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

C-O-N-T-E-N-T-S

P-R-O-C-E-E-D-I-N-G-S

(9:02 a.m.)

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

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

So, Certified Financial Planner Board.

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

MR. HAUSER: Yes, perfectly. Thank you.

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

I've served in leadership roles in three different national financial planning organizations. I've served on the Board of Directors of CFP Board, which issues the CFP certification since 2019. In a few weeks, I'll be completing my term as Board Chair. From 2003 to 2007, I served on the National Board of Directors at the Financial Planning Association, which is a membership organization for financial planners as both President and Chair of the FPA. I also served for five years on the Board of the Foundation for Financial Planning, which is focused on pro bono financial planning.

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

The most significant of these standards is the requirement to act as a fiduciary and therefore act in the best interest of the client at all times when providing financial advice. The scope of CFP Board's fiduciary duty is broad and it covers any communication that reasonably would be viewed as a recommendation. It also covers recommendations about any kind of financial asset, including securities, investment products, real estate, bank instruments, commodities contracts, derivative contracts, collectibles, or other financial products.

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

All of these CFP professionals are providing financial advice to their clients, while committing to CFP Board to act as a fiduciary. Our requirements have not adversely impacted their business. Today the firms at which CFP professionals work tell us that they don't have enough CFP professionals to meet their clients' needs. Consumers also increasingly demand to work with a CFP professional. This is because we offer what consumers want.

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

We support the Department's proposal, which makes clear that the definition of fiduciary and the obligations that flow from it apply where investors reasonably believe advice is being provided in their best interests. This definition appropriately applies fiduciary status to those in a relationship of trust and confidence, including in circumstances where the advisor is providing one-time advice. This is consistent with CFP Board standards where the fiduciary duty extends to one-time advice such as rollover recommendations.

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

If a retirement investor receives bad advice, then the consequences can be enormous. They can have significantly fewer assets a time when they're hoping to retire. This may mean that investors have to retire much later or that their standard of living during retirement is significantly worse. This damage is due to products that put the retirement savings of the American worker at risk, but pay high commissions to the seller. Retirement savings must be protected regardless of whether the assets are held in a 401(k) account or in IRA because so much is at stake.

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

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

CFP Board submitted a comment letter to DOL that attaches guidance comparing our Code of Ethics and standards of conduct to the NAIC model regulation. The CFP professionals in my firm proudly act as fiduciaries when providing financial advice. That's what our clients want and what they deserve. We believe that the retirement security rule will cause more retirement investors to seek professional investment advice because they'll be confident that their advisors are required by law to act in their best interest. Thank you.

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

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

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

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

MR. DANFORD: I'm sorry.

MR. HAUSER: Thank you.

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

Family Investment Center is registered with the Securities and Exchange Commission as a registered investment advisor and RIA. We are the only RIA serving mostly blue collar and middle income clients from the Greater Kansas City region through our offices in Saint Joseph, Missouri and Lenexa, Kansas. In addition, I hold the Certified Financial Planner certification from the Certified Financial Planner Board of Standards.

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

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

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

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

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

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

First, the proposal rule would close several big regulatory loopholes that exist under the current rule and that harm retirement savings. It would cover rollover recommendations to ensure that retirement savers receive strong protection when they are most vulnerable to receiving conflicted advice. Financial professionals often have strong incentives to recommend rollovers because each one can result in a big pay day for them.

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

Third, the proposed rule would apply to all retirement advice and to all classes of retirement investments, including securities, non-securities, many insurance products, and a wide range of other investments not covered by the current rule. We believe that closing each of these big loopholes is a major step in the right direction to protect retirement savings, hard earned savings.

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

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

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

As CFP professionals, we have helped the CFB Board develop the CFP standard. The CFP standard are a set of workable, practicable guidelines that frame how we do business at Family Investment Center and how we deliver services to our clients under a high fiduciary standard. We believe that the proposed rule aligns with the CFP standard. For these reasons, we ask the Department to use the CFP standards as a model to provide practical guidance to fiduciary professionals on how to implement the ERISA fiduciary definition.

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

We ask the Department to carefully assess the potential regulatory burdens and compliance costs that the proposed rule would impose on smaller firms like ours that do not have a large Compliance Department and resources that bigger firms have. We ask that wherever possible, the Department consider and adopt compliance guidance that do not increase the already burdensome compliance obligations that firms like ours already face.

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

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

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

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

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

First, I would like to address the supposedly measured approach the Department claims to be taking. In fact, the Department has singled out fixed index annuities for special criticism that is exceedingly misinformed reflecting a fundamental misunderstanding of what the products accomplish for consumers. The announcement of the proposed rule includes an outrageous characterization of the many diligent members of our industry to make available products that American workers demand to enhance their financial security, particularly in their golden years.

The 2023 proposal is largely a regurgitation of the previous DOL fiduciary with modifications to broaden its scope and breadth that cannot be reconciled with the Fifth Circuit's Chamber of Commerce decision. The 2023 proposal is deeply flawed and should be withdrawn in its entirety. Second, the economic analysis data reflected in the preamble consist of flawed analysis based on selective pieces of outdated academic research and back in the envelope calculation to justify a predetermined conclusion.

The analysis flies in the face of the benefits a strategic product allocation may achieve for the vast majority of individuals the Department is trying to paternalistically protect. The average household income of annuity owners is $76,000 and the median U.S. income is $63,000. And the average age of annuity consumers is in their early 60s.

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

It also reflects the complete absence of understanding the risks that insurance providers take on when offering these products. The volatility, maintaining principal protection, sequence of return risk, and probably most importantly longevity risk that retirement savers would otherwise be left alone to face can be mitigated by the sale of a guaranteed annuity project that addresses consumers' needs by taking these risks or at least a portion of those assets off of their plates.

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

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

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

Lastly, the DOL is mistaken by taking the view that sales of fixed products are only driven by incentives and reflect a lax regulatory regime that needs to be buttressed. Sales in 2022 of fixed annuities, MYGAs, were in fact up 110 percent and are attributable difficult markets in 2022 and a significant rise in interest rates. Today, they're up 42 percent year over year for some of the same considerations. On the FAA side last year, we saw a 25 percent increase in sales with a similar increase today. This is not due to incentives, but an acceptance of the product concept and a risk mitigation strategy that I discussed earlier.

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

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

It is discouraging to have the good work that they do and products that they provide disparaged and disregarded during the current rulemaking process. In fact, annuity professionals help consumers save and prepare for their retirement and help create financial security. A 2022 survey found that nine and ten annuity owners purchased annuities primarily to provide peace of mind during retirement. Over 80 percent intended to use annuity distributions for income during retirement.

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

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

In seeking financial security, Americans want the freedom to choose the financial advice and the retirement products that fit their individual needs. Implementing this unnecessary rule will only hurt low to middle income workers, retirees, and their families. We want to make clear that NAFA strongly supports the best interest standard for annuity transactions. Annuity professions should and do act in the best interest of their clients when making recommendations to purchase an annuity.

There was a lot of talk yesterday about the NAIC best interest model regulation. And many testifiers made erroneous observations about it. NAFA worked closely with the NAIC as it revised the suitability model regulation to incorporate the best interest standard. The process to develop the current model took over 2-1/2 years and benefitted from the input of a wide variety of regulatory, industry and consumer stakeholders. It was essential to strike the proper balance between an enhanced standard of conduct for annuity professionals and a workable regulatory framework that would support access to essential retirement advice and products necessary to ensure a safe and predictable retirement for the millions of Americans who need and value annuities as part of their retirement plan.

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

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

MR. ROBERTS: Thank you. I'm Tom Roberts with the Groom law group and I realize we're over time, so I'll keep my remarks brief. I just wanted to punctuate the remarks that my NAFA colleagues made this morning by observing that our co-panelists and many of yesterday's panelists made the point repeatedly that they are fiduciaries who are paid to render advice. And that's fine. That's how it should be. The mere fact that insurance producers are paid not for their advice, but for completed sales does not render them inferior, nor does the fact that insurance producers who are well trained, supervised, monitored, acting in accordance with state regulatory standards, the fact that they are compensated --

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

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

MR. KHAWAR: So thank you all for your testimony. Maybe starting with Ms. Heinrich and Mr. DiVencenzo, how would you characterize the nature of the relationship between an insurance professional and the customer? And how does the customer understand as Tom was just indicating that this is more of a sales relationship and not an advice relationship?

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

MR. DIVENCENZO: Go ahead, Pam.

MS. HEINRICH: Well, part of the conversation, Ali, between the producer and the client is to understand their role -- their role as it relates to the insurance carriers whose products their representing. They disclose how they're paid for their services and their relationship with that carrier. Certainly the client can ask greater questions about that relationship and their compensation. But I think that the conversation, the transparency, the model's requirements that the producer share with the client, why they're making the recommendations that they do. And the role that they play in the transaction, I think makes it clear that there's an understanding of that relationship and how it works.

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

MR. ROBERTS: If I could just jump in. You know, I think when an insurance producer appears before a perspective client, it's crystal clear to the perspective client that the insurance producer is selling. The insurance producer has no agreement to be paid any fee in the event that the customer does not buy the product. That's clear. It's inherent. And in that respect, I would analogize that interaction to the interaction of fee-based advisors, not when they've been engaged, not post-engagement, but that at times they're seeking to be engaged.

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

MS. HANSEN: Speaking of clearing something up, I just have a follow-up on that. Ms. Heinrich, you made a statement that said that the NAIC 2020 model rule, that comments by the Department claiming that, that model rule misses the fiduciary mark -- that the Department saying it missed the fiduciary mark is simply misplaced. Thereby implying at least as I understand that comment to say that the NAIC 2020 model rule does place an appropriate level of fiduciary supervision over individuals. To me, that statement is directly in conflict with the other aspects of your testimony that says that both the producer and the client -- and again, this is just my understanding of what has been said -- have a clear understanding that the producer is only selling.

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

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

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

MS. HEINRICH: Yeah. Certainly a fiduciary standard is to act in the best interest of your client, but you don't have the duty -- I think the loyalty duty. So it's a best interest standard to act in the best interest of the clients as is the fiduciary standard, but it does not rise to the level of the sort of liability exposure to be an ERISA fiduciary in the context of insurance product sales is not intended to be.

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

(Simultaneous speaking.)

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

MR. ROBERTS: Yes.

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

MR. ROBERTS: That's correct.

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

MR. ROBERTS: That's correct.

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

MR. ROBERTS: That's correct.

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

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

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

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

MR. ROBERTS: Yes.

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

MR. HAUSER: And to understand these particular categories of contracts -- I think to fully understand one of these contracts, you have to understand what the index is. You have to understand how the crediting rate works. You have to understand how that index, you know, tracks to the actual performance the customer is likely to receive, what the participation rate is, how that works. You have to understand whether dividends are included in the index. And you have to understand a host of charges. And are these all typically explained to the customer? And is an assessment made of kind of what the right combination is for their interest?

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

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

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

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

MR. HAUSER: In your experience, do the typical investors, are they able to navigate their way through all these complexities, the different indexes, the participation rates, the various charges, the caps and buffers and all the rest without expert help from the folks you represent?

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

MS. HEINRICH: Right.

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

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

MR. HAUSER: I appreciate that.

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

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

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

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

MR. ROBERTS: Sure, of course.

MR. HAUSER: -- and then I'll be happy to respond. But the question I guess I have and what's confusing to me -- and this really, I think is following up on Megan Hansen's line of questions, which is I mean it appears to me as I understand the way this relationship works, the advice -- there's advice, it's individualized. It's about a fairly complex set of products that ordinary investors can't really understand without this expert assistance. And the people they're dealing with hold themselves out as acting in the customer's best interest.

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

MR. ROBERTS: I would like to answer this. There is a difference, and we all know there's a difference between a fiduciary relationship of trust and confidence and a professional sales interaction. A professional sales interaction is one where the transaction-based producer seeks to understand the individual circumstances and seeks to determine whether or not a product that, that individual has available for sale meets the customer's needs. That is a best interest interaction that is short of a fiduciary interaction.

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

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

MR. ROBERTS: You're scripting a conversation that bears no relationship with any commercial interaction of any kind. What I would say is do they understand that they're dealing with a commissioned sales person? Of course they do. Of course they do. They received the explanation of the product. They receive a disclosure of the fact that the person who they're speaking to is compensated only if a product is purchased. More often than not, Tim, that producer walks out of the room having completed no sale. And so they are not compensated at all for any of the advice that they gave the consumer.

MR. HAUSER: So can I just ask --

(Simultaneous speaking.)

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

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

MR. ROBERTS: Sure. Sure.

MR. HAUSER: So the first is, I mean so is it your view that the distinction comes from the fact that they're paid on a commission basis and that fact is known to the customer and essentially nothing else? That's the key driver. They can otherwise hold themselves out as acting in the customer's best interest. They can give individualized recommendations. They can let the customer believe that they're getting advice that's based on what's best for them. But the customer should know because they're being paid on a commission basis that they're not dealing with someone they should treat as part of a trust and confidence relationship. Is that the position NAFA is taking?

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

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

MR. HAUSER: Yeah, just one more thing. I mean so to the extent you're basing this line on the fact that it's a commissioned-based transaction, could you just explain to me why is that different than an attorney that's paid on a -- on a contingent basis? Don't they have a -- You know, aren't their clients entitled to think they're getting representation that is based upon their interests? And isn't the service they're being compensated for -- They're not being paid for delivering a win by any means possible. They're being paid for their services, aren't they, as lawyers -- as professional lawyers obligated to act in their client's interest. Zealously and loyally. Why do you think the clients view it differently?

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

MS. HANSEN: Yeah. Given that we are over time, I would like if at all possible, Mr. Moisand, there was one comment you made that I -- that if you either have it off the top of your head or if there's a way in your written comment -- you mentioned -- you made a statement, "the overwhelming majority of Americans want to work with an advisor acting in their best interest as a fiduciary" or something along those lines, I was writing quickly. And I was curious where you got that statistic where you -- where that came from. I don't know if you happen to have it. Or I know we are over time, but I'd be interested to see that if you happen to have it.

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

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

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

MR. HAUSER: Okay, thank you.

MS. HANSEN: We are over time now.

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

MR. DANFORD: Thank you.

MR. HAUSER: Thanks.

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

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

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

MR. HAUSER: Yes, perfectly. Thank

you.

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

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

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

Board's fiduciary standard.

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

We know that the Department has worked tirelessly over many years to find a workable solution to its concerns regarding the security of retirement savers. At the same time, our members are keenly aware of the complexity of the already existing state and federal laws governing various aspects of the financial planning profession. And conflicting interpretations of the term "fiduciary" among various agencies and regulators. This complexity forms the basis of the concerns and the request for clarification we want to share with you today.

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

Many of our members are dually registered and carry multiple licenses to meet the client's needs and they operate as either independent contractors or employees. Members in these varying categories are going to experience different burdens in implementing the proposed rule. They will require significantly more time to review and fully understand any proposal, which must be considered in light of all the other existing regulatory obligations at play in our industry.

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

We do respectfully encourage the Department to consider an extension of the 60-day effective date and request a commitment from the Department to implement any final proposal using a phase-in approach with education, rather than punitive enforcement. For the regulated community to be successful in complying with any new requirements and changes to their obligations, there must first be clarity and mutual industry-wide understanding of the proposal, as well as sufficient time to implement any necessary changes.

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

For a better understanding in advance of enforcement of any final rule and provide greater clarity for our members and the industry as a whole, we respectfully request that the Department provide clear implementation guidance and compliance tools such as a succinct list of new documentation requirements, turnkey forms, templates, as well as FAQs ahead of or along with and parallel any final rule. At a minimum, this guidance should identify work compliance with existing regulatory requirements will satisfy the Department's proposed requirements and more importantly, where financial professionals are going to need to take steps beyond seeking to comply with their existing regulatory obligations.

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

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

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

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

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

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

Everywhere I go, every FPA chapter I visit, it comes up time and time again from our members. They tell me I'm a certified financial planner. You can look me up online. You can verify my credentials and see that I'm required to act as a fiduciary under CFP Board's code and standards. But that person down the street who has no financial planning education or experience and can only offer insurance products as an example, they also call themselves a financial planner as well. So FPA does agree that titles can and do mean something and can often be misleading to consumers, which is why we applaud you for recognizing the issue and we look forward to providing additional input as part of our ultimate comment letter.

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

Our CFP professional members stand

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

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

MR. CADIN: Cadin, thank you.

MR. HAUSER: Cadin, thank you.

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

And I'd like to start by stating a few simple truths. First, it's incredibly disheartening that you, the Department of Labor have decided to jam this rule through the holiday season. Second, while we've repeatedly tried to engage and construct a dialogue over the course of the last several years, just as many of our industry partners we have, we have found the lack of responsiveness and disregard for the undeniable consequences of this rule to be unfortunately consistent.

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

My name is Marc Cadin. I'm the CEO of Finseca. Finseca was created in 2020 to reunify the financial security profession. The men and women who believe that holistic financial advice is the key to advancing the cause, which is the inspiration behind our name. Financial security for all.

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

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

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

Now at Finseca, we support a regulatory environment that provides the best outcomes for consumers. It provides them with protections, as well as enables our members and the profession at large to work to serve their clients. We were a constructive force that brought real world examples during the SEC's process to adopt a best interest standard, as well as the NAIC's adoption of Model Rule 275, which as you have heard has been adopted by more than 40 states.

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

Now in preparation for this hearing, I've had the opportunity to talk with dozens and dozens of our members. One conversation in particular needs to be shared. Jacob, a financial security professional from Indiana was describing the compliance burden on his shoulders and how significant it is since this profession as you know is regulated by the states, by FINRA, the SEC, the Department of Labor. And all of these rules are filtered through the different compliance departments at the companies he works with. When I talked to Jacob, he described the regulatory burden as being more disruptive to his business than was COVID. Jacob said COVID was more of a delay in terms of income. Sure, things slowed down, but business still got done. He still had the ability to meet with his clients digitally and nothing stopped him from moving forward or maintaining relationships.

On the contrary, he described the regulatory process as a hindrance in moving clients forward. He noted how intimidating it is to have potential clients when they first meet and they expect to form a relationship and instead, they had a lengthy complex contract filled with legalese placed in front of them with the explanation that signing this allows us to pursue a relationship. Now Jacob and the tens of thousands of advisors like him continue to navigate the challenging regulatory environment. And as I said, Finseca, we support smart regulations that protect consumers. We support smart regulations that protect consumers. But what we don't support is regulations that are going to inhibit the access to the advice and products that consumers need to be financially secure. Now your latest fiduciary proposal seems designed to make it impossible for millions of Americans to get the advice and products they need.

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

First, this framing of the rule is offensive, misleading, and factually inaccurate. Commissions are not junk fees. State regulation is not inaccurate. And your stated reason as to why fixed indexed annuities are up 25 percent is entirely wrong. Now I could point on a bunch of those different pieces, but I'm going to focus on commissions. A commission, which as you know is regulated as part of a product approval process by the states. It offers consumers a more efficient and effective way to access insurance products and related advice.

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

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

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

However, insurance products are different than securities. Professionals who are forced to use 2020-02 often offer their clients insurance solutions from competing carriers. These products compete directly with each other to consumers benefit and on price, feature, service, and underwriting. This makes the co-fiduciary requirement of 2020-02 impractical to almost impossible.

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

But not to be outdone, another broad bipartisan coalition passed and President Biden signed SECURE 2.0 in December of 2022. Two sweeping pieces of legislation passed within three years. This is because most of the members of both parties of both houses and both administrations understand we need to get more Americans saving earlier. We need to open up access.

Our elected representatives understand that defined benefit plans no longer exist. Our elected representatives understand that we have a looming crisis with entitlements. Our elected representatives understand that people like Jacob and the thousands of people like them, they understand they're here to serve their clients. They understand that they want to help their clients make better financial decisions. That they're essential in the financial decision making process. And yes, the members of Congress and our elected representatives understand that people like Jacob and the thousands of people like him want to take care of his family and his employees.

For all of those reasons and

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

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

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

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

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

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

Each year, a NAPFA member must sign a fiduciary oath and code of ethics, which generally require a NAPFA member always act in good faith, to be proactive in disclosing conflicts of interest, and to not accept commissions, referral fees, or compensation that is contingent upon the purchase or sell of a financial product. NAPFA members must truly be fee-only financial professionals.

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

As a result, a NAPFA registered

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

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

Because of this conflict of interest, financial professionals who are paid for commissions may have difficulty placing the client's best interest above the financial professional's personal financial interest. NAPFA's position is that the fee-only method of compensation is the most transparent and objective compensation method available in today's marketplace.

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

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

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

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

NAPFA also called for the SEC to include strong fiduciary standards and other such as those under the CFP standards in its 2019 regulation best interest known as Reg BI. NAPFA has continued to urge the SEC to do more to protect retail investors and retirement savers. Reg BI however does not solve the problem of conflicted retirement advice since Reg BI only applies to securities recommendations, transactions involving non-securities are not covered.

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

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

I would like to also note that NAPFA

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

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

We don't have asset minimums, which

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

So in conclusion, NAPFA believes that the CFP standards are aligned with the proposed rule and provide a workable framework, which is used by CFP professionals today to help the Department develop and implement the proposed ERISA fiduciary definition. We encourage the Department to adopt new regulations that do not merely mirror language from the SEC's regulation best interest, but instead would establish and strengthen safeguards under ERISA to protect retirement savers against conflicts of interest.

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

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

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

And I have two questions for you about this. The first is when you're interacting with clients, is it your experience that they understand the difference between the kind of services you're providing and what they should expect from a sales person?

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

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

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

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

MR. KHAWAR: Okay, thank you.

MS. WILKER: Ms. Jordan, I'll

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

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

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

MS. JORDAN: Yeah. So I'm a former educator, so I try to put things in a simple way for my clients, but I realize that they're professional adults. So for example, if I'm referring a client to an estate attorney, I use the simple example of if I'm related to this estate attorney, he's my uncle, that I'm going to disclose that to you so you're aware of that and you're going to get three choices to make so you can vet and see who you like best.

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

MS. WILKER: Yes, thank you.

MS. JORDAN: Okay, great.

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

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

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

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

As mentioned in my testimony, there

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

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

For example, one agency can call

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

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

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

MR. MAHONEY: You're welcome.

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

(Simultaneous speaking.)

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

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

MS. LLOYD: Thank you.

MR. MAHONEY: You're welcome.

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

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

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

MR. EDWARDS: Yes. Can you hear me?

MR. HAUSER: Yes, thank you.

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

So at the outset, I would like to deliver sort of a big warning to the Department of Labor that you are likely to face, you know, a flood of dubious arguments. You know, in this space, what we've seen in the past is whenever you try to do something about conflicting investment advice, the industry will often flood the zone with these kinds of arguments.

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

Essentially the statute says that the SEC is the only entity that can make rules for how brokerages are to keep the records. And letter after letter poured in citing the same provision. And what you did not see was the entirety of the provision that was being cited. The industry had, you know, across the board truncated the very last sentence, you know, of that section that said that the SEC had to consult with the states as to the adequacy of the record schools.

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

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

They told the courts that the people who were selling products were mere sales people and that they were just sales people. And it was just a sales relationship, an arm's length relationship. This is simply, you know, not true. Ultimately, you know, the advice, you know, people get really matters. But often times what people are not getting under their current system, it's not actually advice. It's a sales pitch. So they may, you know, no longer getting a particular sales pitch, but it should not be read to mean that they're not getting, you know, thoughtful, useful advice, you know, for their circumstance.

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

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

So you have, you know, folks who've accumulated assets in a fiduciary environment who are now no longer as able to fend for themselves in a free market as they might otherwise, you know, be, who are ripe to be fleeced as they are beginning to experience cognitive decline. So one of the things we know is that the rates of dementia after, you know, roughly 65 double essentially every five years. And so, you know, when you have people trying to manage those funds, it's really critical that they get advice that's in their best interest. We should not assume that they are, you know, able to effectively, you know, fend for themselves for a variety of reasons. You know, diminished capacity, limited financial literacy, you know, there's a whole host of reasons.

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

That does not give an opportunity for ordinary courts of first impression to update the law, you know, as time passes to account for changing circumstances. And so here, this is the world we live in now where you have, you know, dispute after dispute being decided, which an ordinary common law (audio interference) which actually generate, you know, more law and more guidance around what's appropriate. But we don't have that because it all goes through arbitration.

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

I would also encourage you to recognize that fiduciary rulemaking and managing conflicts of interest are absolutely critical for capital flows and for how, you know, our nation as a whole is able to allocate capital. So the way to think about this is, you know, people who are offering investment products or securities to the public, they compete against other businesses that are looking to raise capital as well. Now they compete on, you know, the merits and the risks of their particular offerings and that's, you know, ideally how the system would work.

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

And one general rule of thumb that you should always remember in this context is that, you know, the bigger the commission or the bigger the payout on a particular product for the person selling it to an investor, the less good it is likely to be for the investor or the terms are not as likely to be as generous. And the idea here is simply that, you know, that money being used to pay the Commission has to come from somewhere.

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

So with that, I thank you for the opportunity to speak and testify today. And I will yield the remainder of my time.

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

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

MR. HAUSER: Yes, thank you.

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

So ICI strongly supports efforts to promote retirement security for U.S. workers. Our members play a significant role in helping retirement savers by making available the investment products through which pension plans, defined contribution plans, and IRAs invest. As fiduciaries, our members manage retirement assets to the highest standard, whether it be ERISA fiduciary standards for plan asset vehicles or as investment advisors registered under the Advisers Act managing regulated funds and client accounts.

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

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

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

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

We think these process concerns alone warrant the Department withdrawing the proposal, but I want to highlight a few other factors that weight against preceding with it. First, only a few years ago, the Department issued a new protective exemption, PTE 2020-02 setting parameters around advice to retirement investors. It has not provided any evidence demonstrating that the exemption is not working as intended. The Department should let the regulated community continue implementation of that exemption without prematurely making significant changes to it. And we do view the changes -- the proposed changes as significant. As the Department stated just three years ago, PTE 2020-02 provides clear regulatory standards that ensure American workers and retirees have access to high quality, affordable investment advice.

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

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

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

These supposed benefits would be outweighed by the cost of reducing access to financial information and the burdens of complying with the proposed revisions to PTE 2020-02. Despite this, the Department's regulatory impact analysis fails to comprehensively account for the significant changes that have occurred since 2016 or to provide a benefit estimate. Additionally, while estimating significant costs of implementation, the Department still significantly underestimates these costs.

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

We note that the new proposal could be plagued by additional vulnerability relating to the regulatory impact analysis, which as I mentioned earlier has considerable flaws. There would be a strong basis for a court to find that this RIA fails to meet the standards applicable under the APA. Under the APA, it's incumbent upon the Department to show that the benefits of a proposal will outweigh the costs. We are concerned that this RIA fails to quantify any purported benefits, while grossly underestimating the cost of the changes in terms of both the direct costs of implementation and the cost to investors for loss of access to information and assistance.

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

Some of the areas that must be addressed include platform providers, assisting plan sponsors with platform selection, RFP responses, and other "hire me" situations, call center representatives responding to questions from plan participants, and communications between asset managers and financial institution intermediaries.

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

We disagree with the Department's stated intention of providing a one size fits all or fits most exemption. Exemptions are more effective at both protecting the rights of participants and enabling the provision of necessary services to plans if they are tailored to apply to specific situations. The Department has used this more tailored approach for decades. Rather than leveling the playing field, the application of one set of conditions to all instances of advice, especially the broad range of activities contemplated by this definition will result in less assistance to plans, plan participants and IRA owners and fewer options in the marketplace.

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

MR. HAUSER: Thank you. Mr. Peiffer.

MR. PEIFFER: Yes. Thank you very much. Today I'm here on behalf of investors, myself and my colleagues at PIABA have represented. PIABA is a bar association of hundreds of attorneys around the country that have dedicated their lives to representing investors that have been the victim of financial misconduct.

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

For years, brokerage firms advertisements have said things like "they will not rest until their client knows she comes first" or stating flatly, "our advisors are ethically obligated to act with your best interest at heart." There's dozens and dozens of examples of advertising like this that go back decades.

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

A Department of Labor rule would go a long way toward holding firms accountable in retirement accounts for the duty they already say they have and investors already think they have.

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

Now these proud, strong Americans break down in my office when I explain to them how their investment was lost to conflicted advice. I've had clients live with me because they couldn't afford the fuel and the lodging to go back and forth for a long trial. I've had a client who lost all his money and had to rent a room from his ex-wife. And if that isn't that the worst thing that you ever heard, I've had clients who've attempted suicide after they lost their life savings.

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

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

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

Now this rule doesn't just help investors, it also helps ethical advisors. One of my best friends, and this is real, is a financial advisor. He describes -- He's a good guy. I don't just say that even just for the jokes. He really is. He's my best friend and he's a good person. And he describes his job as protecting his clients from the firm he works for. This rule will give good brokers a tool to say to their firms when they come to them with unscrupulous sales tactics, no, I have a fiduciary duty to these retirees. And it evens the playing field for advisors who already do the right thing by acting in their clients best interest. So it helps investors and it even helps advisors.

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

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

MS. CHISM: Yeah, I mean I think there are a lot of different context in which this could come up. You know, call centers participants calling into plan call centers asking for help. You know, a lot of different context. But you know, I think that the basic issue here is that the proposal casts a lot of doubt over the ability to discuss specifics of an investment strategy or an investment without crossing the line. I think you should be able to explain who or what your product is intended for and even promote its attributes, but with the subjectivity of the facts and circumstances test and the preambles explicit rejection of, you know, the dichotomy between sales and advice, it's hard to interpret the proposal as allowing some of these conversations. And so, you know, in our comment letter, I think we'll provide more detail on some of the situations that you're asking about.

MR. KHAWAR: I appreciate that. So a follow-up for all three of you. Could you talk a little bit about how you see from the retail customer perspective, an understanding of the distinction between a sales relationship? And we heard earlier today about this concept of a sales relationship that's in the customer's best interest. But how they can distinguish between that kind of best interest relationship and the fiduciary relationship. And what are the ways in which those consumers are kind of educated and understand that no, this is a -- this is a sales relationship or this is a fiduciary relationship? What are the ways in which that happens? And again, that's really for all three of you.

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

These people, you know, often -- Look, I've represented everybody from illiterate plant workers, all the way up to neurosurgeons. And so it's not even an education issue. It's just, they don't know because they're not in the investment space. And they're told repeatedly through marketing that the brokerage firm will act in their best interest and that is why they give them all their money. You wouldn't give everyone -- these people all your money if you thought it was a sales relationship. So they don't really know.

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

And so from my experience, and I've got a decent finger on this pulse because I meet with a lot of investors, nobody understands the difference between a sales person and the different duties that they're owed. But somebody else might have a different experience.

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

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

MR. KHAWAR: Okay. Can I slightly reframe the question just to make sure I'm kind of getting at the point? So appreciate, you know, you can't get in someone's head. I think what I'm trying to understand is how does -- are there ways in their practices in that sales context? Because a lot of what we've heard in testimony are practices that look actually very similar between the fiduciary best interest relationship and the sales best interest relationship. And is the thing that we should be kind of hanging our hat on is that consumers should understand that if this is a commission relationship and the individual won't get paid unless they purchase that product that, that's a sales relationship. And therefore kind of the consumer protections and the regulatory framework are going to be different as a result. And that's kind of the way we should view the world. That's kind of my question.

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

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

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

They don't understand, you know, differential commission. So they may understand that maybe there's a -- you know, they get paid if you sell something. But they don't understand that you get paid five times as much for selling a non-traded REIT or indexed annuity versus, you know, an ordinary mutual fund. They simply don't understand that.

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

Practically speaking, it's also very easy to see how people aren't going to understand the difference because you have different best interest standards that mean different things. This is, you know, it's such double talk that, you know, best interest means one thing in a securities context. Best interest means another thing in the insurance context. But, oftentimes, it's the same person selling both insurance and securities. So if you've got someone with a license to sell securities and a person with a license to sell insurance, they just sort of switch their hats as the conversation goes along. And the person on the other side simply, you know, really doesn't understand.

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

And so, ultimately, you know, in

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

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

MR. HAUSER: Ms. Chism, I had maybe just one question, I think. And that's, you made a reference to a belief that maybe there should be more exemptions for those people that are fiduciaries that are tailored to the specific markets in which they operate as opposed to, you know, 2020-02 and 84-24 standing alone. And I guess, I mean as I view both those exemptions, they're mainly just about prudence, loyalty, not overcharging people, and not making misleading communications. And outside of those broad parameters and having policies and procedures to make sure those thing happen, they kind of leave the operationalizing of those things to the firms. And I'm wondering, I mean are there specific market segments that you think shouldn't have prudence, loyalty, not overcharging, not making misleading statements requirements? What did you mean and what did you have in mind by more specific exemptions? And why are these four particular duties problematic for any one market segment?

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

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

MR. HAUSER: Okay. Yeah, whatever you can provide us in the comment letter on that score would be helpful, I think. And just a couple times in your testimony -- I said one question, but of course, I thought of a second one. But in your testimony, you referred a number of times to an established relationship. And I'm just wondering what work are those words meant to convey? I mean so are you suggesting that it's not possible for somebody to have the right kind of relationship of trust and confidence if for example, this is the first recommendation of a plan of how to invest plan assets that they've ever received from this particular person. Do they have to have had a preexisting relationship to place trust and confidence in the advisor? What do you have in mind there?

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

So, you know, I think it's just there's sort of, you know, a jurisdictional issue and a statutory authority issue. You've got a federal appellate court opinion kind of laying out what the, you know, what the ERISA fiduciary context requires. And you know, so I think that definitely one-time recommendations would be tough. But I think again, many of them are covered by best interest standard.

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

MS. CHISM: No. I think, you know, again, when you're talking about a first-time interaction, you know, a lot of times what I'll call the advice provider, the provider will be talking about their services and you know, what they can offer. And I think the perspective client, you know, will often times have questions about, well what would you do for me? You know, what strategies would you use if I hired you? You know, they have some expectation to talk about customization, you know, and just what exactly would your plan look like.

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

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

MS. CHISM: It could.

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

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

(Simultaneous speaking.)

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

MS. CHISM: Yeah, I think it's varied facts and circumstances. I did hear that conversation yesterday. But you know, I don't think that I could give you a full answer, you know, just based on one hypothetical. I think it does come down to, you know, is there an established relationship with trust and confidence?

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

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

Whereas if you have a rule in place that provides that they owe you some real obligations, you can trust them from the get-go relying on the strength of that rule. Which makes it easier for people to give advice and for people to trust advice. And so, you know, in my view, if you exclude initial interactions, you know, from the rule, you're going to basically turn your entire industry of sales people into, you know, pick up artists. And you know, essentially what they're trying to do is use every psychological trick they can to manipulate people into trusting them quickly before they can be held accountable for what they do.

And so, essentially, you know, we have modern psychology. Enormous amount of study has gone into how to, you know, convince people to trust you, how to buy particular things, how to sell particular things. You know, for example, if you just go Instagram and you type in "indexed annuities" and scroll through it, you're going to see lots of people talking about oh, you've got this old 401(k) lying around. It's almost as though there's a centralized training hub for how to convince people to trust you quickly and buy -- get them to buy indexed annuities. So ultimately, we need a rule in place that protects trust across the board, whether it's an initial relationship or a continuing one.

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

And that happens sometimes in the first meeting. It happens sometimes in the second meeting. But people are entitled to trust the people they are trusting their money with. This is money that they have saved over the course of 20 or 30 or 40 years. And they've gone without so that in their golden years, they can have this money. And they really ought to be able to trust somebody from jump street that's giving them advice on that. And so that's all I've got to say about that.

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

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

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

MR. PEIFFER: Absolutely.

MR. HAUSER: So I'd just like to thank all of the members of this panel and everybody else that's testified this morning, all very helpful. And we'll be back at 1 o'clock. Don't miss out. Thank you all.

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

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

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

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

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

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

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

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

Our second point is that the

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

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

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

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

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

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

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

It took the Department several years

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

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

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

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

George, can you tackle the substance for us?

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

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

But the Department hasn't proposed narrowly tailored changes. Instead the Department has proposed a completely replace a bright line test, one that's been in place for nearly 50 years, with a test that is highly dependent on the recipients interpretation of the particular facts and circumstances surrounding discussions that in many cases are not recorded or documented.

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

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

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

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

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

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

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

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

And it will unnecessarily interfere

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

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

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

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

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

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

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

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

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

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

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

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

And fourth and finally, any new definition of advice should show proper deference to existing state and federal regulations, including state regulations of insurance.

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

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

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

MR. QUINN: Can you hear me now?

MR. HAUSER: Yes, yes. Thank you.

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

Thank you for providing us this opportunity to offer our views regarding this retirement security rule, and the important impact it will have on your time and financial advisors.

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

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

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

Revisions to the current regulations, no matter how well intentioned must be undertaken with caution, and in full appreciation of the collateral impacts that it can cause.

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

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

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

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

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

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

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

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

We are however concerned any time an

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

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

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

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

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

However, despite the similarities,

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

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

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

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

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

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

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

In particular, it mandates adoption

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

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

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

Next, in order to be able to rely on PTE 2020-02, a firm must correct instances in which it determines that it is not held to the requirements of the exemption. In theory, this makes sense. But it ignores the practicality of taking corrective action for a large number of customers in instances where there is no tangible economic harm.

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

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

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

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

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

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

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

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

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

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

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

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

While Congress has a reputation for

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

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

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

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

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

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

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

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

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

Secure 2.0 also eliminated

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

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

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

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

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

The proposal we are discussing

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

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

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

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

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

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

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

Currently insurers are not considered fiduciaries according to the preamble for 84-24, nor are they included in the 14 types of entities who must file the Form 5330.

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

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

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

Do you have to amend your advice

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

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

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

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

By limiting the investment types in covered principle transactions are you prohibited from representing that type of investment?

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

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

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

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

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

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

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

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

Record keepers, their support and call centers do not provide advice. They provide education. They can't adopt a 2020-02 strategy, as they don't have the infrastructure to adapt to the proposed PTE. What it the Department's intention to eliminate these basic conversations?

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

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

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

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

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

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

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

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

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

MS. ISAACSON: I'll go very quick. Okay. Term life insurance policies are excluded from the definition of investment property. Does the Department agree that group term life insurance policies should also be excluded?

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

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

The institutional asset manager and plan agreed to the scope of a fiduciary duty, but yet negotiated the spoke investment management agreement. As the parties have agreed to the scope of the asset managers' fiduciary duties it seems wrong to expand that scope extra contractually to the entire consolidated group.

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

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

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

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

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

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

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

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

Verizon had a defined benefit retirement plan and a 401(k) plan. The retirement plan offered me a choice of an annuity or a lump sum payout, which I could then roll over to an individual retirement account.

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

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

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

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

After some agonizing days and nights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We will further discuss rollovers

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

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

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

The proposed rule is incredibly nuanced and thoughtfully designed structure that will accommodate a wide variety of advisor compensation models, will not inhibit the introduction of new and innovative investment products that would help retirement savers, and should move us closer to a world in which conflict free investment advice is an accepted norm rather than a contested ideal.

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

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

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

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

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

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

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

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

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

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

MR. STEIN: Yeah, I only have another paragraph. Only one of the advisors cautioned against a rollover. This suggests that 14 of the (audio interference) were either poorly trained to offer competent advice, which is unlikely. Or that they were primarily motivated, consciously or subconsciously (audio interference).

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

There are, of course, major exceptions to this aspect of human behavior. A parent sacrificing for child, a soldier displaying bravery in combat, an activist seeking to make the world a more just place. But an investment advisor giving advice across the desk, it is too often only effective regulation, such as the proposed rule here, that can ensure that the advisor is working for the exclusive interest of his client. That, or perhaps advisors all taking a lesson from Kris Kringle.

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

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

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

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

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

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

And so, courts can agree or disagree

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

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

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

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

But once I talk about what I actually do, and how that could benefit a client, well, all of a sudden that's in the gray area where it's impossible or very difficult to tell whether it's in bias.

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

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

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

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

MR. KREPS: For sure. And I would

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

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

And I think it would be helpful too if you could think about if there are particular scenarios, even if you essentially took all of our preamble discussion and kind of, you know, took it to the bank.

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

Kendra, kind of the same questions to you.

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

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

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

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

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

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

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

And what I would suggest is that when you're thinking of your comments as well, you know, if you can, to the extent these are all important issues to you, if you could just repeat those issues in your comment, as well as what you think the revolution ought to be, or whether it's a question where you just need clarity or, you know, whatever.

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

MS. ISAACSON: Very happy to do that.

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

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

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

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

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

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

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

We've already crossed that Rubicon. But we are concerned that in trying to extend the definition of fiduciary for these purposes, in the way that it is, that the Department's exceeding both its statutory text of ERISA and what the 5th Circuit said in the Chamber of Commerce decision.

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

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

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

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

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

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

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

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

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

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

One could say, I'm your fiduciary, make the recommendation, you know, as in the circumstance even that Ms. Winston described, and not be a fiduciary just as a literal application. I'm just wondering do you, I mean, would you support that much of a change to the rule?

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

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

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

MR. HAUSER: Yes, see --

MR. QUINN: Or it's a multi part, you know. We probably are. But I wouldn't want to just say as a blanket statement one fiduciary acknowledgment at some point in time creates an ongoing similar fiduciary relationship.

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

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

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

But by the end of your testimony

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

(Simultaneous speaking.)

(Laughter.)

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

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

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

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

(Whereupon, the above-entitled

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

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

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

MR. HAUSER: Yes, thank you.

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

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

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

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

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

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

The Department, ADISA takes pride in

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

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

As I said, we're focused on alternative investments and especially in the retail space. The essence of alternative investments is that they provide returns that are generally uncorrelated to stock and bond markets and may be sold by a public registration statement or privately placed. But they are typically not traded on an exchange and hold assets that are also not market traded, things like real estate, energy assets, and debt.

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

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

To put it another way, alternative investments are sold into accounts as component parts to provide important diversification benefits, but they are not themselves advised portfolios. Because of their typically less liquid and long-term nature as holdings, these products are particularly well suited to a commission model of compensation for those who recommend them.

Turning to the proposal itself, there's no doubt that there are gaps where current law or regulation leave retirement savers vulnerable to overreaching behavior. Closing these gaps is a worthy aim. Under this rubric, however, the Department's proposed approach involves a wholesale revision to the definition of investment advice fiduciary.

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

This would be particularly true with regard to broker-dealers that make recommendations regarding alternative investments for commission-based compensation. Accordingly, ADISA does not support the proposal in its current form. The Department, in our view, is sweeping all manner of relationships that touch IRAs into the investment advice with fiduciary rubric including those that involve a one-time recommendation of an alternative investment.

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

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

The distinction is important however, for it lies at the heart of how Congress separated investment advisors and broker-dealers under the Federal Securities laws ensuring that the latter did not come within the definition of investment advisor under the Advisers Act where the advice was incidental to the security sales efforts.

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

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

And this point about the difference between sales and advice is particularly relevant to the world of ALTs or alternative investments as they typically do not involve a wholesale decision of where or how to hold assets or how the investor's overall portfolio should be shaped to meet his or her goals. The hallmarks of advice in the way the term is understood and used by investors and investment professionals alike is portfolio management. The process whereby a financial advisor recommends an alternative investment isn't viewed with the sales element since it is a single or isolated sales process relative to a specific product.

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

We've noted previously in reference to the prior fiduciary rule proposal, any approach that subjects financial advisors to additional costs will result into having those costs passed along to those seeking this advice or worse, result in an unwillingness to provide services to IRA holders without imposing higher fees or even establishing higher minimums.

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

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

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

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

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

The SEC clearly understood that

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

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

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

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

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

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

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

Third and most importantly, there's the likelihood that the Department's approach will substantially diminish if not eliminate the commission-based model used by broker-dealers by serving IRAs. Brokers are in the business of selling securities. They provide advice pertinent thereto, but not a special compensation and only is incidental to their sales and securities. Otherwise, they'd be investment advisors subject to regulations and such. They therefore occupy a unique place in the landscape that provided advise, if at all, in relation to the securities they're selling or transacting. And this distinct approach is what warranted having a separate set of statutory and regulatory provisions that apply to and govern their conduct.

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

Several years ago, we pointed out in

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

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

The Commission-based approach can be

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

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

MR. GRADY: I shall. I think the final point I wanted to make is there is a demographic element to the small balance saver universe that strongly suggests that these efforts will have a disproportionate impact unless affluent and poorly served communities. They're made up in material a part by elderly savers and others who are new to the workforce or to the practice of saving for retirement. It also includes persons from historically disadvantaged communities such as person of color who have only started saving. Causing access to expertise and reducing the availability of the Commission model will have two effects.

It will dramatically limit access of this community to important expertise and in our mind, it will take away the ability of the IRA as a type of account to buy the types of alternatives that can help counteract the market exposure that those accounts otherwise have. In our view, we think the Department should take the proposal back and rework it in light of these concerns. Thank you.

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

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

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

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

Before speaking to the specifics of the proposal, let me start first with our view of the current state of retirement savings. Many Americans face a significant shortfall in their retirement savings exacerbated by soaring health care costs and longer life expectancies. The shift in defined benefit plans to defined contribution plans has placed greater responsibility on individuals to navigate the complexities of the markets themselves. In this environment, access to personalized investment advice is crucial to helping investors establish fluid savings and investing habits early in their careers which increases the probability of good retirement savings outcomes.

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

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

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

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

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

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

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

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

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

Certain aspects of the proposal, however, are likely to be counterproductive to the core goals of the rulemaking because they are likely to reduce rather than enhance the opportunities for investors to actually receive fiduciary advice.

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

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

Consistent with this approach, several types of interactions identified in the proposal should not be subject to an investment fiduciary standard.

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

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

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

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

This is particularly true of Betterment as our managed account offering does not permit a quick apples-to-apples comparison of available investment options or costs.

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

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

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

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

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

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

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

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

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

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

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

MR. HAUSER: Yes, perfect. Thank you.

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

I have an MBA from the University of South Florida, a law degree from the University of Miami, a master's and law degree from the University of Denver, and for 12 years I've been an adjunct professor for the graduate tax program at Northeastern University where I was lead faculty for the retirement planning course at Northeastern. I've been an active member of the Florida Bar for 39 years, licensed before the U.S. Tax Court, the 11th Circuit Court of Appeals, the 9th Circuit Court of Appeals, and the Supreme Court of the United States. The last 22 years, I've been CO of a CPA firm that managed qualified plans for small companies. And I'm here to clear up some misconceptions concerning the retirement industry which I've worked in without a client complaint for 22 years now and the fiduciary role.

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

Deceit number, one and this is in your fact sheet, it says, for example, advice rooted in conflicts of interest regarding the sale of just one investment product fixed index annuities may cost savers as much as $5 billion. That is just simply not true. And I'll tell you why it's not true. I wrote an article for the Journal of Accountancy back in 2009 saying no commissions or fees are taken out of fixed inequity index annuities.

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

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

It's just simply not true. There are other things in the foundation that are not true, but in the interest of time, we're not going to get into it. And mainly it deals with resident studies that are not peer reviewed, they're really people's opinions. Then we go on to the next problem. The S&P 500 beats all investments over long period of time. There's a misconception in the fee base and I've worked with these people for 40 years now that we're fee based, we're unbiased, we're better. Absolutely all not true. They make money when you make money. But guess what, when you lose money, they still make money. But that was never brought out and not only that was never brought out that these annuity contract person doesn't take any commissions out of your account. But anyway, we go on.

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

$650,000 difference in favor of fixed annuities.

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

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

The .2 percent more than an advisor may make or 1.2 percent, what is the biggest threat to everybody's retirement listening to this program? It's our national debt. The United States is $34 trillion, not billion, trillion in debt growing yearly. Social Security and Medicare/Medicare trust fund runs out of money this decade, Social Security runs out a next decade. And it seems to me the plan is they're going to lean on the federal government to make up for the shortfall in the Social Security trust fund that the Social Security trust fund will not be able to lean on the federal government because we are broke, $34 trillion.

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

By the way, on my analysis, quick and dirty, if every government agency reduced their budget 28 percent which could be 9 percent every year for the next three plus years, then you'd have a balanced budget. And then you'd be on a road to a more secure retirement for everybody. Why you're wasting my time and everybody's time and everybody's intellectual effort to go through this fiduciary role is abysmal -- I'm hoping that this can be thrown in the trash can and that you can come up with a new proposal how we can save everybody's retirement and save the U.S. government from the $34 trillion in debt growing to the point that the only thing we're going to have are taxes paid is interest on the debt. And with that, I rest my case, counsel.

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

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

MR. HAUSER: Yes.

MR. McMAHON: Great. Good afternoon. My name is Adam McMahon. I am a partner in the law firm of Davis & Harman. This afternoon, I'm speaking on behalf as you said, the SPARK Institute to voice our strong concerns with the Department's latest fiduciary proposal.

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

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

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

Given these views, we believe that

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

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

With regard to all of these unfortunate consequences that we believe would result in the proposal, we want to emphasize that we think that this is a unique exercise unlike a lot of other regulatory proposals from the Department or other regulators in which our expectations about the impact of the proposal aren't these mere hypothetical or speculative expectations as to what might occur.

Because of the similarities to this rule and the way that in many respects, it's functionally equivalent to the Department's 2016 rule. Our expectations and views on this proposal actually reflect our real-world experience implementing the 2016 fiduciary rule before it was eventually invalidated. Including a reduction in many beneficial services I'm going to talk about that had to be eliminated in response to that rule.

So what are the types of interactions and conversations we're particularly concerned about? Well, they generally fall into two categories that I want to talk about. The first broad category of interactions that we're really concerned about underneath the proposal are the many forms of participant assistance again that SPARK members provide in reliance on their current treatment as non-fiduciary activity.

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

These include tools that help prevent employees from depleting their accounts before retirement and encourage employees to keep their assets in the retirement savings system when they switch their jobs.

These types of assistance encourage participants to adopt healthy financial habits and avoid what are generally regarded as common mistakes. And they are often targeted to specific individuals based on their circumstances. And we believe it is this individualization that actually helps promote the positive outcomes that we're trying to achieve.

Under the proposal, however, we believe many forms of this assistance would merely be treated as fiduciary investment advice and would therefore either be reduced or only offered at an increased cost.

One example we've heard from our members is being concerned and I'll offer this as a hypothetical which is a record-keeper tool that helps participants make decisions about their option to receive distributions and loans from the plan.

In offering this type of assistance, a record-keeper might ask the participant for specific information about their situation. How much is your financial need? Are there specific facts that would support exception to the early distribution penalties that comply to in-service withdrawals? What is your anticipated ability to repay this type of distribution?

And based on all of this information, a record-keeper might suggest that a participant take a loan rather than a hardship withdrawal in order to avoid those early distribution penalties if they're able to repay it.

Under the current five-part test, these types of assistance tools which do not refer to any specific investments under the plan, generally are not regarded as fiduciary investment advice or are not when we say regarded as fiduciary investment advice.

However, under the proposal, we're concerned that these types of communications would be viewed as advice. The second broad category of communications that we're concerned about are the types of conversations that we believe are clearly sales conversations rather than advice.

And although they occur in a sales context, many of these conversations we believe are nevertheless very helpful in promoting things such as plan formation, helping encourage participation, and bringing new products and services to plans and participants thereby increasing their healthy financial habits.

On this issue of sales, for example, the hypothetic word I guess the real-world context that I'd like to offer this in is we believe that the proposal would make it much harder to sell plans to small employers.

It would apply across the board, but it's particularly concerning I believe in some of the small plan sales context. Under the current regulatory five-part test, plans are often marketed with a pre-selected platform of investments that are often marketed as being appropriate or specifically selected to serve a small employer market.

These conversations are not and have generally not been treated as sales, excuse me, as advice but rather a sales conversations in non-fiduciary context. And in our view, this is appropriate as we do not believe that plan sponsors, even plan sponsors, even smaller plan sponsors accept back that these sales representatives marketing their own firm's products are providing fiduciary level advice in a relationship of trust and confidence.

Under the proposal, however, which doesn't have platform exceptions or doesn't have types of exceptions to cover communications with large plant sponsors or small plant sponsors or allows them to define the scope of their relationship, we're very concerned that these marketing activities would newly be treated as fiduciary investment advice, and could only be offered in reliance on the exemption or potentially limiting plan sponsors only to generic product descriptions or general information, which doesn't necessarily connect them to the types of products that would be helpful for them.

Well the goal of all the interactions I've discussed is generally to make it more likely that more workers will be able to adequately quickly prepare for retirement, whether, again, by encouraging small employers to adopt a plan or suggesting that employees avoiding in-service withdrawals that can't be repaid.

We believe that the fiduciary proposal, that threaten many of these valuable forms of assistance. The fiduciary liability and cost have a newly accompanied all of these interactions in many instances simply cannot be justified by the benefits that they would create for a firm.

In this regard, we want to emphasize that the availability of a generally available advice exemption such as PTE 2020-02 as it currently exists and especially as it's realized, should not be used as a justification for inappropriately lowering the fiduciary bar.

Using the most workable exemption is no cure for the wrong fiduciary definition. And even for those record-keepers and other service providers, who have already implemented PTE 2020-02 as we've heard and a few discrete well-defined, clearly defined relationships.

We do not think the Department should assume they will extend the use of that exemption to many of these helpful conversations that have long been treated as non-fiduciary forms of assistance.

Unfortunately, as a result of the proposal, we expect that many record-keepers will simply stop providing these forms of assistance. Whether they actually fall within the technical definition of fiduciary advice or even come close to approaching that line, the risks and costs associated with taking on fiduciary status especially for situations in which it was not intended, it just those costs are too much and the risks are too high.

In our written comments which we're still working on and intend to get in before the deadline, we will offer some suggestions on the types of changes that would maybe marginally improve the proposal. However, it is our view that even if, you know, those types of changes were made, it would still not prevent many of these negative consequences under the framework that's being proposed by the Department.

For these reasons and because we believe that the current fiduciary proposal would inappropriately lower the bar for fiduciary investment advice that would eliminate many of these beneficial forms of assistance, we are encouraging the Department to withdraw its proposal and not re-propose any similar rules unless they are far more narrowly tailored to avoid these negative consequences.

Again, I'd like to thank the Department for giving us the opportunity to speak today. I'm happy to answer any questions.

MR. HAUSER: Thank you. So I'll start with a few questions and then maybe others can join in. I think I'd like to start with Mr. Rubin from Betterment.

And, I mean, maybe I'll start first with a statement and then a question that the statement is just that a lot of the kinds of communications that you are discussing I don't think are fiduciary in nature under the new proposal. You know, it's not just a trust and confidence test, there has to be a recommendation. And unless and until you have a recommendation, you don't have a fiduciary anything.

So when you were talking about kind of those pre-recommendation conversations, when you were talking about sort of educational kinds of communications and the like, those shouldn't be picked up and I -- I mean, that's not our intention to pick up those communications. We don't think the rule as drafted does. And there was a -- you know, and the recommendation concept here really is the one that, you know, should be familiar to folks from FINRA and the SEC. It's a call to action.

It's not, you know, just providing people kind of disclosure of the attributes of the particular investment, the basic investment principles, those sorts of things.

So the question I have is just -- I mean I won't ask you does that reassure you, but a question would be, you know, there's a lot of discussion of these issues in the preamble.

But as I asked a previous Panel, I mean is part of the issue here that we, in your view, we really ought to move these things up into the text of the reg and just be very express about the sorts of educational communications, the non-recommendation sorts of communications? And that they just aren't picked up as fiduciary advice?

MR. RUBIN: Yes, well thank you. And let me say that I am, you know, happy to hear that it is, you know, your intent is more consistent with the position that we discussed and maybe, you know, we had assumed.

I do think that is, you know, one of the things that would be helpful is just to both have the final rule outside of the preamble include a definition, a clear definition of recommendation that, you know, also includes the sorts of interactions that are explicitly not intended to be captured in the context of a recommendation.

And I do think that would, you know, would give us a fair amount of reassurance. I think our concern is that in the absence of additional clarity around both the scope of the definition of a recommendation as well as the scope of the educational exemption, that I think that it's likely to chill a number of the sorts of interactions that we've identified.

Just because of the, you know, the difficulty of complying procedurally and the additional burden of ensuring that all of the requirements of the PTE would be complied with. And so I do think, again, that it would be very helpful if there were some additional clarity in the final rule.

MR. HAUSER: Okay, so that would, yes, so if just as you're preparing your comment, if you could think about those areas you think it's especially important for us to, you know, underline in that way as non-fiduciary sorts of communication.

And if there are particular hypothetical sorts of situations or scenarios that you think maybe are on the line or especially susceptible to either misinterpretation or just that you think maybe we have the wrong interpretation, but if you could underline those for us and identify them. I mean generally speaking, when we put out the, if you look at the preamble to the rule as I mentioned in the last time we did meet, we don't think and we don't intend for this rule to pick up kind of general investment communication, stuff between the HR Department, the employees, I don't think this was your issue in particular, but the kind of mandated disclosures that go with swap transactions, the hire me kind of conversation right up to the point that somebody's actually making an investment recommendation that's intended to be covered.

We don't think wholesaling kinds of conversations are generally picked up and this maybe goes to the last testimony, but we also think that what we said previously about platform providers, you know, and even actually in 2016 project, if you fell within the contours of that platform provider exception, we don't think you've done anything that would be picked up as a recommendation subject to fiduciary status.

In this rule, all of those things if people think they should be in Reg text or think we should say more about them, I think it would be extremely helpful to know that.

And then, similarly, we didn't expend a lot of Reg text on the line between education and advice and information and advice and those sorts of things.

But if you're just describing the attributes of an investment or basic educational principles, that's not picked up. And if you look at the guidance we gave in both in the current interpretable bulletin, but also even in the 2016 rule where we had a fairly lengthy discussion of what's advice and education, I don't think we think those lines are any different.

Because it's the -- you have to have the recommendation before you get there. So just I'd urge anybody who's got, has these worries to take a look at that language. And tell us how you think we can do a better job maybe of making sure that people don't have anxieties about communications we didn't intend to pick up in the first place as fiduciary.

MR. RUBIN: Certainly that's very helpful and we'll certainly do so in coming.

MR. HAUSER: Thank you. And then, Mr. Grady, I just had a couple of questions for you before maybe I turn it over to others. But I think you viewed, if I understood your testimony, you viewed 2020-02 as significantly more restrictive maybe than Reg BI or more demanding.

And that you were concerned about potential impacts on access to advice as a result of those additional stringencies and I don't mean to put you on the spot, but if there's any specifics in that regard that you'd like to identify about ways in which it's more stringent than Reg BI that you think we should be thinking about, I'd appreciate it.

MR. GRADY: I think we're going to get into that, thank you, in our comment letter, but I do want to say that in the context we're talking about, the compliance with 2020-02 is one that I think your own Department acknowledged was a higher barrier than the mere Reg BI standard.

So I think you can go through the litany, but I think, but it struck me principally as was a relatively broad set of sort of different additional and higher standards than somebody who's trying to both be a broker-dealer complying with Reg BI generally than somebody who's a broker-dealer trying to comply with the advice fiduciary definition would be trying to comport itself with.

And for that reason we could see quite a number of them saying I'm just not going to serve IRAs even though the brokerage model might be: a) very welcome to the IRA holder; and, b) it's really at the heart of a lot of sales of investment products that are alternatives which is why we're so concerned about the backing away of the broker-dealer community from serving IRAs because of the differential in compliance.

MR. HAUSER: Yes, and so there, too, I appreciate that you'll, you're looking to address those things in the written comment. And I would urge you to do that because I don't, I don't think at least the standards, the fundamental duties of prudence and loyalty and then not misleading folks and the like, I don't know that they are appreciably different than the two context.

And it would just be good to understand, but there are other features obviously in 2020-02. And it would just be good to understand what you think are the kind of the key drivers here.

MR. GRADY: Thank you for that. And I think part of our answer is going to ultimately come back to the way the SEC addressed the issue was it chose not to impose fiduciary status on broker-dealers making recommendations in the Reg BI world. And that, as a result, it might require quite a lengthy re-write of 2020-02 to make clear where the fiduciary duty concept might be limited, truncated or nonexistent in the case of a broker-dealer made in advice fiduciary who is also trying to comply with 2020-02 and Reg BI.

So I can just tell you that that's

probably where the letter will go.

MR. HAUSER: So as, I mean as you understand it, and this isn't like a legal quiz, I just want to understand where you're coming from here.

I mean, what do you think are the differences in terms of the standard that apply to the recommendation under the securities laws as between a broker and an advisor? There's a difference in kind of the default monitoring obligation and not only that, but it is important, but under ERISA, there is no on-going monitoring obligation, you know?

And I think and we can be clear about that. The ERISA functional test of fiduciary status is a transaction-by-transaction test. It's by its nature transactional. Are you giving advice with respect to this transaction that's fiduciary? So it's in every case going to be decided on a transactional basis.

But after that, I have a hard time,

you know, if you put aside the monitoring issue, it's hard to single out any difference in the governing standard as between a recommendation from a broker, an advisor under the Advisor Act and under the SEC. And they are both rooted in the same fiduciary principles as best I can tell. Aren't they?

MR. GRADY: No, that last point I would start with and say no, I don't think so or we wouldn't have the 34 Act on the one hand, the Advisers Act on the other with a clear exclusion of broker-dealers and investment advisor status to the extent they give advice that is solely incidental to the conduct of their business.

And they don't get specially compensated for it. So with that level of congressional understanding of the difference, I think we're very leery of anything that suggests that the standards are close enough to be legally or practically the equivalent of each other when applied to real life work of a broker-dealer.

I think that, you know, the SEC spent quite a bit of time trying to explain why it wasn't going to adopt a single fiduciary standard despite in some cases, the recommendations of staffers from prior eras as to why it should do so.

And I think in some ways, the formulation often will come down to an understanding of what the difference is between putting your client first on the one hand and not putting yourself ahead of the client on the other.

And I noticed in your own release that both formulations were used which I'd want to get into and will and plan to get into in the comment letter because I think that is a key differential in especially where as you label it or the Department labels it in conflicted advice. Sort of putting the client first may in some ways be interpreted as never allowing for compensation. It could vary by the advice given as opposed to a standard that says you can't put your interests ahead of the clients or as you put it, subordinate the clients' interest to your own.

So I think that's what and if it's helpful, we'll get into that in our comment letter.

MR. HAUSER: It would be helpful. The latter is what's intended. There is not an assumption in our part that perfectly level compensation is required by this.

MR. GRADY: I appreciate that and I --

MR. HAUSER: It's understand --

MR. GRADY: Can I just make one point?

MR. HAUSER: Yes.

MR. GRADY: Sort of touched on by your question and that is we are also happy to see new ways of providing advice come into the marketplace including one of my fellow panelists, the use of technology and internet to serve smaller balance savers does have appeal to both us and to the market generally. But I want to point out that a lot of those models cannot, certainly they do not now.

We don't see how they would necessarily will in the future, incorporate alternatives in them. They're just not a good fit for a technology driven advice model even if that model is otherwise a nice fit and it alleviates some of the Department's concerns that the commission model may go away. So that will be in our letter as well.

MR. HAUSER: Okay, thank you. And can I get a preview of that? What is it you think is, makes it especially hard?

MR. GRADY: I think you'll see that if you, if there is a program and I'm sure my fellow panelists would be glad to tell me that there is one, but if you can find a program that literally includes a non-listed security in a program that's delivered essentially via the internet without the need for a particular signature on the application or the requirements that are mandated by the state merit reviews of investors qualifications and the like, I think including even the basic type of alternative investments such as a non-exchanged listed REIT is very difficult in an advice model that's delivered electronically.

MR. HAUSER: Thank you. And do you have any sense of -- you referenced at one point concerns about small balance savers in particular and I didn't take to your, you as expressing concern just with respect to the folks here, members' advice. But I am wondering about that. Do you have any data or are you familiar with any data or do you have any information on the extent to which small savers are investing in alternative investments and of the sort that you recommend and have expertise in?

MR. GRADY: I mean, we are still collecting feedback and data from our members through a wide-based survey to just try to get at that question specifically because we figure data is going to help everybody and we want to be honest brokers on this question.

But from what we've seen, you know, the standards for buying a lot of alternative investments, they're not, you know, sort of available to everybody.

There is a wealth or income test that must be satisfied and it's built into the offering documents and the merit review process that the states follow. Certainly, for publicly offered programs such as REITs and BDCs.

So I think, as a result, there is a need for talking to smaller balance savers about including ALTs in their portfolio just to avoid them being totally linked to market-based products.

But at the same time, telling them that those aren't available because there's a high minimum fee to be in an account that's going to make those accessible or that they're not accessible to investors unless they're willing to meet certain requirements in their own IRA account is, to our mind, going to make it less likely that those smaller balance savers are going to get access to alternatives. We think they're going to get less access to advice or expertise generally but in particular to the ALT space given those extra concerns.

MR. HAUSER: But right now as it stands, they don't have much access to the ALT space and that's something you think should change? Is that --

MR. GRADY: Oh, I think, I was actually say -- pardon my interruption. There are programs that are sold to a significant extent into the IRA market.
The 20, 30, 40, even 50 percent of certain ALTs programs are sold into IRA accounts for the reasons that I was angling at before, certainly their non-correlation and diversification impact.

I think the concern is that taking

away or changing the current framework for the revision of that expertise to the IRA holder is going to mean IRA holders will get much less marketed at them by the financial provider community, and have much less opportunity to put ALTs in their portfolios than they have now.

MR. HAUSER: My perception though and tell me if I've got this wrong, is that there is exposure and access to these investments and outside the small saver kind of community and the IRA market, but not so much for small savers.

MR. GRADY: Small savers aren't excluded because it doesn't require them to have an asset balance in their IRA to meet the wealth or income tests that are otherwise established under the state merit rules.

So I think what we're saying is it's more, it's not likely that firms are going to go through the hoops to make those products available to the small balance savers in their

IRAs because of all the costs associated with those hoops.

MR. HAUSER: Okay, thank you. Thank you very much.

MR. GRADY: Absolutely.

MR. HAUSER: Any data you can provide us would be terrific. And I'll turn it over to anybody else on the Panel who has questions.

MR. PALEVEDA: The only question I have is if you do a study --

MS. HANSEN: So, let me ask right now. Sorry, thank you. I had a question for Mr. Grady. You mentioned that these, that the products that are covered here are recommended to retirement investors.

Several times you said that they were made as recommendations and I'm curious as to what you think again to serve your opinion whether when these recommendations are made whether the retirement investor is under the impression that the retirement investor appropriately should trust and put their trust into that recommendation and why or why not?

MR. GRADY: You know, I don't think the context for the recommendation differs by whether we're talking about the placement of the investment into a retirement account or a, you know, taxable just for argument's sake, taxable brokerage account. Because in many cases, the same investor who's a client of a broker-dealer will have both retirement accounts and taxable accounts.

I think the major difference is, is there a reason to put a high-income producing investment that maybe long-term in nature in a tax deferred vehicle or tax-deferred account like an IRA?

Not that it's sold differently, not that it's, that the relationship is differently seen, but rather the overlay is, is this the right place for taxable versus a high-income producing investments that might cause current liability if held in the taxable account, but which are shielded from current federal taxes held in a retirement account? I think that's --

MS. HANSEN: That doesn't answer my question. I'm asking whether the retirement investor believes whether it is your view that the retirement investor believes they can trust and put their trust into that recommendation.

MR. GRADY: No, I think the retirement investor is also the taxable investor. I think they're all looking at their broker-dealer as providing expertise on the security in question.

And the extra trust is in the expertise as to whether or not something would be a good fit with the retirement account.

MS. HANSEN: So is that, yes, the retirement investor does believe they can trust the recommendation?

MR. GRADY: I'm saying it's no different. If they trust the advisor, then they would for whether it's a taxable or a tax exempt account.

MS. HANSEN: Okay.

MR. GRADY: I don't think there's any different --

MS. HANSEN: So just to be clear, you're not going to answer the question.

MR. GRADY: It's not that I don't want to answer the question. I just think the context is it's often the same person with multiple accounts sitting in front of a broker-dealer asking where they should hold the investment in question. I do think they trust the broker-dealer to give them an expert answer on whether it would be sensible to hold it in the tax free account or not.

MS. HANSEN: So they do trust their broker-dealer to provide them the recommendation? Yes, is the answer?

MR. GRADY: They do trust the broker-dealer to give them the right recommendation as taxable versus nontaxable accounts in answer to your question.

I don't think it's any different as between the two places in any other respect of their understanding of the trust relationship.

MR. HANSEN: Thank you.

MR. GRADY: Absolutely.

MR. PALEVEDA: I have a question. Did the Department of Labor EBSA do a study on the reduction of people setting up retirement plans?

The time you last passed the fiduciary rule our empirical analysis showed three major insurance companies withdrew completely from the small retirement plan market, Transamerica, New York Life and Ohio National.

Our studies showed that new retirement plans reduced 40 percent the year you decided to place this fiduciary rule in effect because the insurance agents didn't think they could comply with the fiduciary rule, and would want to show a client anything else other than a retirement plan. Have you looked at the damage that was created from this fiduciary rule that was placed several years ago? I did and it was significant and that's the reason I oppose it.

MS. HANSEN: We are happy to take a look at anything that is sent in through the comment period. Unfortunately, this Panel is scheduled to end a minute ago so we are going to need to end this panel today right now.

(Whereupon, the above-entitled matter went off the record at 3:16 p.m. and resumed at 3:30 p.m.)

MR. HAUSER: Okay, I think we've reached the last panel, and that includes representatives of the American Bankers Association, Collective Wealth Partners and the Institute for Portfolio Alternatives. And we'll start with Mr. Keehan from the American Bankers Association. At least that's my hope.

MR. KEEHAN: There we go. Coming through okay?

MR. HAUSER: Yes.

MR. KEEHAN: All right. Terrific.

MR. HAUSER: That's good. Thank you.

MR. KEEHAN: Members of the panel, my name is Tim Keehan. I'm a senior vice president of asset management for the American Bankers Association. ABA is the voice of the nation's $23.5 trillion banking industry. Its membership is comprised of small, regional and large banks that together employ more than two million people, safeguard over $18 trillion in deposits and extend over $12 trillion in loans.

ABA appreciates the opportunity to be here regarding the Department of Labor's proposed amendments to its Investment Advice Regulation and related prohibited transaction class exemptions, which collectively I'll refer to as the fiduciary proposal or proposal.

My testimony today will cover three areas of the fiduciary proposal. First, the Department's interpretation of the term 'recommendation.' Second, the Department's view that non-fiduciary statements and actions that are made separate and apart from one another may be combined to become fiduciary investment advice. And third, the proposal's impact on the institutional marketplace.

At the outset, we are puzzled that the Department is holding the public hearing on the proposal during rather than following the comment period. We are not aware of any other instance in which the Department or another federal agency has held a hearing when interested parties and stakeholders have yet to provide a formal response. Currently, we are soliciting views and feedback on the proposal from our member banks and are still deeply engaged in formulating a collective member-wide response.

We believe this hearing is premature and therefore limited in value and function. The Department and the public would have been better served if this hearing were held after the conclusion of the comment period. We therefore urge the Department to consider holding another, more comprehensive and informed public hearing once everyone's views have been crystallized, submitted and published.

A more thorough vetting is particularly appropriate for this proposal, which ABA believes is overbroad and overreaching by capturing many persons who provide valuable services to individuals, plans and plan fiduciaries, but who should not be viewed as a fiduciary under either ERISA or the Internal Revenue Code. If adopted in its current form, the proposal will likely harm the very plan participants, beneficiaries and IRA account owners that the Department is seeking to protect by making it extremely difficult, complex and costly for banks to make available and deliver the products, services and information necessary for persons to achieve a financially sound retirement. The three areas we've selected to discuss illustrate the compliance challenges posed.

First, the proposal's overbroad definition of a person who renders investment advice and who therefore becomes a fiduciary, hinges on the Department's interpretation of the term 'recommendation.' The Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action. Contrary to the Department's view that this is an objective inquiry, inclusion of the word 'suggestion' within this interpretation, is inherently subjective, not objective, and puts in doubt whether both the bank and the retirement investor truly understand whether, and on what basis, a fiduciary relationship has been established. Equating recommendation and suggestion in this way, when coupled with ERISA's strict liability prohibited transaction regime, could actually harm retirement investors and is unwarranted.

Moreover, making a suggestion a basis for fiduciary responsibility is an unprecedented stretch of the term that belittles the concept of fiduciary duty while effectively stifling valued communication to retirement investors. Together with its proposed unraveling of the investment advice regulation's five-part test, the Department's interpretation of recommendation would capture a vast swath of written and oral communications that are not intended as a bona fide recommendation. Banks thereby are placed in a precarious position, as there have been and will continue to be numerous, repeated, and unanticipated situations in which a bank and its retirement customer may differ on whether a recommendation was in fact provided to the customer. This, in turn, will serve only to cut short or silence a retirement service provider's conversations with its retirement investors and potential customers for fear that any such conversation could be deemed fiduciary action.

ABA believes that the term recommendation can be sensibly narrowed and targeted to reach only those instances in which recommendations are actually intended and balanced with potential mislabeling as fiduciary. To achieve this result, we recommend that the Department interpret a recommendation as a communication that is a clear, affirmative statement of intentional endorsement and support for the retirement investor to engage in or refrain from taking a particular course of action that is based on the individual needs of the retirement investor. Stated this way, both the retirement services provider and the retirement investor would know when a recommendation is genuinely taking place. It would also realize the Department's declared goal of establishing an objective rather than subjective test to determine whether investment advice is being rendered.

Second, we're concerned about the Department's far-reaching attempt to label as fiduciary a series of unrelated non-fiduciary statements and actions. As stated in the proposal's preamble, the Department believes a series of actions taken directly or through an affiliate that may not constitute a recommendation when each action is viewed individually, may amount to a recommendation when considered in the aggregate. This view, which was codified in the 2016 fiduciary rule, is presumably intended to prevent an unlawful evasion of the investment advice regulation.

From a compliance and supervisory standpoint, however, this is simply unworkable. In essence, multiple, unrelated conversations, each of which separately, is not a recommendation with retirement investors across the bank and its affiliates, could, in retrospect, be woven together by the Department to form a recommendation leading to fiduciary status without the bank or affiliate even being aware of such a situation. This could occur even in the Department's own illustration in the proposal of a non-fiduciary action where the Department assures us that a car dealer salesperson is not giving a recommendation.

However, it is quite possible that another non-fiduciary statement, a missing piece, may be provided by a representative of the car dealer's finance arm in the showroom, which, when aggregated with the salesperson's statement out on the lot, could become, unintentionally and in random fashion, a recommendation that would trigger fiduciary status for both the car dealer and its finance arm.

In other words, when employing the Department's policy of aggregation to determine whether a recommendation has been provided, there seem to be no limits and no nexus requirements to individual conversations and actions.

We recommend that the Department

withdraw this policy. If unlawful evasion of fiduciary status is the concern, then the Department can include a broad anti-evasion provision in the final rule which would better serve efficient and prudent administration. Such a provision could simply read, "No person shall knowingly act in a manner that functions as an unlawful evasion of the purposes of the investment advice regulation."

This language would ensure that a person cannot deliberately structure a program to unlawfully evade fiduciary status while removing the cloud of fiduciary status resulting from non-fiduciary statements and actions, and with it, elevated costs and liability risks.

Third, ABA is concerned about the proposal's needless intrusion into the corporate retirement marketplace. The Department has focused much of its attention, in media statements and in public forums, on the proposal's benefits in the retail marketplace without having truly analyzed the need for the proposal in the institutional marketplace.

Institutional investors typically are well-versed in the functioning of financial markets, the parameters of investment decision making and the availability of investment choices. There's simply no evidence that institutional plan fiduciaries are being systematically misled, disadvantaged, or abused by their service provider as they seek market information or viewpoints for their consideration in making their own investment decisions. The Department's one size fits all approach to applying strict liability provisions to all potential advice providers ignores the fundamental fact that plan fiduciaries are obligated to understand the environment in which they operate and the transactions that they undertake.

For these reasons and others, we believe that the fiduciary proposal should be withdrawn for further vetting with stakeholders and interested parties, and then should a re-proposal be necessary, revised to be sensibly tailored to the retail marketplace. This is a job for a dart gun, not a blunderbuss. Panel members, thank you for your time, and I'm happy to answer any questions you may have.

MR. HAUSER: Thank you. The second person on the panel is, and I apologize if I mispronounce your name, Kamila Elliott.

MS. ELLIOT: Yes. Thank you, Tim. My name is Kamila Elliott.

MR. HAUSER: Kamila.

MS. ELLIOT: Yes.

MR. HAUSER: Thank you.

MS. ELLIOT: So thank you for the opportunity today to talk about my experience working with retirement savers and how important this proposed rule is to all Americans.

My name is Kamila Elliott. I served as the 2022 Chair of CFP Board. I was the first African-American chair and one of the youngest people to ever serve in that role. I spent the earlier part of my professional career working at Vanguard with ultra-high net-worth individuals, endowments and foundations.

But I am now the founder and CEO of the financial planning firm, Collective Wealth Partners. We are a majority women and black-owned registered investment advisor firm headquartered in Atlanta, Georgia. We provide holistic financial planning advice primarily to resilient communities.

Now that may be a new term for many of you this afternoon. You probably have heard the term underserved communities, but I'm intentionally calling us resilient. Underserved means that they're individuals that are not being served at all, that there are significant impediments to obtaining financial advice, particularly holistic advice. But I don't think the word is empowering. So we use the word resilient that regardless of the impediments and barriers facing black and brown communities and receiving competent and ethical financial planning, they're working to close that gap and they're looking and seeking competent and ethical financial advice. So I think it's really important to share that all of the financial advisors at Collective Wealth Partners are certified financial planners who provide fiduciary advice to our clients. That is, financial advice that's in our clients' best interest.

Some have argued that financial advisors cannot serve moderate-income individuals if they are required to provide advice that is in those individuals' best interests. That is not our experience at Collective Wealth Partners, where moderate-income people are the bulk of our client base. We charge fees for individual, household or business financial planning, which can be charged as a fixed fee or on an hourly basis, whichever works best for the client. We establish fees based on the complexity of the client's financial situation and help with implementation of our recommendations and a time frame for ongoing monitoring.

We also charge an assets under management fee if we're managing a client's financial assets. So to allow us to best serve our clients, particularly moderate-income families, we have no minimum asset requirement for investment management services, and we consolidate household assets under management to provide our clients with the best value for our services. Using this flexible compensation arrangement, we can work with a client to provide them with what they need at a price that they can afford. This is how we meet our clients' financial needs across the income spectrum.

We educate our clients in an easy to understand manner so they can understand personal financial advice and use these concepts to pursue their financial objectives. We talk to our clients about the importance of saving early in life, even if it's only a small amount each month. Our goal is to provide comprehensive advisory services about retirement, taxes, estate planning, investment strategy, and insurance, and provide them with holistic lifetime assistance so they can build financial independence for themselves and their families.

We know that in these resilient communities, every dollar counts. I have witnessed and researched the impact on these communities when they are charged too much or don't receive advice that is in their best interests. These are the kinds of things that expand what is already a large racial wealth gap. When we address our clients' financial needs holistically and act as fiduciaries, we are taking steps to close that wealth gap. The wealthy receive financial advice that is best for them. Why shouldn't those with moderate-income be treated the same?

The stakes have never been higher. Retirement savers today are responsible for making their own investment decisions. Like many, like some of you on the call today, I don't have a pension. The vast majority of my retirement is in a 401k plan. But that was not the case in 1974 when ERISA was adopted. Because retirement savers are not investment specialists themselves, they look for help from financial professionals with whom they trust and are confident will do what is good for them.

But that trust and confidence is often misplaced. Financial advisors who are not required to work in their clients' best interests may sell products that carry high commissions or management fees or annuities, or, we heard earlier, illiquid, privately held investments that can tie up their assets well into retirement. The potential for harm is enormous. These types of products usually introduce unnecessary risk and cost that erode savings over time. It may not appear like a lot in one year, but over time it can be the difference between someone retiring at 65, 75, or not being able to retire at all.

Resilient communities are especially vulnerable to receiving incompetent and unethical advice that can erode retirement savings, regardless of the saver's net worth. After a lifetime of saving for retirement, these individuals are left holding the bag. And Congress could not have intended this result when they passed ERISA almost 50 years ago.

So I'll share with you a couple of stories of what I'm seeing every day working as a financial planner. I had someone come to me, a teacher, a career changer, bless her for leaving corporate America, becoming a teacher. So she had a previous retirement account, and a financial professional came to her school and said, I can help you with that. She was, at the time, in her 30s. He put her in an annuity that has a surrender charge of up to 18% if she takes her annuity out within the first 14 years. So she's locked into a product for 14 years. She returns before that period, she loses 18%, 12%, 10%, and not until year 14 as an end, where it's two percent, and at year 15, it's zero.

Now within that annuity are non-diversified portfolios, high-cost funds, and a high administrative fee that she's paying every single year. This is not what's setting up her up for success. And also, this financial professional has not spoken to her since she purchased this annuity from him, I'm looking at the contract, eight years ago. Is this what we intend to help teachers save for retirement? Someone putting them in a high cost product, locked in for 14 years in a non-diversified portfolio? I think not.

Now the second is a friend's mom reached out to me. One of my friends said, her mom needs help. And I looked at her portfolio, and it's a very large firm, I won't say the name of the firm, but to initially put her retirement, they charged her two percent. So before they even did anything, the initial fee just to go in the fund was two percent. And the annual fee for the fund is over one percent. So they put her in a fund that, in year one, she's losing three percent. This is before she has any return on her portfolio whatsoever. That's a high hurdle to lose three percent in one year.

Now this wasn't a private equity. This was not a venture capital where it takes intensive research and a huge team to make sure she's in the right product. But this is what's happening to many Americans when they seek competent and ethical financial advice. They're going to someone getting one-time advice that's not in their best interest and is eroding their retirement savings year over year over year.

So the Department of Labor wants to require financial professionals to act in their clients' best interest when providing retirement investment advice. Now this one calls firms to abandon moderate-income clients. My firm is not the only firm that serves these clients. And there are firms all across America serving retirement savers of more modest means with best-interest advice.

But also, look at this from the consumer's perspective. The reason consumers often have a negative view of financial professionals is because, in many circumstances, they aren't required to act in their client's best interest. We often see resilient communities, because of their own experiences or experiences of friends or family, they do not trust most financial advisors. So where do they go?

MS. WILKER: Ms. Elliot, I just want to let you know, it has been ten minutes. Could you wrap up?

MS. ELLIOT: Yeah.

MS. WILKER: Thank you so much.

MS. ELLIOT: They go to TikTok, they go to other social media platforms and they get highly questionable and flat out wrong advice.

We need to build trust and confidence with these communities of color to have in professional financial advisors. And the proposed deal rule will help with that. And thank you, and I'm happy to take any questions you may have.

MR. HAUSER: Thank you. Let's see, next is the Institute for Portfolio Alternatives. Kevin Walsh.

MR. WALSH: Thank you, Tim. And I'm nervous, guys. Good afternoon. I'm Kevin Walsh and I'm a principal at Groom Law Group. I'm here on behalf of the Institute for Portfolio Alternatives and I really appreciate the opportunity to provide feedback to the Department on your latest fiduciary proposal.

I appreciate the hard work that

you've all put into the proposal. That being said, IPA's ask is going to be that the proposal be withdrawn. We've got a handful of concerns that have been raised by other commenters. For example, we'd like to see a general recognition that sales activity and wholesaling between sophisticated parties does not give rise to fiduciary status. We've talked a lot about that the last two days, though. We'd like additional time to digest and respond to the proposal. Folks requested a comment extension. I think you've heard a lot of that already. We'd like more time to come into compliance if the proposal is ultimately adopted. I think the amount of time being given right now seems pretty short. We'd like changes to the disqualification provisions of PTE 2020-02 because they seem to raise some due process concerns. We look at some of those SEC cases and we've got concerns about those provisions. And then we would advise the Department not to impose Title I of ERISA on plans that are only subject to Title II.

So we anticipate raising those and other concerns in our written comments. We want to highlight we're still working through proposal. But in light of other's testimony, I'm going to focus on just two connected issues today, and these are kind of the core issues, honestly.

First, the summary here, sales conversation isn't fiduciary, and there's a difference between ERISA's fiduciary standard and a best interest standard. Now that's kind of the core of what folks have talked about for the last two days. And so in order to go into this, I'm going to have to go back to first principles, get a little more ephemeral than anyone could possibly want. We're into two long days of hearings. I get that we're tired here, but I'm going to take a step back.

So first off, salespeople aren't fiduciaries. So there I'd look at ERISA and I'd say, what test do we use to figure out when someone's a fiduciary? And I look at Firestone and it says, "We use common law definitions." I look at the Fifth Circuit decision that cites the Firestone, and it again says, "We look to common law definitions when we figure out if somebody's a fiduciary."

So my instinct there is, I look at the common law definition of fiduciary. Trust law goes back to Roman times. We're not going to go into all that today. But if we look at the Restatement of Trusts, kind of the quick and dirty way of figuring out what the test is, there's kind of three takeaways in the restatement.

First off, "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation." Second, "As to matters within the scope of the relation, he's under a duty not to profit at the expense of the other." And then third, they give examples. "Fiduciary relations include not only the relations of trustee and beneficiary, but also, among other things, those of guardian and ward, agent and principal, and attorney and client."

So with that, I got three takeaways. First off, fiduciary status is limited to the scope of the relation. Just at the glance there, it gives me concerns that hire me conversations, or those initial sales conversations really aren't fiduciary conversations. There's a duty not to profit at the expense of the other. I think that's pretty consistent with ERISA but when I think about sales conversations, in a sales conversation, someone is trying to profit.

And then, none of the examples look like sales transactions. I think we could all agree there's a fundamental difference between the relationship between a salesperson and a buyer and that of a guardian and ward.

And so that's common law. Let's look at the statute of ERISA and say, are there clear problems if we say salespeople are fiduciaries? Are there hints that the Fifth Circuit got it right in concluding that salespeople aren't generally fiduciaries? And we could look at the purpose of the statute. We could disagree about that. I think some would argue that it seems to have been about defined benefit plans and preventing trustees from stealing or investment advisors to those defined benefit plans from misusing plan assets. I know others view ERISA's purpose as protecting all American retirement savers. And honestly, I think folks can disagree on that.

But I think we can get grainier from a text perspective. We can look at 3(21)(a)(ii), and it talks about investment advice for a fee, direct or indirect. And ERISA followed on securities law history, the '34 act, the '40 act, were all around.

So first off, under a plain reading of that 3(21)(a)(ii), "You're a fiduciary if you receive a fee, directly or indirectly, a fee from a third party for advice. You aren't a fiduciary if you get a fee only for something else." Something else here could mean something like a completed sale. With that interpretation, it tracks the '40 Act exactly. Broker dealers don't get paid for advice. They only get paid for completed sales. That is, to be a broker, any recommendation has to be solely incidental to the conduct of his business's broker, and you can't receive any special compensation therefore.

Now you could say, well, no special compensation therefore, maybe we're saying that's compensation for advice. But brokerage commissions aren't even partly a fee for advice. If the broker's commission were for advice, you'd expect brokers to seek payments from non-buyers who don't purchase securities. And under securities laws, they don't and they can't.

Now under ERISA, we've taken the

position that brokers can be fiduciaries. Part of that can be, that's Advisory Opinion 1983-60A. The good news, though, is that advisory opinions aren't binding, and we could conclude that it was just indirect.

Now you may not be sold yet. This is the big one. Let's look at the consequences of calling somebody an ERISA fiduciary. ERISA Section 404(a)(1) requires a fiduciary to discharge their duties solely in the interest of participants and beneficiaries. A hired, registered investment advisor can meet that standard, but I don't see how a commission-based salesperson can. A commission-based salesperson can absolutely make best interest recommendations for you, but the only reason they're making a recommendation at all is in the hope that you buy something so they can be paid. It's important, then, to recognize that a best interest sales standard that everyone seems to be talking about is fundamentally different from ERISA's solely requirement.

And if we look at exemptions, folks focus on 406(b)(3), where they're saying, well, that's the problem under ERISA with the commission. If we grant an exemption with 408, we still loop back to needing to comply with 404, and 404 is where the problem comes in. The word 'solely.' If Congress had planned on banning brokers from providing by selling to retirement savers, they'd have done it explicitly and not hid this elephant in a mouse hole.

Okay, that's the bad news. The good news here, ERISA is not the only standard. Salespeople can satisfy a best interest standard. And other regulators have crafted different best interest standards, and we should work with them and encourage them to do so. Industry has supported various best interest standards and strong loyalty standards, just not ERISA's fiduciary standard. The word 'solely' doesn't work. There's a myriad of standards of loyalty, such as the best interest standards that a salesperson can satisfy. We've got the NAIC standard, the NASAA standards. We've got the SEC standards. We've got other best interest care standards. There's a fulsome debate going on about what standards appropriate in what circumstances.

But at bottom, it's wrong to put ERISA's standard on these salespeople because ERISA's fiduciary standard has been interpreted as the highest standard under law. Under Donovan v. Bierwirth, we say that a fiduciary has to act with an eye single to the interests of participants and beneficiaries. The only way that we can make the ERISA fiduciary standard work for salespeople is if we lower the ERISA standard, and that's not what we should be doing, because it conflicts with the statute.

So, to sum up, it isn't that salespeople want to rip off clients. It's that they recognize that their duty of loyalty is different than the duty of loyalty between a parent and a child or a guardian and ward. Salespeople are not interacting with potential buyer out of sense of duty arising from some existing relationship of trust and confidence. Instead, salespeople can make best interest recommendations, but at bottom, they have an interest in selling a product that makes ERISA's fiduciary standard of loyalty unworkable under Section 404.

So I thank you for your time today, and I'd be happy to take any questions you might have. And sorry for speaking so quickly. I know I had ten minutes.

MR. HAUSER: Thank you. No objections to your speaking quickly. Let's see, I think one more panelist, Donald Jones.

MR. JONES: Thank you. I'm grateful to be with you. I want to thank the United States Department of Labor for the honor of testifying today on this vital issue.

My name is Donald Jones, and I am

the founder and partner of the independent professional ERISA 402(a) named fiduciary firm called Fiduciary Wise. I speak today as an individual and not representing any other person or firm or organization.

First, I'd like to say I strongly support the proposal of the changes recommended by the Department of Labor. I believe the Department of Labor is to be commended for its efforts to compromise in this, the third attempt to change the definition of a fiduciary under ERISA. Second, I thank the Department for its sterling example and tireless effort to protect the plan participant beneficiaries in America's retirement plans.

Today, I will center my remarks only on qualified retirement plans. I do not work in the area of wealth management or IRAs. I believe that I may be the only one to testify that is an independent, discretionary ERISA 402 Named Fiduciary with approximately a thousand plans that we provide fiduciary governance for under ERISA.

I've struggled with what to say. I've decided about all the yeas and nays have been said, and so I've decided, in being the last speaker, to give a message of hope.

In my 15 years in working as an ERISA 402 Fiduciary in big and small plans, I have found, by and large, service providers, and in this case, particularly investment professionals, have repeatedly had the desire to do what's right for their participants, their beneficiaries, and plan fiduciaries. But in saying so, I'll give a quote from a case of Donovan v. Cunningham, and though I think it's a little bold, but I believe it makes the point. "A full heart and an empty head is no defense."

I'm not suggesting that everyone working out there, or even close to everyone working out there, has an empty head. But here's what I have seen in working, particularly in the last 15 years, though I've been in ERISA for over 50 years, or nearly 50, because ERISA isn't 50 years old yet. But I notice a noticeable difference in experience, knowledge and ability between a broker, which I will call a non-fiduciary, an ERISA 3(21)(a), I'll call a co-fiduciary and ERISA 3(38), investment manager, to help the participant and their beneficiaries. In essence, this is what I'm saying. I believe in the goodwill of the people out there. I believe they want to do what's right. I believe their desires are good. Of course there's a bad apple occasionally, there is in anything. But the problem is their desire can only go so far. They're ill-equipped to be able to actually provide their duties.

Perhaps I'm speaking as the only boots on the ground, authentic, if you want to call it, fiduciary with a thousand plans, who is the responsible fiduciary. Please note that we are never under contract any other service provider, such as an advisor, record keeper at

TPA. I speak from experience of over 5000 plans or maybe more in the last 50 years. And again, as I've mentioned, the last 15 as Named Fiduciary.

Today I recognize that I would be the last speaker. That's not the best place to speak, but that's my lot. But I'm grateful. But I'd like to end with an example of hope, of what I have witnessed and plans I have managed. Before I do so, let me just take a moment to say, let's remember that ERISA is based on the debacle of Studebaker's failure. The desire of ERISA was solely to protect a participant who is helpless and innocent, and I believe it's best compared as a mother to her child. Until one understands that mother-child relationship and the sacredness of it, no one is really ready, no matter what capacity they're in, to represent an employee or a plan in a retirement basis.

You ask, what is my hope? My hope is based on the goodness and moral behavior of hundreds and hundreds of service providers I have worked with. However, approximately 95% of them are not fiduciaries, and because of that and maybe that alone, they are ill-prepared to carry their load that they must have.

Why do I believe that has happened? Well, I don't know for sure, but I've been a pretty good student of ERISA, and I believe the single greatest reason is broker dealers have scared them so much that becoming a fiduciary will absolutely ruin them. This is sad, and it's not true, because all that ERISA is asking is to put someone else first and then do the best you can to provide the highest standards under ERISA. There's nothing scary about it.

When I decided to be a 402(a) named fiduciary, I left an excellent company, many benefits, a good paycheck, and well-meaning individuals urged me not to be a 402(a) fiduciary, except for a very supportive wife, which, by the way, we will have been married 50 years here in a few months. Everyone thought I'd lost my head be this type of fiduciary.

And I had no blueprint to follow. The more I listened to the naysayers, the more fear I had. They all cared about me. But here's the bottom line. They had no idea what it was like to be a 402(a) fiduciary. They were giving experience though well-meaning. They were giving advice by having no experience.

I appeal to everyone as we close. Let's learn to embrace the privilege of fiduciary care. In the end, you will feel better about yourself, and you can do a better job. In my opinion, the DOL has been fair in this proposal. Let's cast off the boogeyman tactics and focus entirely on the participant's welfare. I will just give one example of what authentic fiduciary care is about. And remember, the 402 has no safety net.

Several years ago, I did and noticed an unscientific survey. I asked my staff to look at approximately 450 plans we had then and see what could we conclude had happened, by embracing fiduciary care. And we found, on an average, we were able to return back to the plan participants about 81 basis points per year. Now doing a little math, over about a 35-year period, that's $150,000 more in every employee's retirement account.

In doing that, though, I take sole responsibility as a discretionary fiduciary, I speak from experience. No service provider was embarrassed. In fact, when changes were found by talking offline, we had the service provider, particularly the investment professional, introduce the change as if it was their own. No one's compensation was changed. No one was terminated.

But finally, and most importantly, they felt much better about themselves, in them, inside them. And many said that they knew they weren't doing it like they could have and should have, what they learned on their mother's knee. And they desired to embrace fiduciary care. No longer did they need to be scared and what a relief that was. I have proof that it works.

What you've heard many times today is, maybe this may happen, maybe this may happen. But in reality, it doesn't happen. In conclusion, I would like to give just a few pieces of advice.

MS. WILKER: Mr. Jones, I do just want to let you know it has been ten minutes, so if you could make your conclusion remarks quickly.

MR. JONES: Okay. Thank you so much. I know the Department's proposal isn't perfect. It'll need to be tweaked. But it's fair. Let's work together in the spirit of cooperation. Give it a chance. And I know that as you learn to embrace fiduciary and the highest standard known in the law, and note this well, there is enough elasticity that if a mistake is made, an honest mistake, it can be corrected. No one gets in trouble. Everyone can feel good about it.

Lastly, learn to use the Common Law of Trust. That is one of the best gifts that you have, as stated in the Restatement of Law, Trust Third.

And finally, if you want an example, I've heard pros and cons about lifetime guaranteed income. On its surface, it's not good or bad. But go to the Restatement Sections 90(b), (f), and (h)(2), and you'll solve the mystery of how to use it. Thank you very much. I'm grateful to have been with you today.

MR. HAUSER: Thank you very much. I think I just have a few questions, and then maybe we can wrap this up.

Starting with you, Mr. Keehan, your comments were very precise, and I think I followed them, and I appreciate that you're going to elaborate upon them in your written comments. So that's all to the good. And really, the only question I wanted to ask you about was, I think it might have been your first of your points, but on our use of the word 'suggestion' in connection with what counts as a recommendation.

And I guess, we're not trying to depart when we talk about what counts as a recommendation, we're not trying to depart from the way FINRA and the SEC talk about recommendation. It's really the same definition. And if you look at FINRA's guidance on what they mean by recommendation, you'll see that same word suggestion in their guidance documents. We're talking about a call to action. And similarly, the reference to -- it's a contextual test. I mean, whether or not somebody's actually making a recommendation, and it fairly can be seen as a call to action, is dependent on a larger context.

But we're not trying to depart in any way from that. And I just wonder if, one, if that alleviates any of your concerns, and second, if it doesn't, if you have any concerns about our potentially writing a definition of recommendation that departs from the test that FINRA and the SEC use when they talk about recommendations.

MR. KEEHAN: Thank you, Tim, for that elaboration. That's very helpful to know. And yes, we will be responding in our comment letter with more information on this. I think where we're coming out and of course, we're still in the middle of the comment period rather than at the end so I'm continuing to huddle with our members.

I think the concern here for us is that the definition of recommendation appears to be such a lowered baseline that together with regular basis, which has been so widened in applicability, that the proposal sets a hairline trigger on what amounts to investment advice. And so much so that the proposal appears to capture not just certain bank personnel that would not normally be considered a fiduciary, but actually a range of non-fiduciary, non-financial persons and professions, all involving relationships of trust and confidence. Think real estate agents or life coaches, divorce counselors. I mean, the list could go on of those who are going to be inadvertently captured by this rule by virtue of the fact that you have such a widened definition of recommendation and regular basis.

MR. HAUSER: Okay. Yeah, it'd be helpful if you'd explain why you think it's going to be broader in operation and, for example, the concept as applied by the SEC and FINRA and whether or not you think we should depart from that standard.

MR. KEEHAN: Yeah, I mean, SEC and FINRA, were dealing with registered broker dealers. So that's a regulated, supervised and examined set of individuals and entities.

What I just mentioned here, I'm not sure that the Department of Labor wants to get into the business of regulating real estate agents and life coaches and probation officers and divorce counselors where they technically can fit under the definition of investment advice under this proposal.

MR. HAUSER: Yeah, well, it'd be helpful if you could elaborate on those circumstances where they'd fit. They have to make those investment recommendations as a regular part of their business to fall within the test. I don't have much familiarity with life coaches, but I'm guessing they don't engage in much in the way of investment recommendations, and the same goes for those other categories of folks you mentioned. But to the extent you can point to specific things in our language that you think are problematic on that score, please point them out, and we'll make sure we're not reaching folks we have no intention of reaching.

MR. KEEHAN: We'd be happy to do that.

MR. HAUSER: Thank you for that, and

we look forward to your comments.

Mr. Walsh, mostly, you were making a legal argument. I found it interesting, but I don't think I want to join you on a legal debate on this panel. But I would like to, just so I better understand how you're drawing the line between fiduciary advice and non-fiduciary advice, is it your position that if somebody is essentially paid on a commission basis, that that's the end of the analysis, as far as whether they can be a fiduciary under ERISA?

MR. WALSH: If the only fee they're receiving is a commission, then they're not being paid for advice.

MR. HAUSER: So it doesn't matter in your judgment, in that circumstance, whether they hold themselves out to the customer as providing individualized advices about their particular circumstances. It's based entirely on the customer's interest and not on their competing interests and any of that. That's all beside the point. The only thing that matters is that they're paid on a commission basis.

MR. WALSH: So I think you're coming back to the good news here, which is that ERISA's fiduciary standard isn't the only standard, and there are plenty of other care standards out there. But if we look at the history of the Advisers Act before ERISA was enacted and the choice to use the word 'solely,' it doesn't seem like Congress was trying to get at broker dealers.

MR. HAUSER: Well, again, I want to kind of avoid a protracted legal debate. But it's not unusual under ERISA for fiduciaries to have conflicted compensation, no? I mean, so think of an insurance company. Would you agree that an insurance company that's making benefit determinations, that has authority over the final benefit determination, has a direct financial interest in whether they grant or deny the benefits?

MR. WALSH: So when we look at that, we've got the obligations under 404 for a fiduciary who's involved in plan administration, and the structure is designed so that they can't act in a way that conflict plays a role. Now when you're hired for benefit administration, you're brought in to process that. You're getting a fee for that. When you're a broker, you're only getting a fee when a transaction is executed.

I'm not here to talk to how health insurance operates but I think the key point here is that if we look at the rich Common Law Traditions, brokers aren't advice fiduciaries.

MR. HAUSER: The Common Law Tradition defining who's a fiduciary by virtue of rendering advice?

MR. WALSH: I mean, the Common Law Tradition of who's a fiduciary. I think if we look at the case law that's out there, it suggests that we look to the Common Law in terms of understanding what these words mean.

And then we can even look at the text of 3(21)(a)(ii), and we can see that it tracks very well with the Advisers Act carve-out for broker dealers.

MR. HAUSER: So you looked through the Common Law and preparing for this testimony today?

MR. WALSH: I did. I don't want to sound like such a nerd here, but apparently fiduciary status goes back to Roman times.

MR. HAUSER: Absolutely.

MR. WALSH: -- concept of fideicommissum, which allowed fiduciaries to hold property on behalf of another. This is something that courts have been exploring for more than 2000 years now.

MR. HAUSER: Now you're talking to a nerd, so we're doing just fine. But I mean, I guess the question I have is, first of all, two things. One, based on your review of the Common Law standards, have you found in the Common Law anything like the five-part test?

Can you think of -- since the time of the Romans, are you familiar with a case under the Common Law with respect to agency fiduciary status? Anything?

MR. WALSH: Oh, yeah. Yeah.

MR. HAUSER: It's listed on the five-part test.

MR. WALSH: Yeah, the 2018 decision.

MR. HAUSER: Apart from the 2018 decision, I understand how you interpret that decision. But apart from that, when we're looking to these Common Law sources, are you familiar with any case that adopted the five-part test?

MR. WALSH: I think the key is you look at the 2018 decision from the Fifth Circuit, and it really talks about how the five-part test was a good summary of that rich Common Law tradition.

MR. HAUSER: I think what the court said was that trust and confidence is relevant to this analysis, that it matters what the relationship is between the person giving the advice and the person receiving the advice. And what I'm hearing you say, and that's fine, if that's your position, I just want to make sure I understand it, that it really is irrelevant whether the customer has put complete and total faith and confidence in the advisor, and if they've done it precisely because the advisor held themselves out in that position. And it's even irrelevant, under your approach if they have a long-standing relationship outside, say, the ERISA context. As long as the person is just getting a commission for their advice.

MR. WALSH: I think we would both agree that the relationship between a salesperson and a potential buyer is very different than that of a guardian and a ward or an agent and principal.

MR. HAUSER: What I don't agree with is that it's very different from the relationship between other categories of investment advisors and the broker or the insurance agent. I think all of those categories can hold themselves out in much the same way, have much the same relationship with the customer, and from the customer standpoint, look very similar. And I think we've heard testimony from folks over the course of this hearing describing how the relationship works when they're trying to make these recommendations that effectively says just that. But your point of view is that that just doesn't matter.

MR. WALSH: The '40 Act draws these lines.

MR. HAUSER: Is it your understanding that the '40 Act governs what we do under ERISA?

MR. WALSH: No, but I think that when the statute's clear, there's less deference owed to the agencies. And I think this is a case where the statute is clear.

MR. HAUSER: Did ERISA provide that

incidental, that advice doesn't count if it's incidental? Or did it provide that it counts that somebody's a fiduciary to the extent they give advice for a fee, direct or indirect.

MR. WALSH: Are you saying that brokers get fees when people don't buy the product?

MR. HAUSER: I'm saying that part of the compensation, that part of the reason --

MR. WALSH: They don't get a fee unless the product's sold.

MR. HAUSER: Well, okay, I don't think that's quite true. I think part of the reason people are paid commissions is, what they're partly being paid for is the service they're rendering to their customers. I think that they would be hard pressed, that is part of what you get compensated for. I tried this analogy earlier. I think when an attorney is paid on a contingency basis, would I say they're not providing a service to the customer, that their representational obligations don't include a duty of loyalty to the clients? Of course they do. The fact that they get paid only if they win the case doesn't mean they're just getting paid to win. They're getting paid for representation. They're getting paid for a service they render. And I don't know why it's different in this context. But again, I'm sorry.

MR. WALSH: We do ephemeral here, and I understand we don't want to have a legalistic debate. We are getting ephemeral here. I think the attorney/client relationship is very different than a broker salesperson relationship, though. I think if we look at the engagements at the outset, there's clear differences. But I hear your point that I think reasonable people could have a lot of interesting discussions about the solely language in 404 and if Congress really was trying to get rid of salespeople in the retirement space.

MR. HAUSER: Yeah. Well, just to be

clear, we're not proposing to get rid of salespeople. We're happy with the commission model. We're happy with the fee-based model. We think all of these things can be consistent with ERISA, and we're trying to give guidance on how to make that work. But I welcome your point of view on this and appreciate you and everyone's testimony.

And finally, just to wrap up, and I think we will close with this. I'd also like to thank, in addition to thanking Mr. Keehan and Mr. Walsh, I'm very grateful for Ms. Kamila Elliot's participation in this hearing, as well as Mr. Jones and obviously anybody who's putting themselves out there and representing people in a fiduciary capacity.

Speaking as an agency responsible for -- on behalf of the agency that's responsible for regulating fiduciaries, we thank you for your service. We're very grateful. Whenever people are willing to step up and act in accordance with those basic fiduciary duties of prudence and loyalty with respect to something as important as retirement benefits. And I understand from your testimony that you both are committed to that as well. And thank you for that.

MS. ELLIOT: Thank you.

MR. HAUSER: And with that, I think we're closing the hearing. I'd like to also thank everybody who's testified over the past couple of days, whether I agreed with you or not, whether you agreed with me or not, whether we're still working through the issues. It was all enormously helpful and gave us a lot to think about. And I'm confident that when we move to a final rule, it will reflect what we've learned from this hearing as well as from your written comments to come. So thank you all very much. Take care, everybody.

(Whereupon, the above-entitled matter went off the record at 4:28 p.m.)

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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.

Neal R Gross

Court Reporter

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.