales and securities. Otherwise, they'd
4 be investment advisors subject to regulations
5 and such. They therefore occupy a unique place
6 in the landscape that provided advise, if at
7 all, in relation to the securities they're
8 selling or transacting. And this distinct
9 approach is what warranted having a separate
10 set of statutory and regulatory provisions that
11 apply to and govern their conduct.

12 It appears that despite some
13 statements to the contrary, the Department has
14 set its sights on the commission models moving
15 in the direction of eliminating it for IRA
16 holders and other savers. Eliminating or
17 restricting a potentially more economical
18 approach to the acquisition of securities and
19 other assets by IRAs will not, in our view,
20 advance the ability of small balance savers to
21 meet their goals.

22 Several years ago, we pointed out in

1 testimony in the Department's proposed
2 fiduciary role that reducing the availability
3 of advice and expertise to small balance savers
4 was likely to have a detrimental impact on
5 their ability to meet their goals.

6 The Department seeks to cast doubt
7 on this access point making a repeating
8 criticisms of studies relied on by the industry
9 and critics even now abrogated fiduciary role
10 in arguing that the rule would diminish the
11 availability of advice and create wealth gap.
12 Leaving aside the Department's criticisms for
13 the moment, after all, the rule was never fully
14 implemented so it's hard to say whether the
15 studies in question were able to measure its
16 true impact, ADISA continues to believe that
17 any regulatory program resulting in the
18 reducing of the availability of access to
19 investment expertise and to an alternative
20 investments will impact small balance savers
21 more than any other group of retirement savers.

22 The Commission-based approach can be

1 and often is a more affordable way to obtain
2 advice. As it subjects savers, sorry,
3 subjecting the saver's entire portfolio to an
4 advisory fee. Small balance savers will be
5 avoided by firms that want to try and charge
6 commissions to the extent that increase
7 compliance costs, if at all, would require them
8 to raise fees or impose higher minimums.
9 Effectively putting up a wall to the purchase
10 of ALTs by IRA holders is not in the best
11 interest of those holders. I've given the
12 intense dispute of whether --

13 MR. WILKER: Mr. Grady, it's been
14 over ten minutes. Could you wrap up your
15 remarks?

16 MR. GRADY: I shall. I think the
17 final point I wanted to make is there is a
18 demographic element to the small balance saver
19 universe that strongly suggests that these
20 efforts will have a disproportionate impact
21 unless affluent and poorly served communities.
22 They're made up in material a part by elderly

1 savers and others who are new to the workforce
2 or to the practice of saving for retirement.
3 It also includes persons from historically
4 disadvantaged communities such as person of
5 color who have only started saving. Causing
6 access to expertise and reducing the
7 availability of the Commission model will have
8 two effects.

9 It will dramatically limit access of
10 this community to important expertise and in
11 our mind, it will take away the ability of the
12 IRA as a type of account to buy the types of
13 alternatives that can help counteract the
14 market exposure that those accounts otherwise
15 have.

16 In our view, we think the Department should
17 take the proposal back and rework it in light
18 of these concerns. Thank you.

19 MR. HAUSER: Thank you. Mr. Rubin
20 of Betterment.

21 MR. RUBIN: Good afternoon. My name
22 is Joshua Rubin and I am Vice President and

1 Associate General Counsel at Betterment.
2 Betterment enthusiastically supports the goal
3 of expanding access to retirement advice that
4 is in retirement investor's best interest.
5 Betterment uses technology to offer affordable
6 fiduciary advice and our asset-based fee
7 structure aligns our interests with those of
8 our clients.

9 But even though putting our clients
10 first is at the center of our business model,
11 we have some concerns with how we would
12 implement certain aspects of the proposed
13 rulemaking package.

14 Before speaking to the specifics of
15 the proposal, let me start first with our view
16 of the current state of retirement savings.
17 Many Americans face a significant shortfall in
18 their retirement savings exacerbated by soaring
19 health care costs and longer life expectancies.
20 The shift in defined benefit plans to defined
21 contribution plans has placed greater
22 responsibility on individuals to navigate the

1 complexities of the markets themselves.

2 In this environment, access to personalized
3 investment advice is crucial to helping
4 investors establish fluid savings and investing
5 habits early in their careers which increases
6 the probability of good retirement savings
7 outcomes.

8 At Betterment, we believe it is
9 crucial to ensure that retirement savers
10 broadly participated in the capital markets.
11 It's our mission, our reason for existing.
12 Betterment pioneered the use of technology to
13 provide investment advisory services primarily
14 over the internet lowering costs and expanding
15 access to fiduciary advice.

16 Betterment's offering is focused on
17 long-term goals and building wealth. We use
18 technology to create engaging and clear digital
19 experiences that help clients identify savings
20 goals such as retirement, select managed
21 portfolios and track their progress toward
22 those goals.

1 Our portfolios are composed
2 primarily of globally diversified low fee
3 exchange traded funds. We serve individual
4 investors and employer-sponsored retirement
5 plans through our Betterment at Work platform.

6 Betterment manages over \$40 billion
7 on behalf of over 800,000 clients with a median
8 age of around 40. At Betterment, our clients
9 can trust that when we recommend a particular
10 investment to them, our professional judgment
11 is not compromised by our financial interests.
12 We are financially independent of the
13 investment products that we recommend.
14 Betterment clients pay an asset-based advisory
15 fee which is typically .25 percent of assets
16 under management.

17 Because our fees grow when our
18 clients balances grow, we have every incentive
19 to identify and select better or less costly
20 investments allowing us to continually drive
21 down individual portfolio costs and generate
22 significant market pressure in favor of lower

1 fee products.

2 And because we are not compensated
3 based on our clients' trading volumes, we have
4 no incentive to engage in frequent trading.
5 Unfortunately, this client-aligned business
6 model is far from universal across retirement
7 offerings, and secured revenue streams and
8 conflicted product advice remain widespread.
9 This is true notwithstanding recent rulemakings
10 from this and other agencies including the
11 Securities and Exchange Commission's regulation
12 best interest.

13 Although it is difficult to pinpoint
14 the financial impact of conflicted advice on
15 retail investors, both in the form of higher
16 fees and lost returns, estimates are easily in
17 the tens of billions of dollars each year.
18 Accordingly, we hope to see a final rule that
19 expands access to high quality retirement
20 advice, ensures that all investment
21 recommendations are subject to the same
22 stringent standards of conduct and minimizes

1 conflicts in interest.

2 We also support the proposed
3 expansion of PTE 2020-02 to digital investment
4 advice. We believe that advice is advice
5 regardless of medium. So long as quality
6 advice can be provided in a manner consistent
7 with the requirements of the PTE, it is in
8 investors' interests to allow it to be provided
9 in any form including digitally.

10 Digital advice is proven effective
11 in extending access and lowering costs for
12 investors. Using thoughtful design choices,
13 digital interfaces are often uniquely capable
14 of presenting understandable breakdowns of fees
15 and revenue streams associated with the
16 investment products in an account helping to
17 highlight and ultimately reduce conflicts of
18 interest.

19 Certain aspects of the proposal, however, are
20 likely to be counterproductive to the core
21 goals of the rulemaking because they are likely
22 to reduce rather than enhance the opportunities

1 for investors to actually receive fiduciary
2 advice.

3 In our view, the most problematic provisions of
4 the proposal share a common thread. They
5 expand the application of fiduciary standards
6 to interactions far removed from actual
7 investment recommendations. That remains an
8 important place for non-fiduciary educational
9 interactions where it is practically impossible
10 to obtain sufficient information to satisfy the
11 fiduciary duty of prudence.

12 Indeed, other fiduciary regimes
13 recognize that it is not practical for every
14 interaction to be subject to full-on fiduciary
15 status. For example, under the advisor's act,
16 interactions relating to marketing and
17 promotion which are entirely distinct from the
18 recommendation of the nesting products require
19 disclosure, oversight and controls that have
20 not been solved subject to fiduciary
21 requirements.

22 Consistent with this approach, several types of

1 interactions identified in the proposal should
2 not be subject to an investment fiduciary
3 standard.

4 First, higher need conversations
5 between platform providers and 401(k) plan
6 funds or prospects should not be subject to a
7 fiduciary standard. Plan record-keepers offer
8 a wide variety of services and features most of
9 which are not specific to investments. This
10 also applies, in our view, to discussions of
11 investment approach or philosophy without
12 regard to specific investments that might be
13 recommended in a client's account.

14 For example, Betterment's offering
15 of separately managed accounts or what we like
16 to think of as the equivalent of personal
17 target date funds managed to each individual
18 investor's unique goals and circumstances is
19 distinct in the marketplace, and can often
20 require a fair amount of explanation in the
21 early part of the sales process before a plan
22 sponsor will even consider this approach.

1 Second, educational interactions
2 leading up to an investor choosing to initiate
3 a roll over should not be subject to a
4 fiduciary standard. In our experience,
5 investors who are considering rolling over to a
6 new provider can be initially varied if
7 providing all of the information necessary for
8 a provider to make a fiduciary rollover
9 recommendation. Of prospects who visited a
10 rollover or IRA related educational resource in
11 Betterment's website in 2023, only a fraction
12 proceeded to initiate a rollover. And a
13 smaller fraction still provided all of the
14 information necessary to ultimately complete
15 that rollover.

16 Providing educational information
17 about investing philosophy, platform
18 functionality, and costs among other things,
19 can be very helpful for retail investors as
20 they seek to learn more about potential
21 providers.

22 This is particularly true of Betterment as our

1 managed account offering does not permit a
2 quick apples-to-apples comparison of available
3 investment options or costs.

4 Providing such basic information can
5 be critical to determining whether an investor
6 will even seek a rollover recommendation and
7 provide all of the information necessary to
8 allow a provider to make one subject to a
9 fiduciary standard. And even when they are
10 willing to provide it, investors considering a
11 rollover do not always have information about
12 their current plans, investment options and
13 fees readily available.

14 Under the proposal, these investors
15 will be foreclosed from having helpful
16 conversations about their rollover options.
17 Data aggregation services have automated the
18 process of obtaining the information to some
19 extent. But there remain data limitations that
20 make it challenging to rely entirely on
21 automated data providers under a fiduciary
22 standard.

1 Indeed, the 2016 fiduciary proposal
2 which Betterment supported included the best
3 interest contract exemption that applied a
4 streamlined approach to rollovers for level fee
5 fiduciaries without access to all information
6 required to otherwise make a fiduciary
7 recommendation.

8 A streamlined approach is also
9 called for in the context of pre-recommendation
10 interactions between prospects and providers
11 such as investment advisors. Not only are
12 investment advisors already subject to a
13 fiduciary standard of conduct, regardless of
14 whether they are making a recommendation, but
15 any educational interactions would be subject
16 to the broad anti-fraud and disclosure
17 requirements under the Advisers Act.

18 Without modification, this proposal
19 would have the perverse result of reducing
20 critical investor education from entities that
21 are already investment fiduciaries without
22 meaningfully increasing investor protections.

1 The proposal notes that fiduciary status should
2 only attach in the context in which the
3 retirement investor can reasonably place their
4 trust and confidence in the advice provider.
5 But shrinking the educational exemption is
6 likely to reduce the circumstances in which a
7 retirement investor chooses to do so. It is
8 also likely to increase inertia as fewer
9 investors will change providers.

10 As there are far more retirement
11 investors who are currently served by
12 conflicted legacy incumbents, this will
13 ultimately result in fewer retirement investors
14 engaging with newer or innovative and
15 potentially less conflicted providers.

16 In sum, the proposal could be
17 improved to ease these practical challenges
18 without sacrificing the important objective of
19 raising standards of conduct throughout the
20 industry.

21 Thank you for your time and consideration. I
22 look forward to addressing any questions.

1 MR. HAUSER: Thank you. Let's see,
2 next up is Mr. Paleveda. I apologize if I got
3 your name wrong. Is he already muted?

4 MR. PALEVEDA: Okay, can you hear me
5 now?

6 MR. HAUSER: Yes, perfect. Thank
7 you.

8 MR. PALEVEDA: Okay, great. Hello,
9 everybody, my name is Nick Paleveda. I'm a
10 USCF Chess Master, three-time Florida State
11 Champion.

12 I have an MBA from the University of South
13 Florida, a law degree from the University of
14 Miami, a master's and law degree from the
15 University of Denver, and for 12 years I've
16 been an adjunct professor for the graduate tax
17 program at Northeastern University where I was
18 lead faculty for the retirement planning course
19 at Northeastern. I've been an active member of
20 the Florida Bar for 39 years, licensed before
21 the U.S. Tax Court, the 11th Circuit Court of
22 Appeals, the 9th Circuit Court of Appeals, and

1 the Supreme Court of the United States.

2 The last 22 years, I've been CO of a CPA firm
3 that managed qualified plans for small
4 companies. And I'm here to clear up some
5 misconceptions concerning the retirement
6 industry which I've worked in without a client
7 complaint for 22 years now and the fiduciary
8 role.

9 And one of them is the fiduciary
10 role in the foundation that this rule is based
11 on which after me reading, which I think was
12 close to 400 pages, it's based on a lot of
13 deceit, misrepresentation and dishonesty. And
14 I'm going to bring them out in less than ten
15 minutes.

16 Deceit number, one and this is in
17 your fact sheet, it says, for example, advice
18 rooted in conflicts of interest regarding the
19 sale of just one investment product fixed index
20 annuities may cost savers as much as \$5
21 billion.

22 That is just simply not true. And I'll tell

1 you why it's not true. I wrote an article for
2 the Journal of Accountancy back in 2009 saying
3 no commissions or fees are taken out of fixed
4 inequity index annuities.

5 The peer reviewed articles which
6 some I write and some I don't, most of the ones
7 that were cited in your study are not peer
8 reviewed studies by the way. Anyway, they had
9 to look it up. And I was shocked they didn't
10 know. Then they came back with the conclusion
11 that I was correct. These contracts have no
12 fees or commissions taken out of the clients'
13 accounts.

14 They're like CDs issued from an insurance
15 company. So they do have the climbing
16 surrender charges just like CDs do, but it is
17 misleading to say that a client is going to be,
18 it's going to cost \$5 billion.

19 It's just simply not true. There
20 are other things in the foundation that are not
21 true, but in the interest of time, we're not
22 going to get into it. And mainly it deals with

1 resident studies that are not peer reviewed,
2 they're really people's opinions. Then we go
3 on to the next problem. The S&P 500 beats all
4 investments over long period of time. There's
5 a misconception in the fee base and I've worked
6 with these people for 40 years now that we're
7 fee based, we're unbiased, we're better.
8 Absolutely all not true. They make money when
9 you make money. But guess what, when you lose
10 money, they still make money. But that was
11 never brought out and not only that was never
12 brought out that these annuity contract person
13 doesn't take any commissions out of your
14 account. But anyway, we go on.

15 The S&P 500 beats all investments
16 over a long period of time. And this is simply
17 not true. If you invested \$1 million in the
18 S&P 500 in the year 2000, retired ten years
19 later, you'd have about \$750,000. During the
20 same ten-year period, I'm talking about year
21 2000 to 2010, you put a million dollars in the
22 fixed annuity that about \$1.4 million. It's a

1 \$650,000 difference in favor of fixed
2 annuities.

3 Now, granted, that was the years
4 2000 to 2010. You're welcome to do your own
5 study. Please fact-check everything I say.
6 And you're going to find out I'm correct. By
7 the way, when you lost all that money, the
8 fee-based planners still got paid. These quote
9 unbiased fiduciary still got paid. Yet they
10 didn't do as good of a job as somebody who just
11 put the client in a fixed annuity.

12 Now, if you take the data from 2010
13 to 2020, then of course with the lowest
14 interest that we've seen in years, the S&P 500
15 did better. Now we go to 2020 to 2030, the
16 data is inconclusive at this point in time.
17 It's yet to be seen. So the thing is, the
18 third part, and this is the biggest part. The
19 biggest problem with retirement is not what was
20 mentioned in your article.

21 The .2 percent more than an advisor
22 may make or 1.2 percent, what is the biggest

1 threat to everybody's retirement listening to
2 this program? It's our national debt. The
3 United States is \$34 trillion, not billion,
4 trillion in debt growing yearly. Social
5 Security and Medicare/Medicare trust fund runs
6 out of money this decade, Social Security runs
7 out a next decade. And it seems to me the plan
8 is they're going to lean on the federal
9 government to make up for the shortfall in the
10 Social Security trust fund that the Social
11 Security trust fund will not be able to lean on
12 the federal government because we are broke,
13 \$34 trillion.

14 What would be good for this Committee to do is
15 have a road to Damascus moment and turn around
16 and address how they can reduce their budget 28
17 percent.

18 By the way, on my analysis, quick
19 and dirty, if every government agency reduced
20 their budget 28 percent which could be 9
21 percent every year for the next three plus
22 years, then you'd have a balanced budget. And

1 then you'd be on a road to a more secure
2 retirement for everybody. Why you're wasting
3 my time and everybody's time and everybody's
4 intellectual effort to go through this
5 fiduciary role is abysmal -- I'm hoping that
6 this can be thrown in the trash can and that
7 you can come up with a new proposal how we can
8 save everybody's retirement and save the U.S.
9 government from the \$34 trillion in debt
10 growing to the point that the only thing we're
11 going to have are taxes paid is interest on the
12 debt. And with that, I rest my case, counsel.

13 MR. HAUSER: Thank you. And last
14 person on this panel, Mr. McMahon for the SPARK
15 Institute.

16 MR. McMAHON: Sure. Thank you. Can
17 you all hear me?

18 MR. HAUSER: Yes.

19 MR. McMAHON: Great. Good
20 afternoon. My name is Adam McMahon. I am a
21 partner in the law firm of Davis & Harman.
22 This afternoon, I'm speaking on behalf as you

1 said, the SPARK Institute to voice our strong
2 concerns with the Department's latest fiduciary
3 proposal.

4 SPARK Institute represents retirement plan
5 record keepers and other retirement plan
6 service providers and collectively our members
7 administer retirement plans for more than 110
8 million American workers.

9 As we've previously communicated to
10 the Department, multiple iterations of its
11 fiduciary rules, the SPARK Institute has long
12 believed that persons providing investment
13 recommendations and advice and relationships of
14 trust and confidence should be subject to
15 ERISA's fiduciary duties.

16 However, for interactions that fall
17 outside of those special relationships of trust
18 and confidence, SPARK does not believe that
19 those fiduciary standards, the obligations, the
20 risks, and liabilities that go along with them
21 should apply.

22 Given these views, we believe that

1 the Department's latest fiduciary proposal
2 would inappropriately lower the bar for
3 determining when fiduciary relationships exist.
4 And as a result, this lowering of the fiduciary
5 bar will have many negative consequences for
6 retirement savings.

7 Specifically, if the proposed
8 definition is finalized as it's proposed, we
9 expect a significant reduction in the many
10 beneficial forms of assistance that service
11 providers and record-keepers currently provide
12 the plan sponsors and participants in the
13 current reliance when the treatment is
14 non-fiduciary activity. And to the extent that
15 these services and communications and
16 interactions can continue to exist, our concern
17 that they'll only be able to be provided at an
18 increased cost to plans and participants.

19 With regard to all of these
20 unfortunate consequences that we believe would
21 result in the proposal, we want to emphasize
22 that we think that this is a unique exercise

1 unlike a lot of other regulatory proposals from
2 the Department or other regulators in which our
3 expectations about the impact of the proposal
4 aren't these mere hypothetical or speculative
5 expectations as to what might occur.

6 Because of the similarities to this
7 rule and the way that in many respects, it's
8 functionally equivalent to the Department's
9 2016 rule. Our expectations and views on this
10 proposal actually reflect our real-world
11 experience implementing the 2016 fiduciary rule
12 before it was eventually invalidated.

13 Including a reduction in many beneficial
14 services I'm going to talk about that had to be
15 eliminated in response to that rule.

16 So what are the types of
17 interactions and conversations we're
18 particularly concerned about? Well, they
19 generally fall into two categories that I want
20 to talk about. The first broad category of
21 interactions that we're really concerned about
22 underneath the proposal are the many forms of

1 participant assistance again that SPARK members
2 provide in reliance on their current treatment
3 as non-fiduciary activity.

4 These valuable forms of assistance
5 include tools and communications that record-
6 keepers offer to do things such as encouraging
7 portfolio diversification to participants who
8 may be disproportionately invested in certain
9 asset classes or maybe exclusively employer
10 stock.

11 These include tools that help prevent employees
12 from depleting their accounts before retirement
13 and encourage employees to keep their assets in
14 the retirement savings system when they switch
15 their jobs.

16 These types of assistance encourage
17 participants to adopt healthy financial habits
18 and avoid what are generally regarded as common
19 mistakes. And they are often targeted to
20 specific individuals based on their
21 circumstances. And we believe it is this
22 individualization that actually helps promote

1 the positive outcomes that we're trying to
2 achieve.

3 Under the proposal, however, we
4 believe many forms of this assistance would
5 merely be treated as fiduciary investment
6 advice and would therefore either be reduced or
7 only offered at an increased cost.

8 One example we've heard from our
9 members is being concerned and I'll offer this
10 as a hypothetical which is a record-keeper tool
11 that helps participants make decisions about
12 their option to receive distributions and loans
13 from the plan.

14 In offering this type of assistance,
15 a record-keeper might ask the participant for
16 specific information about their situation.
17 How much is your financial need? Are there
18 specific facts that would support exception to
19 the early distribution penalties that comply to
20 in-service withdrawals? What is your
21 anticipated ability to repay this type of
22 distribution?

1 And based on all of this
2 information, a record-keeper might suggest that
3 a participant take a loan rather than a
4 hardship withdrawal in order to avoid those
5 early distribution penalties if they're able to
6 repay it.

7 Under the current five-part test, these types
8 of assistance tools which do not refer to any
9 specific investments under the plan, generally
10 are not regarded as fiduciary investment advice
11 or are not when we say regarded as fiduciary
12 investment advice.

13 However, under the proposal, we're
14 concerned that these types of communications
15 would be viewed as advice. The second broad
16 category of communications that we're concerned
17 about are the types of conversations that we
18 believe are clearly sales conversations rather
19 than advice.

20 And although they occur in a sales
21 context, many of these conversations we believe
22 are nevertheless very helpful in promoting

1 things such as plan formation, helping
2 encourage participation, and bringing new
3 products and services to plans and participants
4 thereby increasing their healthy financial
5 habits.

6 On this issue of sales, for example, the
7 hypothetical word I guess the real-world context
8 that I'd like to offer this in is we believe
9 that the proposal would make it much harder to
10 sell plans to small employers.

11 It would apply across the board, but
12 it's particularly concerning I believe in some
13 of the small plan sales context. Under the
14 current regulatory five-part test, plans are
15 often marketed with a pre-selected platform of
16 investments that are often marketed as being
17 appropriate or specifically selected to serve a
18 small employer market.

19 These conversations are not and have
20 generally not been treated as sales, excuse me,
21 as advice but rather a sales conversations in
22 non-fiduciary context. And in our view, this

1 is appropriate as we do not believe that plan
2 sponsors, even plan sponsors, even smaller plan
3 sponsors accept back that these sales
4 representatives marketing their own firm's
5 products are providing fiduciary level advice
6 in a relationship of trust and confidence.

7 Under the proposal, however, which
8 doesn't have platform exceptions or doesn't
9 have types of exceptions to cover
10 communications with large plant sponsors or
11 small plant sponsors or allows them to define
12 the scope of their relationship, we're very
13 concerned that these marketing activities would
14 newly be treated as fiduciary investment
15 advice, and could only be offered in reliance
16 on the exemption or potentially limiting plan
17 sponsors only to generic product descriptions
18 or general information, which doesn't
19 necessarily connect them to the types of
20 products that would be helpful for them.

21 Well the goal of all the
22 interactions I've discussed is generally to

1 make it more likely that more workers will be
2 able to adequately quickly prepare for
3 retirement, whether, again, by encouraging
4 small employers to adopt a plan or suggesting
5 that employees avoiding in-service withdrawals
6 that can't be repaid.

7 We believe that the fiduciary
8 proposal, that threaten many of these valuable
9 forms of assistance. The fiduciary liability
10 and cost have a newly accompanied all of these
11 interactions in many instances simply cannot be
12 justified by the benefits that they would
13 create for a firm.

14 In this regard, we want to emphasize
15 that the availability of a generally available
16 advice exemption such as PTE 2020-02 as it
17 currently exists and especially as it's
18 realized, should not be used as a justification
19 for inappropriately lowering the fiduciary bar.

20 Using the most workable exemption is
21 no cure for the wrong fiduciary definition.
22 And even for those record-keepers and other

1 service providers, who have already implemented
2 PTE 2020-02 as we've heard and a few discrete
3 well-defined, clearly defined relationships.

4 We do not think the Department
5 should assume they will extend the use of that
6 exemption to many of these helpful
7 conversations that have long been treated as
8 non-fiduciary forms of assistance.

9 Unfortunately, as a result of the
10 proposal, we expect that many record-keepers
11 will simply stop providing these forms of
12 assistance. Whether they actually fall within
13 the technical definition of fiduciary advice or
14 even come close to approaching that line, the
15 risks and costs associated with taking on
16 fiduciary status especially for situations in
17 which it was not intended, it just those costs
18 are too much and the risks are too high.

19 In our written comments which we're
20 still working on and intend to get in before
21 the deadline, we will offer some suggestions on
22 the types of changes that would maybe

1 marginally improve the proposal. However, it
2 is our view that even if, you know, those types
3 of changes were made, it would still not
4 prevent many of these negative consequences
5 under the framework that's being proposed by
6 the Department.

7 For these reasons and because we
8 believe that the current fiduciary proposal
9 would inappropriately lower the bar for
10 fiduciary investment advice that would
11 eliminate many of these beneficial forms of
12 assistance, we are encouraging the Department
13 to withdraw its proposal and not re-propose any
14 similar rules unless they are far more narrowly
15 tailored to avoid these negative consequences.

16 Again, I'd like to thank the
17 Department for giving us the opportunity to
18 speak today. I'm happy to answer any
19 questions.

20 MR. HAUSER: Thank you. So I'll
21 start with a few questions and then maybe
22 others can join in. I think I'd like to start

1 with Mr. Rubin from Betterment.

2 And, I mean, maybe I'll start first
3 with a statement and then a question that the
4 statement is just that a lot of the kinds of
5 communications that you are discussing I don't
6 think are fiduciary in nature under the new
7 proposal. You know, it's not just a trust and
8 confidence test, there has to be a
9 recommendation. And unless and until you have
10 a recommendation, you don't have a fiduciary
11 anything.

12 So when you were talking about kind
13 of those pre-recommendation conversations, when
14 you were talking about sort of educational
15 kinds of communications and the like, those
16 shouldn't be picked up and I -- I mean, that's
17 not our intention to pick up those
18 communications. We don't think the rule as
19 drafted does. And there was a -- you know, and
20 the recommendation concept here really is the
21 one that, you know, should be familiar to folks
22 from FINRA and the SEC. It's a call to action.

1 It's not, you know, just providing people kind
2 of disclosure of the attributes of the
3 particular investment, the basic investment
4 principles, those sorts of things.

5 So the question I have is just -- I
6 mean I won't ask you does that reassure you,
7 but a question would be, you know, there's a
8 lot of discussion of these issues in the
9 preamble.

10 But as I asked a previous Panel, I mean is part
11 of the issue here that we, in your view, we
12 really ought to move these things up into the
13 text of the reg and just be very express about
14 the sorts of educational communications, the
15 non-recommendation sorts of communications?
16 And that they just aren't picked up as
17 fiduciary advice?

18 MR. RUBIN: Yes, well thank you.
19 And let me say that I am, you know, happy to
20 hear that it is, you know, your intent is more
21 consistent with the position that we discussed
22 and maybe, you know, we had assumed.

1 I do think that is, you know, one of
2 the things that would be helpful is just to
3 both have the final rule outside of the
4 preamble include a definition, a clear
5 definition of recommendation that, you know,
6 also includes the sorts of interactions that
7 are explicitly not intended to be captured in
8 the context of a recommendation.

9 And I do think that would, you know,
10 would give us a fair amount of reassurance. I
11 think our concern is that in the absence of
12 additional clarity around both the scope of the
13 definition of a recommendation as well as the
14 scope of the educational exemption, that I
15 think that it's likely to chill a number of the
16 sorts of interactions that we've identified.

17 Just because of the, you know, the
18 difficulty of complying procedurally and the
19 additional burden of ensuring that all of the
20 requirements of the PTE would be complied with.
21 And so I do think, again, that it would be very
22 helpful if there were some additional clarity

1 in the final rule.

2 MR. HAUSER: Okay, so that would,
3 yes, so if just as you're preparing your
4 comment, if you could think about those areas
5 you think it's especially important for us to,
6 you know, underline in that way as non-
7 fiduciary sorts of communication.

8 And if there are particular
9 hypothetical sorts of situations or scenarios
10 that you think maybe are on the line or
11 especially susceptible to either
12 misinterpretation or just that you think maybe
13 we have the wrong interpretation, but if you
14 could underline those for us and identify them.
15 I mean generally speaking, when we put out the,
16 if you look at the preamble to the rule as I
17 mentioned in the last time we did meet, we
18 don't think and we don't intend for this rule
19 to pick up kind of general investment
20 communication, stuff between the HR Department,
21 the employees, I don't think this was your
22 issue in particular, but the kind of mandated

1 disclosures that go with swap transactions, the
2 hire me kind of conversation right up to the
3 point that somebody's actually making an
4 investment recommendation that's intended to be
5 covered.

6 We don't think wholesaling kinds of
7 conversations are generally picked up and this
8 maybe goes to the last testimony, but we also
9 think that what we said previously about
10 platform providers, you know, and even actually
11 in 2016 project, if you fell within the
12 contours of that platform provider exception,
13 we don't think you've done anything that would
14 be picked up as a recommendation subject to
15 fiduciary status.

16 In this rule, all of those things if
17 people think they should be in Reg text or
18 think we should say more about them, I think it
19 would be extremely helpful to know that.

20 And then, similarly, we didn't
21 expend a lot of Reg text on the line between
22 education and advice and information and advice

1 and those sorts of things.

2 But if you're just describing the
3 attributes of an investment or basic
4 educational principles, that's not picked up.
5 And if you look at the guidance we gave in both
6 in the current interpretable bulletin, but also
7 even in the 2016 rule where we had a fairly
8 lengthy discussion of what's advice and
9 education, I don't think we think those lines
10 are any different.

11 Because it's the -- you have to have
12 the recommendation before you get there. So
13 just I'd urge anybody who's got, has these
14 worries to take a look at that language. And
15 tell us how you think we can do a better job
16 maybe of making sure that people don't have
17 anxieties about communications we didn't intend
18 to pick up in the first place as fiduciary.

19 MR. RUBIN: Certainly that's very
20 helpful and we'll certainly do so in coming.

21 MR. HAUSER: Thank you. And then,
22 Mr. Grady, I just had a couple of questions for

1 you before maybe I turn it over to others. But
2 I think you viewed, if I understood your
3 testimony, you viewed 2020-02 as significantly
4 more restrictive maybe than Reg BI or more
5 demanding.

6 And that you were concerned about
7 potential impacts on access to advice as a
8 result of those additional stringencies and I
9 don't mean to put you on the spot, but if
10 there's any specifics in that regard that you'd
11 like to identify about ways in which it's more
12 stringent than Reg BI that you think we should
13 be thinking about, I'd appreciate it.

14 MR. GRADY: I think we're going to
15 get into that, thank you, in our comment
16 letter, but I do want to say that in the
17 context we're talking about, the compliance
18 with 2020-02 is one that I think your own
19 Department acknowledged was a higher barrier
20 than the mere Reg BI standard.

21 So I think you can go through the
22 litany, but I think, but it struck me

1 principally as was a relatively broad set of
2 sort of different additional and higher
3 standards than somebody who's trying to both be
4 a broker-dealer complying with Reg BI generally
5 than somebody who's a broker-dealer trying to
6 comply with the advice fiduciary definition
7 would be trying to comport itself with.

8 And for that reason we could see
9 quite a number of them saying I'm just not
10 going to serve IRAs even though the brokerage
11 model might be: a) very welcome to the IRA
12 holder; and, b) it's really at the heart of a
13 lot of sales of investment products that are
14 alternatives which is why we're so concerned
15 about the backing away of the broker-dealer
16 community from serving IRAs because of the
17 differential in compliance.

18 MR. HAUSER: Yes, and so there, too,
19 I appreciate that you'll, you're looking to
20 address those things in the written comment.
21 And I would urge you to do that because I
22 don't, I don't think at least the standards,

1 the fundamental duties of prudence and loyalty
2 and then not misleading folks and the like, I
3 don't know that they are appreciably different
4 than the two context.

5 And it would just be good to
6 understand, but there are other features
7 obviously in 2020-02. And it would just be
8 good to understand what you think are the kind
9 of the key drivers here.

10 MR. GRADY: Thank you for that. And
11 I think part of our answer is going to
12 ultimately come back to the way the SEC
13 addressed the issue was it chose not to impose
14 fiduciary status on broker-dealers making
15 recommendations in the Reg BI world. And that,
16 as a result, it might require quite a lengthy
17 re-write of 2020-02 to make clear where the
18 fiduciary duty concept might be limited,
19 truncated or nonexistent in the case of a
20 broker-dealer made in advice fiduciary who is
21 also trying to comply with 2020-02 and Reg BI.

22 So I can just tell you that that's

1 probably where the letter will go.

2 MR. HAUSER: So as, I mean as you
3 understand it, and this isn't like a legal
4 quiz, I just want to understand where you're
5 coming from here.

6 I mean, what do you think are the
7 differences in terms of the standard that apply
8 to the recommendation under the securities laws
9 as between a broker and an advisor? There's a
10 difference in kind of the default monitoring
11 obligation and not only that, but it is
12 important, but under ERISA, there is no
13 on-going monitoring obligation, you know?

14 And I think and we can be clear
15 about that. The ERISA functional test of
16 fiduciary status is a
17 transaction-by-transaction test. It's by its
18 nature transactional. Are you giving advice
19 with respect to this transaction that's
20 fiduciary? So it's in every case going to be
21 decided on a transactional basis.

22 But after that, I have a hard time,

1 you know, if you put aside the monitoring
2 issue, it's hard to single out any difference
3 in the governing standard as between a
4 recommendation from a broker, an advisor under
5 the Advisor Act and under the SEC. And they
6 are both rooted in the same fiduciary
7 principles as best I can tell. Aren't they?

8 MR. GRADY: No, that last point I
9 would start with and say no, I don't think so
10 or we wouldn't have the 34 Act on the one hand,
11 the Advisers Act on the other with a clear
12 exclusion of broker-dealers and investment
13 advisor status to the extent they give advice
14 that is solely incidental to the conduct of
15 their business.

16 And they don't get specially compensated for
17 it. So with that level of congressional
18 understanding of the difference, I think we're
19 very leery of anything that suggests that the
20 standards are close enough to be legally or
21 practically the equivalent of each other when
22 applied to real life work of a broker-dealer.

1 I think that, you know, the SEC
2 spent quite a bit of time trying to explain why
3 it wasn't going to adopt a single fiduciary
4 standard despite in some cases, the
5 recommendations of staffers from prior eras as
6 to why it should do so.

7 And I think in some ways, the
8 formulation often will come down to an
9 understanding of what the difference is between
10 putting your client first on the one hand and
11 not putting yourself ahead of the client on the
12 other.

13 And I noticed in your own release
14 that both formulations were used which I'd want
15 to get into and will and plan to get into in
16 the comment letter because I think that is a
17 key differential in especially where as you
18 label it or the Department labels it in
19 conflicted advice. Sort of putting the client
20 first may in some ways be interpreted as never
21 allowing for compensation. It could vary by
22 the advice given as opposed to a standard that

1 says you can't put your interests ahead of the
2 clients or as you put it, subordinate the
3 clients' interest to your own.

4 So I think that's what and if it's
5 helpful, we'll get into that in our comment
6 letter.

7 MR. HAUSER: It would be helpful.
8 The latter is what's intended. There is not an
9 assumption in our part that perfectly level
10 compensation is required by this.

11 MR. GRADY: I appreciate that and I
12 --

13 MR. HAUSER: It's understand --

14 MR. GRADY: Can I just make one
15 point?

16 MR. HAUSER: Yes.

17 MR. GRADY: Sort of touched on by
18 your question and that is we are also happy to
19 see new ways of providing advice come into the
20 marketplace including one of my fellow
21 panelists, the use of technology and internet
22 to serve smaller balance savers does have

1 appeal to both us and to the market generally.
2 But I want to point out that a lot of those
3 models cannot, certainly they do not now.

4 We don't see how they would
5 necessarily will in the future, incorporate
6 alternatives in them. They're just not a good
7 fit for a technology driven advice model even
8 if that model is otherwise a nice fit and it
9 alleviates some of the Department's concerns
10 that the commission model may go away. So that
11 will be in our letter as well.

12 MR. HAUSER: Okay, thank you. And
13 can I get a preview of that? What is it you
14 think is, makes it especially hard?

15 MR. GRADY: I think you'll see that
16 if you, if there is a program and I'm sure my
17 fellow panelists would be glad to tell me that
18 there is one, but if you can find a program
19 that literally includes a non-listed security
20 in a program that's delivered essentially via
21 the internet without the need for a particular
22 signature on the application or the

1 requirements that are mandated by the state
2 merit reviews of investors qualifications and
3 the like, I think including even the basic type
4 of alternative investments such as a
5 non-exchanged listed REIT is very difficult in
6 an advice model that's delivered
7 electronically.

8 MR. HAUSER: Thank you. And do you
9 have any sense of -- you referenced at one
10 point concerns about small balance savers in
11 particular and I didn't take to your, you as
12 expressing concern just with respect to the
13 folks here, members' advice. But I am
14 wondering about that. Do you have any data or
15 are you familiar with any data or do you have
16 any information on the extent to which small
17 savers are investing in alternative investments
18 and of the sort that you recommend and have
19 expertise in?

20 MR. GRADY: I mean, we are still
21 collecting feedback and data from our members
22 through a wide-based survey to just try to get

1 at that question specifically because we figure
2 data is going to help everybody and we want to
3 be honest brokers on this question.

4 But from what we've seen, you know, the
5 standards for buying a lot of alternative
6 investments, they're not, you know, sort of
7 available to everybody.

8 There is a wealth or income test
9 that must be satisfied and it's built into the
10 offering documents and the merit review process
11 that the states follow. Certainly, for
12 publicly offered programs such as REITs and
13 BDCs.

14 So I think, as a result, there is a
15 need for talking to smaller balance savers
16 about including ALTs in their portfolio just to
17 avoid them being totally linked to market-based
18 products.

19 But at the same time, telling them
20 that those aren't available because there's a
21 high minimum fee to be in an account that's
22 going to make those accessible or that they're

1 not accessible to investors unless they're
2 willing to meet certain requirements in their
3 own IRA account is, to our mind, going to make
4 it less likely that those smaller balance
5 savers are going to get access to alternatives.
6 We think they're going to get less access to
7 advice or expertise generally but in particular
8 to the ALT space given those extra concerns.

9 MR. HAUSER: But right now as it
10 stands, they don't have much access to the ALT
11 space and that's something you think should
12 change? Is that --

13 MR. GRADY: Oh, I think, I was
14 actually say -- pardon my interruption. There
15 are programs that are sold to a significant
16 extent into the IRA market.

17 The 20, 30, 40, even 50 percent of certain ALTs
18 programs are sold into IRA accounts for the
19 reasons that I was angling at before, certainly
20 their non-correlation and diversification
21 impact.

22 I think the concern is that taking

1 away or changing the current framework for the
2 revision of that expertise to the IRA holder is
3 going to mean IRA holders will get much less
4 marketed at them by the financial provider
5 community, and have much less opportunity to
6 put ALTs in their portfolios than they have
7 now.

8 MR. HAUSER: My perception though
9 and tell me if I've got this wrong, is that
10 there is exposure and access to these
11 investments and outside the small saver kind of
12 community and the IRA market, but not so much
13 for small savers.

14 MR. GRADY: Small savers aren't
15 excluded because it doesn't require them to
16 have an asset balance in their IRA to meet the
17 wealth or income tests that are otherwise
18 established under the state merit rules.

19 So I think what we're saying is it's
20 more, it's not likely that firms are going to
21 go through the hoops to make those products
22 available to the small balance savers in their

1 IRAs because of all the costs associated with
2 those hoops.

3 MR. HAUSER: Okay, thank you. Thank
4 you very much.

5 MR. GRADY: Absolutely.

6 MR. HAUSER: Any data you can
7 provide us would be terrific. And I'll turn it
8 over to anybody else on the Panel who has
9 questions.

10 MR. PALEVEDA: The only question I
11 have is if you do a study --

12 MS. HANSEN: So, let me ask right
13 now. Sorry, thank you. I had a question for
14 Mr. Grady. You mentioned that these, that the
15 products that are covered here are recommended
16 to retirement investors.

17 Several times you said that they
18 were made as recommendations and I'm curious as
19 to what you think again to serve your opinion
20 whether when these recommendations are made
21 whether the retirement investor is under the
22 impression that the retirement investor

1 appropriately should trust and put their trust
2 into that recommendation and why or why not?

3 MR. GRADY: You know, I don't think
4 the context for the recommendation differs by
5 whether we're talking about the placement of
6 the investment into a retirement account or a,
7 you know, taxable just for argument's sake,
8 taxable brokerage account. Because in many
9 cases, the same investor who's a client of a
10 broker-dealer will have both retirement
11 accounts and taxable accounts.

12 I think the major difference is, is
13 there a reason to put a high-income producing
14 investment that maybe long-term in nature in a
15 tax deferred vehicle or tax-deferred account
16 like an IRA?

17 Not that it's sold differently, not
18 that it's, that the relationship is differently
19 seen, but rather the overlay is, is this the
20 right place for taxable versus a high-income
21 producing investments that might cause current
22 liability if held in the taxable account, but

1 which are shielded from current federal taxes
2 held in a retirement account? I think that's
3 --

4 MS. HANSEN: That doesn't answer my
5 question. I'm asking whether the retirement
6 investor believes whether it is your view that
7 the retirement investor believes they can trust
8 and put their trust into that recommendation.

9 MR. GRADY: No, I think the
10 retirement investor is also the taxable
11 investor. I think they're all looking at their
12 broker-dealer as providing expertise on the
13 security in question.

14 And the extra trust is in the expertise as to
15 whether or not something would be a good fit
16 with the retirement account.

17 MS. HANSEN: So is that, yes, the
18 retirement investor does believe they can trust
19 the recommendation?

20 MR. GRADY: I'm saying it's no
21 different. If they trust the advisor, then
22 they would for whether it's a taxable or a tax

1 exempt account.

2 MS. HANSEN: Okay.

3 MR. GRADY: I don't think there's
4 any different --

5 MS. HANSEN: So just to be clear,
6 you're not going to answer the question.

7 MR. GRADY: It's not that I don't
8 want to answer the question. I just think the
9 context is it's often the same person with
10 multiple accounts sitting in front of a
11 broker-dealer asking where they should hold the
12 investment in question. I do think they trust
13 the broker-dealer to give them an expert answer
14 on whether it would be sensible to hold it in
15 the tax free account or not.

16 MS. HANSEN: So they do trust their
17 broker-dealer to provide them the
18 recommendation? Yes, is the answer?

19 MR. GRADY: They do trust the
20 broker-dealer to give them the right
21 recommendation as taxable versus nontaxable
22 accounts in answer to your question.

1 I don't think it's any different as between the
2 two places in any other respect of their
3 understanding of the trust relationship.

4 MR. HANSEN: Thank you.

5 MR. GRADY: Absolutely.

6 MR. PALEVEDA: I have a question.

7 Did the Department of Labor EBSA do a study on
8 the reduction of people setting up retirement
9 plans?

10 The time you last passed the fiduciary rule our
11 empirical analysis showed three major insurance
12 companies withdrew completely from the small
13 retirement plan market, Transamerica, New York
14 Life and Ohio National.

15 Our studies showed that new
16 retirement plans reduced 40 percent the year
17 you decided to place this fiduciary rule in
18 effect because the insurance agents didn't
19 think they could comply with the fiduciary
20 rule, and would want to show a client anything
21 else other than a retirement plan. Have you
22 looked at the damage that was created from this

1 fiduciary rule that was placed several years
2 ago? I did and it was significant and that's
3 the reason I oppose it.

4 MS. HANSEN: We are happy to take a
5 look at anything that is sent in through the
6 comment period. Unfortunately, this Panel is
7 scheduled to end a minute ago so we are going
8 to need to end this panel today right now.

9 (Whereupon, the above-entitled
10 matter went off the record at 3:16 p.m. and
11 resumed at 3:30 p.m.)

12 MR. HAUSER: Okay, I think we've
13 reached the last panel, and that includes
14 representatives of the American Bankers
15 Association, Collective Wealth Partners and the
16 Institute for Portfolio Alternatives. And
17 we'll start with Mr. Keehan from the American
18 Bankers Association. At least that's my hope.

19 MR. KEEHAN: There we go. Coming
20 through okay?

21 MR. HAUSER: Yes.

22 MR. KEEHAN: All right. Terrific.

1 MR. HAUSER: That's good. Thank
2 you.

3 MR. KEEHAN: Members of the panel,
4 my name is Tim Keehan. I'm a senior vice
5 president of asset management for the American
6 Bankers Association. ABA is the voice of the
7 nation's \$23.5 trillion banking industry. Its
8 membership is comprised of small, regional and
9 large banks that together employ more than two
10 million people, safeguard over \$18 trillion in
11 deposits and extend over \$12 trillion in loans.

12 ABA appreciates the opportunity to
13 be here regarding the Department of Labor's
14 proposed amendments to its Investment Advice
15 Regulation and related prohibited transaction
16 class exemptions, which collectively I'll refer
17 to as the fiduciary proposal or proposal.

18 My testimony today will cover three
19 areas of the fiduciary proposal. First, the
20 Department's interpretation of the term
21 'recommendation.' Second, the Department's
22 view that non-fiduciary statements and actions

1 that are made separate and apart from one
2 another may be combined to become fiduciary
3 investment advice. And third, the proposal's
4 impact on the institutional marketplace.

5 At the outset, we are puzzled that
6 the Department is holding the public hearing on
7 the proposal during rather than following the
8 comment period. We are not aware of any other
9 instance in which the Department or another
10 federal agency has held a hearing when
11 interested parties and stakeholders have yet to
12 provide a formal response. Currently, we are
13 soliciting views and feedback on the proposal
14 from our member banks and are still deeply
15 engaged in formulating a collective member-wide
16 response.

17 We believe this hearing is premature
18 and therefore limited in value and function.
19 The Department and the public would have been
20 better served if this hearing were held after
21 the conclusion of the comment period. We
22 therefore urge the Department to consider

1 holding another, more comprehensive and
2 informed public hearing once everyone's views
3 have been crystallized, submitted and
4 published.

5 A more thorough vetting is
6 particularly appropriate for this proposal,
7 which ABA believes is overbroad and
8 overreaching by capturing many persons who
9 provide valuable services to individuals, plans
10 and plan fiduciaries, but who should not be
11 viewed as a fiduciary under either ERISA or the
12 Internal Revenue Code. If adopted in its
13 current form, the proposal will likely harm the
14 very plan participants, beneficiaries and IRA
15 account owners that the Department is seeking
16 to protect by making it extremely difficult,
17 complex and costly for banks to make available
18 and deliver the products, services and
19 information necessary for persons to achieve a
20 financially sound retirement. The three areas
21 we've selected to discuss illustrate the
22 compliance challenges posed.

1 First, the proposal's overbroad
2 definition of a person who renders investment
3 advice and who therefore becomes a fiduciary,
4 hinges on the Department's interpretation of
5 the term 'recommendation.' The Department
6 views a recommendation as a communication that,
7 based on its content, context, and
8 presentation, would reasonably be viewed as a
9 suggestion that the retirement investor engage
10 in or refrain from taking a particular course
11 of action. Contrary to the Department's view
12 that this is an objective inquiry, inclusion of
13 the word 'suggestion' within this
14 interpretation, is inherently subjective, not
15 objective, and puts in doubt whether both the
16 bank and the retirement investor truly
17 understand whether, and on what basis, a
18 fiduciary relationship has been established.
19 Equating recommendation and suggestion in this
20 way, when coupled with ERISA's strict liability
21 prohibited transaction regime, could actually
22 harm retirement investors and is unwarranted.

1 Moreover, making a suggestion a
2 basis for fiduciary responsibility is an
3 unprecedented stretch of the term that
4 belittles the concept of fiduciary duty while
5 effectively stifling valued communication to
6 retirement investors. Together with its
7 proposed unraveling of the investment advice
8 regulation's five-part test, the Department's
9 interpretation of recommendation would capture
10 a vast swath of written and oral communications
11 that are not intended as a bona fide
12 recommendation. Banks thereby are placed in a
13 precarious position, as there have been and
14 will continue to be numerous, repeated, and
15 unanticipated situations in which a bank and
16 its retirement customer may differ on whether a
17 recommendation was in fact provided to the
18 customer. This, in turn, will serve only to
19 cut short or silence a retirement service
20 provider's conversations with its retirement
21 investors and potential customers for fear that
22 any such conversation could be deemed fiduciary

1 action.

2 ABA believes that the term
3 recommendation can be sensibly narrowed and
4 targeted to reach only those instances in which
5 recommendations are actually intended and
6 balanced with potential mislabeling as
7 fiduciary. To achieve this result, we
8 recommend that the Department interpret a
9 recommendation as a communication that is a
10 clear, affirmative statement of intentional
11 endorsement and support for the retirement
12 investor to engage in or refrain from taking a
13 particular course of action that is based on
14 the individual needs of the retirement
15 investor. Stated this way, both the retirement
16 services provider and the retirement investor
17 would know when a recommendation is genuinely
18 taking place. It would also realize the
19 Department's declared goal of establishing an
20 objective rather than subjective test to
21 determine whether investment advice is being
22 rendered.

1 Second, we're concerned about the
2 Department's far-reaching attempt to label as
3 fiduciary a series of unrelated non-fiduciary
4 statements and actions. As stated in the
5 proposal's preamble, the Department believes a
6 series of actions taken directly or through an
7 affiliate that may not constitute a
8 recommendation when each action is viewed
9 individually, may amount to a recommendation
10 when considered in the aggregate. This view,
11 which was codified in the 2016 fiduciary rule,
12 is presumably intended to prevent an unlawful
13 evasion of the investment advice regulation.

14 From a compliance and supervisory
15 standpoint, however, this is simply unworkable.
16 In essence, multiple, unrelated conversations,
17 each of which separately, is not a
18 recommendation with retirement investors across
19 the bank and its affiliates, could, in
20 retrospect, be woven together by the Department
21 to form a recommendation leading to fiduciary
22 status without the bank or affiliate even being

1 aware of such a situation. This could occur
2 even in the Department's own illustration in
3 the proposal of a non-fiduciary action where
4 the Department assures us that a car dealer
5 salesperson is not giving a recommendation.

6 However, it is quite possible that
7 another non-fiduciary statement, a missing
8 piece, may be provided by a representative of
9 the car dealer's finance arm in the showroom,
10 which, when aggregated with the salesperson's
11 statement out on the lot, could become,
12 unintentionally and in random fashion, a
13 recommendation that would trigger fiduciary
14 status for both the car dealer and its finance
15 arm.

16 In other words, when employing the
17 Department's policy of aggregation to determine
18 whether a recommendation has been provided,
19 there seem to be no limits and no nexus
20 requirements to individual conversations and
21 actions.

22 We recommend that the Department

1 withdraw this policy. If unlawful evasion of
2 fiduciary status is the concern, then the
3 Department can include a broad anti-evasion
4 provision in the final rule which would better
5 serve efficient and prudent administration.
6 Such a provision could simply read, "No person
7 shall knowingly act in a manner that functions
8 as an unlawful evasion of the purposes of the
9 investment advice regulation."

10 This language would ensure that a
11 person cannot deliberately structure a program
12 to unlawfully evade fiduciary status while
13 removing the cloud of fiduciary status
14 resulting from non-fiduciary statements and
15 actions, and with it, elevated costs and
16 liability risks.

17 Third, ABA is concerned about the
18 proposal's needless intrusion into the
19 corporate retirement marketplace. The
20 Department has focused much of its attention,
21 in media statements and in public forums, on
22 the proposal's benefits in the retail

1 marketplace without having truly analyzed the
2 need for the proposal in the institutional
3 marketplace.

4 Institutional investors typically
5 are well-versed in the functioning of financial
6 markets, the parameters of investment decision
7 making and the availability of investment
8 choices. There's simply no evidence that
9 institutional plan fiduciaries are being
10 systematically misled, disadvantaged, or abused
11 by their service provider as they seek market
12 information or viewpoints for their
13 consideration in making their own investment
14 decisions. The Department's one size fits all
15 approach to applying strict liability
16 provisions to all potential advice providers
17 ignores the fundamental fact that plan
18 fiduciaries are obligated to understand the
19 environment in which they operate and the
20 transactions that they undertake.

21 For these reasons and others, we
22 believe that the fiduciary proposal should be

1 withdrawn for further vetting with stakeholders
2 and interested parties, and then should a re-
3 proposal be necessary, revised to be sensibly
4 tailored to the retail marketplace. This is a
5 job for a dart gun, not a blunderbuss. Panel
6 members, thank you for your time, and I'm happy
7 to answer any questions you may have.

8 MR. HAUSER: Thank you. The second
9 person on the panel is, and I apologize if I
10 mispronounce your name, Kamila Elliott.

11 MS. ELLIOT: Yes. Thank you, Tim.
12 My name is Kamila Elliott.

13 MR. HAUSER: Kamila.

14 MS. ELLIOT: Yes.

15 MR. HAUSER: Thank you.

16 MS. ELLIOT: So thank you for the
17 opportunity today to talk about my experience
18 working with retirement savers and how
19 important this proposed rule is to all
20 Americans.

21 My name is Kamila Elliott. I served
22 as the 2022 Chair of CFP Board. I was the

1 first African-American chair and one of the
2 youngest people to ever serve in that role. I
3 spent the earlier part of my professional
4 career working at Vanguard with ultra-high
5 net-worth individuals, endowments and
6 foundations.

7 But I am now the founder and CEO of
8 the financial planning firm, Collective Wealth
9 Partners. We are a majority women and
10 black-owned registered investment advisor firm
11 headquartered in Atlanta, Georgia. We provide
12 holistic financial planning advice primarily to
13 resilient communities.

14 Now that may be a new term for many
15 of you this afternoon. You probably have heard
16 the term underserved communities, but I'm
17 intentionally calling us resilient.
18 Underserved means that they're individuals that
19 are not being served at all, that there are
20 significant impediments to obtaining financial
21 advice, particularly holistic advice. But I
22 don't think the word is empowering. So we use

1 the word resilient that regardless of the
2 impediments and barriers facing black and brown
3 communities and receiving competent and ethical
4 financial planning, they're working to close
5 that gap and they're looking and seeking
6 competent and ethical financial advice. So I
7 think it's really important to share that all
8 of the financial advisors at Collective Wealth
9 Partners are certified financial planners who
10 provide fiduciary advice to our clients. That
11 is, financial advice that's in our clients'
12 best interest.

13 Some have argued that financial
14 advisors cannot serve moderate-income
15 individuals if they are required to provide
16 advice that is in those individuals' best
17 interests. That is not our experience at
18 Collective Wealth Partners, where
19 moderate-income people are the bulk of our
20 client base. We charge fees for individual,
21 household or business financial planning, which
22 can be charged as a fixed fee or on an hourly

1 basis, whichever works best for the client. We
2 establish fees based on the complexity of the
3 client's financial situation and help with
4 implementation of our recommendations and a
5 time frame for ongoing monitoring.

6 We also charge an assets under
7 management fee if we're managing a client's
8 financial assets. So to allow us to best serve
9 our clients, particularly moderate-income
10 families, we have no minimum asset requirement
11 for investment management services, and we
12 consolidate household assets under management
13 to provide our clients with the best value for
14 our services. Using this flexible compensation
15 arrangement, we can work with a client to
16 provide them with what they need at a price
17 that they can afford. This is how we meet our
18 clients' financial needs across the income
19 spectrum.

20 We educate our clients in an easy to
21 understand manner so they can understand
22 personal financial advice and use these

1 concepts to pursue their financial objectives.
2 We talk to our clients about the importance of
3 saving early in life, even if it's only a small
4 amount each month. Our goal is to provide
5 comprehensive advisory services about
6 retirement, taxes, estate planning, investment
7 strategy, and insurance, and provide them with
8 holistic lifetime assistance so they can build
9 financial independence for themselves and their
10 families.

11 We know that in these resilient
12 communities, every dollar counts. I have
13 witnessed and researched the impact on these
14 communities when they are charged too much or
15 don't receive advice that is in their best
16 interests. These are the kinds of things that
17 expand what is already a large racial wealth
18 gap. When we address our clients' financial
19 needs holistically and act as fiduciaries, we
20 are taking steps to close that wealth gap. The
21 wealthy receive financial advice that is best
22 for them. Why shouldn't those with

1 moderate-income be treated the same?

2 The stakes have never been higher.
3 Retirement savers today are responsible for
4 making their own investment decisions. Like
5 many, like some of you on the call today, I
6 don't have a pension. The vast majority of my
7 retirement is in a 401k plan. But that was not
8 the case in 1974 when ERISA was adopted.
9 Because retirement savers are not investment
10 specialists themselves, they look for help from
11 financial professionals with whom they trust
12 and are confident will do what is good for
13 them.

14 But that trust and confidence is
15 often misplaced. Financial advisors who are
16 not required to work in their clients' best
17 interests may sell products that carry high
18 commissions or management fees or annuities,
19 or, we heard earlier, illiquid, privately held
20 investments that can tie up their assets well
21 into retirement. The potential for harm is
22 enormous. These types of products usually

1 introduce unnecessary risk and cost that erode
2 savings over time. It may not appear like a
3 lot in one year, but over time it can be the
4 difference between someone retiring at 65, 75,
5 or not being able to retire at all.

6 Resilient communities are especially
7 vulnerable to receiving incompetent and
8 unethical advice that can erode retirement
9 savings, regardless of the saver's net worth.
10 After a lifetime of saving for retirement,
11 these individuals are left holding the bag.
12 And Congress could not have intended this
13 result when they passed ERISA almost 50 years
14 ago.

15 So I'll share with you a couple of
16 stories of what I'm seeing every day working as
17 a financial planner. I had someone come to me,
18 a teacher, a career changer, bless her for
19 leaving corporate America, becoming a teacher.
20 So she had a previous retirement account, and a
21 financial professional came to her school and
22 said, I can help you with that. She was, at

1 the time, in her 30s. He put her in an annuity
2 that has a surrender charge of up to 18% if she
3 takes her annuity out within the first 14
4 years. So she's locked into a product for 14
5 years. She returns before that period, she
6 loses 18%, 12%, 10%, and not until year 14 as
7 an end, where it's two percent, and at year 15,
8 it's zero.

9 Now within that annuity are
10 non-diversified portfolios, high-cost funds,
11 and a high administrative fee that she's paying
12 every single year. This is not what's setting
13 up her up for success. And also, this
14 financial professional has not spoken to her
15 since she purchased this annuity from him, I'm
16 looking at the contract, eight years ago. Is
17 this what we intend to help teachers save for
18 retirement? Someone putting them in a high
19 cost product, locked in for 14 years in a
20 non-diversified portfolio? I think not.

21 Now the second is a friend's mom
22 reached out to me. One of my friends said, her

1 mom needs help. And I looked at her portfolio,
2 and it's a very large firm, I won't say the
3 name of the firm, but to initially put her
4 retirement, they charged her two percent. So
5 before they even did anything, the initial fee
6 just to go in the fund was two percent. And
7 the annual fee for the fund is over one
8 percent. So they put her in a fund that, in
9 year one, she's losing three percent. This is
10 before she has any return on her portfolio
11 whatsoever. That's a high hurdle to lose three
12 percent in one year.

13 Now this wasn't a private equity.
14 This was not a venture capital where it takes
15 intensive research and a huge team to make sure
16 she's in the right product. But this is what's
17 happening to many Americans when they seek
18 competent and ethical financial advice.
19 They're going to someone getting one-time
20 advice that's not in their best interest and is
21 eroding their retirement savings year over year
22 over year.

1 So the Department of Labor wants to
2 require financial professionals to act in their
3 clients' best interest when providing
4 retirement investment advice. Now this one
5 calls firms to abandon moderate-income clients.
6 My firm is not the only firm that serves these
7 clients. And there are firms all across
8 America serving retirement savers of more
9 modest means with best-interest advice.

10 But also, look at this from the
11 consumer's perspective. The reason consumers
12 often have a negative view of financial
13 professionals is because, in many
14 circumstances, they aren't required to act in
15 their client's best interest. We often see
16 resilient communities, because of their own
17 experiences or experiences of friends or
18 family, they do not trust most financial
19 advisors. So where do they go?

20 MS. WILKER: Ms. Elliot, I just want
21 to let you know, it has been ten minutes.
22 Could you wrap up?

1 MS. ELLIOT: Yeah.

2 MS. WILKER: Thank you so much.

3 MS. ELLIOT: They go to TikTok, they
4 go to other social media platforms and they get
5 highly questionable and flat out wrong advice.

6 We need to build trust and
7 confidence with these communities of color to
8 have in professional financial advisors. And
9 the proposed deal rule will help with that.
10 And thank you, and I'm happy to take any
11 questions you may have.

12 MR. HAUSER: Thank you. Let's see,
13 next is the Institute for Portfolio
14 Alternatives. Kevin Walsh.

15 MR. WALSH: Thank you, Tim. And I'm
16 nervous, guys. Good afternoon. I'm Kevin
17 Walsh and I'm a principal at Groom Law Group.
18 I'm here on behalf of the Institute for
19 Portfolio Alternatives and I really appreciate
20 the opportunity to provide feedback to the
21 Department on your latest fiduciary proposal.

22 I appreciate the hard work that

1 you've all put into the proposal. That being
2 said, IPA's ask is going to be that the
3 proposal be withdrawn. We've got a handful of
4 concerns that have been raised by other
5 commenters. For example, we'd like to see a
6 general recognition that sales activity and
7 wholesaling between sophisticated parties does
8 not give rise to fiduciary status. We've
9 talked a lot about that the last two days,
10 though. We'd like additional time to digest
11 and respond to the proposal. Folks requested a
12 comment extension. I think you've heard a lot
13 of that already. We'd like more time to come
14 into compliance if the proposal is ultimately
15 adopted. I think the amount of time being
16 given right now seems pretty short. We'd like
17 changes to the disqualification provisions of
18 PTE 2020-02 because they seem to raise some due
19 process concerns. We look at some of those SEC
20 cases and we've got concerns about those
21 provisions. And then we would advise the
22 Department not to impose Title I of ERISA on

1 plans that are only subject to Title II.

2 So we anticipate raising those and
3 other concerns in our written comments. We
4 want to highlight we're still working through
5 proposal. But in light of other's testimony,
6 I'm going to focus on just two connected issues
7 today, and these are kind of the core issues,
8 honestly.

9 First, the summary here, sales
10 conversation isn't fiduciary, and there's a
11 difference between ERISA's fiduciary standard
12 and a best interest standard. Now that's kind
13 of the core of what folks have talked about for
14 the last two days. And so in order to go into
15 this, I'm going to have to go back to first
16 principles, get a little more ephemeral than
17 anyone could possibly want. We're into two
18 long days of hearings. I get that we're tired
19 here, but I'm going to take a step back.

20 So first off, salespeople aren't
21 fiduciaries. So there I'd look at ERISA and
22 I'd say, what test do we use to figure out when

1 someone's a fiduciary? And I look at Firestone
2 and it says, "We use common law definitions."
3 I look at the Fifth Circuit decision that cites
4 the Firestone, and it again says, "We look to
5 common law definitions when we figure out if
6 somebody's a fiduciary."

7 So my instinct there is, I look at
8 the common law definition of fiduciary. Trust
9 law goes back to Roman times. We're not going
10 to go into all that today. But if we look at
11 the Restatement of Trusts, kind of the quick
12 and dirty way of figuring out what the test is,
13 there's kind of three takeaways in the
14 restatement.

15 First off, "A person in a fiduciary
16 relation to another is under a duty to act for
17 the benefit of the other as to matters within
18 the scope of the relation." Second, "As to
19 matters within the scope of the relation, he's
20 under a duty not to profit at the expense of
21 the other." And then third, they give
22 examples. "Fiduciary relations include not

1 only the relations of trustee and beneficiary,
2 but also, among other things, those of guardian
3 and ward, agent and principal, and attorney and
4 client."

5 So with that, I got three takeaways.
6 First off, fiduciary status is limited to the
7 scope of the relation. Just at the glance
8 there, it gives me concerns that hire me
9 conversations, or those initial sales
10 conversations really aren't fiduciary
11 conversations. There's a duty not to profit at
12 the expense of the other. I think that's
13 pretty consistent with ERISA but when I think
14 about sales conversations, in a sales
15 conversation, someone is trying to profit.

16 And then, none of the examples look
17 like sales transactions. I think we could all
18 agree there's a fundamental difference between
19 the relationship between a salesperson and a
20 buyer and that of a guardian and ward.

21 And so that's common law. Let's
22 look at the statute of ERISA and say, are there

1 clear problems if we say salespeople are
2 fiduciaries? Are there hints that the Fifth
3 Circuit got it right in concluding that
4 salespeople aren't generally fiduciaries? And
5 we could look at the purpose of the statute.
6 We could disagree about that. I think some
7 would argue that it seems to have been about
8 defined benefit plans and preventing trustees
9 from stealing or investment advisors to those
10 defined benefit plans from misusing plan
11 assets. I know others view ERISA's purpose as
12 protecting all American retirement savers. And
13 honestly, I think folks can disagree on that.

14
15 But I think we can get grainier from
16 a text perspective. We can look at
17 3(21)(a)(ii), and it talks about investment
18 advice for a fee, direct or indirect. And
19 ERISA followed on securities law history, the
20 '34 act, the '40 act, were all around.

21 So first off, under a plain reading
22 of that 3(21)(a)(ii), "You're a fiduciary if

1 you receive a fee, directly or indirectly, a
2 fee from a third party for advice. You aren't
3 a fiduciary if you get a fee only for something
4 else." Something else here could mean
5 something like a completed sale. With that
6 interpretation, it tracks the '40 Act exactly.
7 Broker dealers don't get paid for advice. They
8 only get paid for completed sales. That is, to
9 be a broker, any recommendation has to be
10 solely incidental to the conduct of his
11 business's broker, and you can't receive any
12 special compensation therefore.

13 Now you could say, well, no special
14 compensation therefore, maybe we're saying
15 that's compensation for advice. But brokerage
16 commissions aren't even partly a fee for
17 advice. If the broker's commission were for
18 advice, you'd expect brokers to seek payments
19 from non-buyers who don't purchase securities.
20 And under securities laws, they don't and they
21 can't.

22 Now under ERISA, we've taken the

1 position that brokers can be fiduciaries. Part
2 of that can be, that's Advisory Opinion
3 1983-60A. The good news, though, is that
4 advisory opinions aren't binding, and we could
5 conclude that it was just indirect.

6 Now you may not be sold yet. This
7 is the big one. Let's look at the consequences
8 of calling somebody an ERISA fiduciary. ERISA
9 Section 404(a)(1) requires a fiduciary to
10 discharge their duties solely in the interest
11 of participants and beneficiaries. A hired,
12 registered investment advisor can meet that
13 standard, but I don't see how a
14 commission-based salesperson can. A
15 commission-based salesperson can absolutely
16 make best interest recommendations for you, but
17 the only reason they're making a recommendation
18 at all is in the hope that you buy something so
19 they can be paid. It's important, then, to
20 recognize that a best interest sales standard
21 that everyone seems to be talking about is
22 fundamentally different from ERISA's solely

1 requirement.

2 And if we look at exemptions, folks
3 focus on 406(b)(3), where they're saying, well,
4 that's the problem under ERISA with the
5 commission. If we grant an exemption with 408,
6 we still loop back to needing to comply with
7 404, and 404 is where the problem comes in.
8 The word 'solely.' If Congress had planned on
9 banning brokers from providing by selling to
10 retirement savers, they'd have done it
11 explicitly and not hid this elephant in a mouse
12 hole.

13 Okay, that's the bad news. The good
14 news here, ERISA is not the only standard.
15 Salespeople can satisfy a best interest
16 standard. And other regulators have crafted
17 different best interest standards, and we
18 should work with them and encourage them to do
19 so. Industry has supported various best
20 interest standards and strong loyalty
21 standards, just not ERISA's fiduciary standard.
22 The word 'solely' doesn't work. There's a

1 myriad of standards of loyalty, such as the
2 best interest standards that a salesperson can
3 satisfy. We've got the NAIC standard, the
4 NASAA standards. We've got the SEC standards.
5 We've got other best interest care standards.
6 There's a fulsome debate going on about what
7 standards appropriate in what circumstances.

8 But at bottom, it's wrong to put
9 ERISA's standard on these salespeople because
10 ERISA's fiduciary standard has been interpreted
11 as the highest standard under law. Under
12 Donovan v. Bierwirth, we say that a fiduciary
13 has to act with an eye single to the interests
14 of participants and beneficiaries. The only
15 way that we can make the ERISA fiduciary
16 standard work for salespeople is if we lower
17 the ERISA standard, and that's not what we
18 should be doing, because it conflicts with the
19 statute.

20 So, to sum up, it isn't that
21 salespeople want to rip off clients. It's that
22 they recognize that their duty of loyalty is

1 different than the duty of loyalty between a
2 parent and a child or a guardian and ward.
3 Salespeople are not interacting with potential
4 buyer out of sense of duty arising from some
5 existing relationship of trust and confidence.
6 Instead, salespeople can make best interest
7 recommendations, but at bottom, they have an
8 interest in selling a product that makes
9 ERISA's fiduciary standard of loyalty
10 unworkable under Section 404.

11 So I thank you for your time today,
12 and I'd be happy to take any questions you
13 might have. And sorry for speaking so quickly.
14 I know I had ten minutes.

15 MR. HAUSER: Thank you. No
16 objections to your speaking quickly. Let's
17 see, I think one more panelist, Donald Jones.

18 MR. JONES: Thank you. I'm grateful
19 to be with you. I want to thank the United
20 States Department of Labor for the honor of
21 testifying today on this vital issue.

22 My name is Donald Jones, and I am

1 the founder and partner of the independent
2 professional ERISA 402(a) named fiduciary firm
3 called Fiduciary Wise. I speak today as an
4 individual and not representing any other
5 person or firm or organization.

6 First, I'd like to say I strongly
7 support the proposal of the changes recommended
8 by the Department of Labor. I believe the
9 Department of Labor is to be commended for its
10 efforts to compromise in this, the third
11 attempt to change the definition of a fiduciary
12 under ERISA. Second, I thank the Department
13 for its sterling example and tireless effort to
14 protect the plan participant beneficiaries in
15 America's retirement plans.

16 Today, I will center my remarks only
17 on qualified retirement plans. I do not work
18 in the area of wealth management or IRAs. I
19 believe that I may be the only one to testify
20 that is an independent, discretionary ERISA 402
21 Named Fiduciary with approximately a thousand
22 plans that we provide fiduciary governance for

1 under ERISA.

2 I've struggled with what to say.
3 I've decided about all the yeas and nays have
4 been said, and so I've decided, in being the
5 last speaker, to give a message of hope.

6 In my 15 years in working as an
7 ERISA 402 Fiduciary in big and small plans, I
8 have found, by and large, service providers,
9 and in this case, particularly investment
10 professionals, have repeatedly had the desire
11 to do what's right for their participants,
12 their beneficiaries, and plan fiduciaries. But
13 in saying so, I'll give a quote from a case of
14 Donovan v. Cunningham, and though I think it's
15 a little bold, but I believe it makes the
16 point. "A full heart and an empty head is no
17 defense."

18 I'm not suggesting that everyone
19 working out there, or even close to everyone
20 working out there, has an empty head. But
21 here's what I have seen in working,
22 particularly in the last 15 years, though I've

1 been in ERISA for over 50 years, or nearly 50,
2 because ERISA isn't 50 years old yet. But I
3 notice a noticeable difference in experience,
4 knowledge and ability between a broker, which I
5 will call a non-fiduciary, an ERISA 3(21)(a),
6 I'll call a co-fiduciary and ERISA 3(38),
7 investment manager, to help the participant and
8 their beneficiaries. In essence, this is
9 what I'm saying. I believe in the goodwill of
10 the people out there. I believe they want to
11 do what's right. I believe their desires are
12 good. Of course there's a bad apple
13 occasionally, there is in anything. But the
14 problem is their desire can only go so far.
15 They're ill-equipped to be able to actually
16 provide their duties.

17 Perhaps I'm speaking as the only
18 boots on the ground, authentic, if you want to
19 call it, fiduciary with a thousand plans, who
20 is the responsible fiduciary. Please note that
21 we are never under contract any other service
22 provider, such as an advisor, record keeper at

1 TPA. I speak from experience of over 5000
2 plans or maybe more in the last 50 years. And
3 again, as I've mentioned, the last 15 as Named
4 Fiduciary.

5 Today I recognize that I would be
6 the last speaker. That's not the best place to
7 speak, but that's my lot. But I'm grateful.
8 But I'd like to end with an example of hope, of
9 what I have witnessed and plans I have managed.
10 Before I do so, let me just take a moment to
11 say, let's remember that ERISA is based on the
12 debacle of Studebaker's failure. The desire of
13 ERISA was solely to protect a participant who
14 is helpless and innocent, and I believe it's
15 best compared as a mother to her child. Until
16 one understands that mother-child relationship
17 and the sacredness of it, no one is really
18 ready, no matter what capacity they're in, to
19 represent an employee or a plan in a retirement
20 basis.

21 You ask, what is my hope? My hope
22 is based on the goodness and moral behavior of

1 hundreds and hundreds of service providers I
2 have worked with. However, approximately 95%
3 of them are not fiduciaries, and because of
4 that and maybe that alone, they are
5 ill-prepared to carry their load that they must
6 have.

7 Why do I believe that has happened?

8 Well, I don't know for sure, but I've been a
9 pretty good student of ERISA, and I believe the
10 single greatest reason is broker dealers have
11 scared them so much that becoming a fiduciary
12 will absolutely ruin them. This is sad, and
13 it's not true, because all that ERISA is asking
14 is to put someone else first and then do the
15 best you can to provide the highest standards
16 under ERISA. There's nothing scary about it.

17 When I decided to be a 402(a) named
18 fiduciary, I left an excellent company, many
19 benefits, a good paycheck, and well-meaning
20 individuals urged me not to be a 402(a)
21 fiduciary, except for a very supportive wife,
22 which, by the way, we will have been married 50

1 years here in a few months. Everyone thought
2 I'd lost my head be this type of fiduciary.

3 And I had no blueprint to follow.
4 The more I listened to the naysayers, the more
5 fear I had. They all cared about me. But
6 here's the bottom line. They had no idea what
7 it was like to be a 402(a) fiduciary. They
8 were giving experience though well-meaning.
9 They were giving advice by having no
10 experience.

11 I appeal to everyone as we close.
12 Let's learn to embrace the privilege of
13 fiduciary care. In the end, you will feel
14 better about yourself, and you can do a better
15 job. In my opinion, the DOL has been fair in
16 this proposal. Let's cast off the boogeyman
17 tactics and focus entirely on the participant's
18 welfare. I will just give one example of what
19 authentic fiduciary care is about. And
20 remember, the 402 has no safety net.

21 Several years ago, I did and noticed
22 an unscientific survey. I asked my staff to

1 look at approximately 450 plans we had then and
2 see what could we conclude had happened, by
3 embracing fiduciary care. And we found, on an
4 average, we were able to return back to the
5 plan participants about 81 basis points per
6 year. Now doing a little math, over about a
7 35-year period, that's \$150,000 more in every
8 employee's retirement account.

9 In doing that, though, I take sole
10 responsibility as a discretionary fiduciary, I
11 speak from experience. No service provider was
12 embarrassed. In fact, when changes were found
13 by talking offline, we had the service
14 provider, particularly the investment
15 professional, introduce the change as if it was
16 their own. No one's compensation was changed.
17 No one was terminated.

18 But finally, and most importantly,
19 they felt much better about themselves, in
20 them, inside them. And many said that they
21 knew they weren't doing it like they could have
22 and should have, what they learned on their

1 mother's knee. And they desired to embrace
2 fiduciary care. No longer did they need to be
3 scared and what a relief that was. I have
4 proof that it works.

5 What you've heard many times today
6 is, maybe this may happen, maybe this may
7 happen. But in reality, it doesn't happen. In
8 conclusion, I would like to give just a few
9 pieces of advice.

10 MS. WILKER: Mr. Jones, I do just
11 want to let you know it has been ten minutes,
12 so if you could make your conclusion remarks
13 quickly.

14 MR. JONES: Okay. Thank you so
15 much. I know the Department's proposal isn't
16 perfect. It'll need to be tweaked. But it's
17 fair. Let's work together in the spirit of
18 cooperation. Give it a chance. And I know
19 that as you learn to embrace fiduciary and the
20 highest standard known in the law, and note
21 this well, there is enough elasticity that if a
22 mistake is made, an honest mistake, it can be

1 corrected. No one gets in trouble. Everyone
2 can feel good about it.

3 Lastly, learn to use the Common Law
4 of Trust. That is one of the best gifts that
5 you have, as stated in the Restatement of Law,
6 Trust Third.

7 And finally, if you want an example,
8 I've heard pros and cons about lifetime
9 guaranteed income. On its surface, it's not
10 good or bad. But go to the Restatement
11 Sections 90(b), (f), and (h)(2), and you'll
12 solve the mystery of how to use it. Thank you
13 very much. I'm grateful to have been with you
14 today.

15 MR. HAUSER: Thank you very much. I
16 think I just have a few questions, and then
17 maybe we can wrap this up.

18 Starting with you, Mr. Keehan, your
19 comments were very precise, and I think I
20 followed them, and I appreciate that you're
21 going to elaborate upon them in your written
22 comments. So that's all to the good. And

1 really, the only question I wanted to ask you
2 about was, I think it might have been your
3 first of your points, but on our use of the
4 word 'suggestion' in connection with what
5 counts as a recommendation.

6 And I guess, we're not trying to
7 depart when we talk about what counts as a
8 recommendation, we're not trying to depart from
9 the way FINRA and the SEC talk about
10 recommendation. It's really the same
11 definition. And if you look at FINRA's
12 guidance on what they mean by recommendation,
13 you'll see that same word suggestion in their
14 guidance documents. We're talking about a call
15 to action. And similarly, the reference to --
16 it's a contextual test. I mean, whether or not
17 somebody's actually making a recommendation,
18 and it fairly can be seen as a call to action,
19 is dependent on a larger context.

20 But we're not trying to depart in
21 any way from that. And I just wonder if, one,
22 if that alleviates any of your concerns, and

1 second, if it doesn't, if you have any concerns
2 about our potentially writing a definition of
3 recommendation that departs from the test that
4 FINRA and the SEC use when they talk about
5 recommendations.

6 MR. KEEHAN: Thank you, Tim, for
7 that elaboration. That's very helpful to know.
8 And yes, we will be responding in our comment
9 letter with more information on this. I think
10 where we're coming out and of course, we're
11 still in the middle of the comment period
12 rather than at the end so I'm continuing to
13 huddle with our members.

14 I think the concern here for us is
15 that the definition of recommendation appears
16 to be such a lowered baseline that together
17 with regular basis, which has been so widened
18 in applicability, that the proposal sets a
19 hairline trigger on what amounts to investment
20 advice. And so much so that the proposal
21 appears to capture not just certain bank
22 personnel that would not normally be considered

1 a fiduciary, but actually a range of
2 non-fiduciary, non-financial persons and
3 professions, all involving relationships of
4 trust and confidence. Think real estate agents
5 or life coaches, divorce counselors. I mean,
6 the list could go on of those who are going to
7 be inadvertently captured by this rule by
8 virtue of the fact that you have such a widened
9 definition of recommendation and regular basis.

10 MR. HAUSER: Okay. Yeah, it'd be
11 helpful if you'd explain why you think it's
12 going to be broader in operation and, for
13 example, the concept as applied by the SEC and
14 FINRA and whether or not you think we should
15 depart from that standard.

16 MR. KEEHAN: Yeah, I mean, SEC and
17 FINRA, were dealing with registered broker
18 dealers. So that's a regulated, supervised and
19 examined set of individuals and entities.

20 What I just mentioned here, I'm not
21 sure that the Department of Labor wants to get
22 into the business of regulating real estate

1 agents and life coaches and probation officers
2 and divorce counselors where they technically
3 can fit under the definition of investment
4 advice under this proposal.

5 MR. HAUSER: Yeah, well, it'd be
6 helpful if you could elaborate on those
7 circumstances where they'd fit. They have to
8 make those investment recommendations as a
9 regular part of their business to fall within
10 the test. I don't have much familiarity with
11 life coaches, but I'm guessing they don't
12 engage in much in the way of investment
13 recommendations, and the same goes for those
14 other categories of folks you mentioned. But
15 to the extent you can point to specific things
16 in our language that you think are problematic
17 on that score, please point them out, and we'll
18 make sure we're not reaching folks we have no
19 intention of reaching.

20 MR. KEEHAN: We'd be happy to do
21 that.

22 MR. HAUSER: Thank you for that, and

1 we look forward to your comments.

2 Mr. Walsh, mostly, you were making a
3 legal argument. I found it interesting, but I
4 don't think I want to join you on a legal
5 debate on this panel. But I would like to,
6 just so I better understand how you're drawing
7 the line between fiduciary advice and
8 non-fiduciary advice, is it your position that
9 if somebody is essentially paid on a commission
10 basis, that that's the end of the analysis, as
11 far as whether they can be a fiduciary under
12 ERISA?

13 MR. WALSH: If the only fee they're
14 receiving is a commission, then they're not
15 being paid for advice.

16 MR. HAUSER: So it doesn't matter in
17 your judgment, in that circumstance, whether
18 they hold themselves out to the customer as
19 providing individualized advices about their
20 particular circumstances. It's based entirely
21 on the customer's interest and not on their
22 competing interests and any of that. That's

1 all beside the point. The only thing that
2 matters is that they're paid on a commission
3 basis.

4 MR. WALSH: So I think you're coming
5 back to the good news here, which is that
6 ERISA's fiduciary standard isn't the only
7 standard, and there are plenty of other care
8 standards out there. But if we look at the
9 history of the Advisers Act before ERISA was
10 enacted and the choice to use the word
11 'solely,' it doesn't seem like Congress was
12 trying to get at broker dealers.

13 MR. HAUSER: Well, again, I want to
14 kind of avoid a protracted legal debate. But
15 it's not unusual under ERISA for fiduciaries to
16 have conflicted compensation, no? I mean, so
17 think of an insurance company. Would you agree
18 that an insurance company that's making benefit
19 determinations, that has authority over the
20 final benefit determination, has a direct
21 financial interest in whether they grant or
22 deny the benefits?

1 MR. WALSH: So when we look at that,
2 we've got the obligations under 404 for a
3 fiduciary who's involved in plan
4 administration, and the structure is designed
5 so that they can't act in a way that conflict
6 plays a role. Now when you're hired for
7 benefit administration, you're brought in to
8 process that. You're getting a fee for that.
9 When you're a broker, you're only getting a fee
10 when a transaction is executed.

11 I'm not here to talk to how health
12 insurance operates but I think the key point
13 here is that if we look at the rich Common Law
14 Traditions, brokers aren't advice fiduciaries.

15 MR. HAUSER: The Common Law
16 Tradition defining who's a fiduciary by virtue
17 of rendering advice?

18 MR. WALSH: I mean, the Common Law
19 Tradition of who's a fiduciary. I think if we
20 look at the case law that's out there, it
21 suggests that we look to the Common Law in
22 terms of understanding what these words mean.

1 And then we can even look at the text of
2 3(21)(a)(ii), and we can see that it tracks
3 very well with the Advisers Act carve-out for
4 broker dealers.

5 MR. HAUSER: So you looked through
6 the Common Law and preparing for this testimony
7 today?

8 MR. WALSH: I did. I don't want to
9 sound like such a nerd here, but apparently
10 fiduciary status goes back to Roman times.

11 MR. HAUSER: Absolutely.

12 MR. WALSH: -- concept of
13 fideicommissum, which allowed fiduciaries to
14 hold property on behalf of another. This is
15 something that courts have been exploring for
16 more than 2000 years now.

17 MR. HAUSER: Now you're talking to a
18 nerd, so we're doing just fine. But I mean, I
19 guess the question I have is, first of all, two
20 things. One, based on your review of the
21 Common Law standards, have you found in the
22 Common Law anything like the five-part test?

1 Can you think of -- since the time of the
2 Romans, are you familiar with a case under the
3 Common Law with respect to agency fiduciary
4 status? Anything?

5 MR. WALSH: Oh, yeah. Yeah.

6 MR. HAUSER: It's listed on the
7 five-part test.

8 MR. WALSH: Yeah, the 2018 decision.

9 MR. HAUSER: Apart from the 2018
10 decision, I understand how you interpret that
11 decision. But apart from that, when we're
12 looking to these Common Law sources, are you
13 familiar with any case that adopted the
14 five-part test?

15 MR. WALSH: I think the key is you
16 look at the 2018 decision from the Fifth
17 Circuit, and it really talks about how the
18 five-part test was a good summary of that rich
19 Common Law tradition.

20 MR. HAUSER: I think what the court
21 said was that trust and confidence is relevant
22 to this analysis, that it matters what the

1 relationship is between the person giving the
2 advice and the person receiving the advice.
3 And what I'm hearing you say, and that's fine,
4 if that's your position, I just want to make
5 sure I understand it, that it really is
6 irrelevant whether the customer has put
7 complete and total faith and confidence in the
8 advisor, and if they've done it precisely
9 because the advisor held themselves out in that
10 position. And it's even irrelevant, under your
11 approach if they have a long-standing
12 relationship outside, say, the ERISA context.
13 As long as the person is just getting a
14 commission for their advice.

15 MR. WALSH: I think we would both
16 agree that the relationship between a
17 salesperson and a potential buyer is very
18 different than that of a guardian and a ward or
19 an agent and principal.

20 MR. HAUSER: What I don't agree with
21 is that it's very different from the
22 relationship between other categories of

1 investment advisors and the broker or the
2 insurance agent. I think all of those
3 categories can hold themselves out in much the
4 same way, have much the same relationship with
5 the customer, and from the customer standpoint,
6 look very similar. And I think we've heard
7 testimony from folks over the course of this
8 hearing describing how the relationship works
9 when they're trying to make these
10 recommendations that effectively says just
11 that. But your point of view is that that just
12 doesn't matter.

13 MR. WALSH: The '40 Act draws these
14 lines.

15 MR. HAUSER: Is it your
16 understanding that the '40 Act governs what we
17 do under ERISA?

18 MR. WALSH: No, but I think that
19 when the statute's clear, there's less
20 deference owed to the agencies. And I think
21 this is a case where the statute is clear.

22 MR. HAUSER: Did ERISA provide that

1 incidental, that advice doesn't count if it's
2 incidental? Or did it provide that it counts
3 that somebody's a fiduciary to the extent they
4 give advice for a fee, direct or indirect.

5 MR. WALSH: Are you saying that
6 brokers get fees when people don't buy the
7 product?

8 MR. HAUSER: I'm saying that part of
9 the compensation, that part of the reason --

10 MR. WALSH: They don't get a fee
11 unless the product's sold.

12 MR. HAUSER: Well, okay, I don't
13 think that's quite true. I think part of the
14 reason people are paid commissions is, what
15 they're partly being paid for is the service
16 they're rendering to their customers. I think
17 that they would be hard pressed, that is part
18 of what you get compensated for. I tried this
19 analogy earlier. I think when an attorney is
20 paid on a contingency basis, would I say
21 they're not providing a service to the
22 customer, that their representational

1 obligations don't include a duty of loyalty to
2 the clients? Of course they do. The fact that
3 they get paid only if they win the case doesn't
4 mean they're just getting paid to win. They're
5 getting paid for representation. They're
6 getting paid for a service they render. And I
7 don't know why it's different in this context.
8 But again, I'm sorry.

9 MR. WALSH: We do ephemeral here,
10 and I understand we don't want to have a
11 legalistic debate. We are getting ephemeral
12 here. I think the attorney/client relationship
13 is very different than a broker salesperson
14 relationship, though. I think if we look at
15 the engagements at the outset, there's clear
16 differences. But I hear your point that I
17 think reasonable people could have a lot of
18 interesting discussions about the solely
19 language in 404 and if Congress really was
20 trying to get rid of salespeople in the
21 retirement space.

22 MR. HAUSER: Yeah. Well, just to be

1 clear, we're not proposing to get rid of
2 salespeople. We're happy with the commission
3 model. We're happy with the fee-based model.
4 We think all of these things can be consistent
5 with ERISA, and we're trying to give guidance
6 on how to make that work. But I welcome your
7 point of view on this and appreciate you and
8 everyone's testimony.

9 And finally, just to wrap up, and I
10 think we will close with this. I'd also like
11 to thank, in addition to thanking Mr. Keehan
12 and Mr. Walsh, I'm very grateful for Ms. Kamila
13 Elliot's participation in this hearing, as well
14 as Mr. Jones and obviously anybody who's
15 putting themselves out there and representing
16 people in a fiduciary capacity.

17 Speaking as an agency responsible
18 for -- on behalf of the agency that's
19 responsible for regulating fiduciaries, we
20 thank you for your service. We're very
21 grateful. Whenever people are willing to step
22 up and act in accordance with those basic

1 fiduciary duties of prudence and loyalty with
2 respect to something as important as retirement
3 benefits. And I understand from your testimony
4 that you both are committed to that as well.
5 And thank you for that.

6 MS. ELLIOT: Thank you.

7 MR. HAUSER: And with that, I think
8 we're closing the hearing. I'd like to also
9 thank everybody who's testified over the past
10 couple of days, whether I agreed with you or
11 not, whether you agreed with me or not, whether
12 we're still working through the issues. It was
13 all enormously helpful and gave us a lot to
14 think about. And I'm confident that when we
15 move to a final rule, it will reflect what
16 we've learned from this hearing as well as from
17 your written comments to come. So thank you
18 all very much. Take care, everybody.

19 (Whereupon, the above-entitled
20 matter went off the record at 4:28 p.m.)
21
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Retirement Security Rulemaking

Before: US DOL

Date: 12-13-23

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



Court Reporter

NEAL R. GROSS

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UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

PUBLIC HEARING
RETIREMENT SECURITY RULE: DEFINITION OF AN
INVESTMENT ADVICE FIDUCIARY
DECEMBER 12 – 13, 2023

ERRATA SHEET

The Department of Labor wishes to note the following with respect to the transcript:

1. Day 1, page 13: The opening remarks of Assistant Secretary for Employee Benefits Security Lisa M. Gomez included a statement that the Department will publish a Federal Register Notice notifying the public when the hearing transcript has been posted on EBSA's webpage. However, the Department determined that the most efficient way of providing notice of the posting was through a press release and email blasts, rather than through a Federal Register Notice.
2. Day 1, pages 273-274: An earlier, unofficial draft of the transcript misattributed the following to Mr. Hauser, Deputy Assistant Secretary for Program Operations of the Employee Benefits Security Administration, although it was said by Mr. Hadley, witness on behalf of The Committee of Annuity Insurers. The official transcript accurately reflects that Mr. Hadley said:

The Five-Part Test did a pretty good job. If you look at that test, it really establishes somebody who has an agreement where they will provide ongoing advice, where there's an agreement that both sides understand what's being provided and what doesn't. I am sure there are people that are -- that sell insurance products and act as fiduciaries and meet the Five-Part Test.

And that test makes a lot of sense because it is a -- exactly the type of fiduciary relationship that Congress intended when it borrowed from -- from trust law. And we think that makes sense, and we think you should keep it.

3. The earlier, unofficial draft of the transcript contained other minor errors which have been corrected in the official transcript.