

**Advisory Council on Employee Welfare
and Pension Benefit Plans**

**Report to the Honorable Eugene Scalia,
United States Secretary of Labor**

**Considerations for Recognizing and
Addressing Participants
With Diminished Capacity**

December 2020

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NOTICE

This report was produced by the Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council (the “Council”). The Council was established under section 512 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) to advise the Secretary of Labor on matters related to welfare and pension benefit plans. This report examines considerations for recognizing and addressing participants with diminished capacity. The contents of this report do not represent the position of the Department of Labor (the “Department”).

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ABSTRACT OF ISSUE STATEMENT¹

The mission of the Employee Benefits Security Administration (EBSA) is to assure the security of the retirement, health and other workplace-related benefits of America's workers and their families.² One way EBSA seeks to accomplish this mission is by assisting plan fiduciaries and others in understanding their obligations under ERISA and helping workers and retirees understand their benefits and receive the benefits they have earned.³

As our population ages, employers, plan sponsors and their service providers, as well as plan participants, can benefit from insights into how various industries, professionals and service providers identify and address the unique challenges associated with individuals who may demonstrate diminished mental capacity.

The 2020 Council explored the effective considerations and practices that various industries, organizations and providers have put in place and use when servicing an individual who exhibits diminished mental capacity to the point that he or she may have impaired judgment or be susceptible to undue influence. We have made recommendations to EBSA for their consideration and we hope these recommendations help employers, fiduciaries, plan sponsors and plan service providers better protect participants from potential fraud and financial abuse and, in the end, help plan participants better navigate and understand their benefit options.

The Council does not address state law regarding mental capacity, any legal recourse available for injured parties, or any cybersecurity considerations for benefit plans.⁴ Rather, the purpose of the review was to explore whether there are effective practices and processes that employers, fiduciaries, plan sponsors, and plan service providers may choose to implement to better serve plan participants and beneficiaries.

¹ <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/diminished-capacity-issue-scope-final-09012020.pdf>

² <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement>

³ <https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf>

⁴ <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2016-cybersecurity-considerations-for-benefit-plans.pdf>.

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I. RECOMMENDATIONS

Based on testimony and research and for the reasons stated herein, the Council recommends that the Department of Labor (the “Department”) highlight the issue of the risks to individuals resulting from diminished mental capacity, including potential financial exploitation, including:

- a. As part of the Department’s outreach and education programs, provide general public education through brochures, webinars, educational material, and/or training material to highlight the topic of diminished mental capacity, the associated risk of potential financial exploitation and the steps one can take to forestall the risk.
- b. Publish information for fiduciaries, plan sponsors, as well as third-party administrators, recordkeepers and other plan service-providers, on the topic, with a focus on and including, as applicable, links to the best practices recommended by the financial services industry and the steps it takes to identify and address individuals who exhibit signs of diminished mental capacity and to reduce the risk of financial exploitation.
- c. Issue guidance that recognizes that fiduciaries may voluntarily adopt policies or procedures that:
 - (1) impose reasonable temporary restrictions on participant plan actions, accounts or benefit payments to prevent the distribution of assets when participants exhibit signs of diminished capacity or financial exploitation, and/or
 - (2) encourage actions by participants such as the identification of a “trusted contact,” require confirmation of a Power of Attorney authorization’s continuing effectiveness, or take other reasonable steps to help in the investigation to protect participants from potential fraud and financial abuse.

The Council recognizes that this topic is extremely important, of growing concern and deserves further research. We regard the above recommendations as interim actions that the Department could implement while it continues to study this topic.

II. EXECUTIVE SUMMARY

Over four days of testimony from 21 expert witnesses, the 2020 Advisory Council on Employee Welfare and Pension Benefit Plans (the Council) heard testimony and received information about research, experiences, challenges and practices of identifying and addressing the issues that arise when interacting with and servicing individuals who demonstrate characteristics of diminished capacity. Many reported on the prevalence of encounters, the practices and procedures employed, and some of the outcomes of their efforts. Many of the witnesses offered recommendations for approaches the Department may want to take to help fiduciaries, plan sponsors, plan service providers and record keepers consider and better prepare for assisting and advising participants facing these challenges. All the witnesses agreed that the Department could offer tremendous assistance to the ERISA benefits community through sharing information and guidance on this topic in the form of public and benefits community education and outreach, and several suggested that the Department issue guidance that outlines steps that can be taken by fiduciaries to prepare for and address the issue once a participant demonstrates diminished capacity.

The Council focused first on understanding the issue of diminished capacity and why it has become a societal, business operational, and benefit delivery issue. We then considered what policies and procedures industries and organizations have implemented to help with the identification and addressing the servicing of individuals who are affected, as well as what steps the Department may want to take to provide education and guidance that will help the ERISA community better prepare to address this issue.

The Council heard from and found that the financial industry—with guidance from the Securities and Exchange Commission (SEC) and through the Financial Industry Regulatory Authority (FINRA) and related industry associations and businesses—has broadly adopted and implemented practices to address diminished capacity. The Council spoke with and received extensive information from the Social Security Administration (SSA) about its experience, policies and procedures for working with benefit applicants and payees who they suspect may be incapable of managing or directing management of their Social Security benefits.

Additionally, the Council heard from representative organizations in the ERISA community who shared their experiences, policies and procedures, and we found that there are examples of excellent efforts being made to address this issue. However, we also found that the ERISA community, in general, is not certain as to the role they should play in addressing the issue. We found that there are no best practices, standards or easily found or widely disseminated guidance about these practices. The Council did hear agreement from the ERISA community that this issue is an emerging issue, particularly due to the aging of our society and the benefit, yet risk, associated with the ease of access to financial resources through technology, and that education and guidance from the Department would be welcomed and helpful. The Council was encouraged to recommend that the Department use its role to educate and provide resources or guidance to plan fiduciaries to voluntarily adopt policies and procedures to address this issue.

The report covers the Council's findings, observations, and recommendations.

III. BACKGROUND

As the number of older Americans increases, one issue that threatens retirement security is financial exploitation, especially as it relates to diminished mental capacity. While financial *confidence* increases as individuals age, there is also a noted decline in financial *literacy*,⁵ the effects of which can be exacerbated by individuals experiencing cognitive limitations or decline. As a result, it is vitally important to understand best practices surrounding diminished capacity today in non-retirement contexts to see how these practices can be used to help the retirement plan industry better recognize and deal with participants who may demonstrate, or who are suspected of experiencing, cognitive limitations or decline, in order to reduce and avoid elder abuse and elder financial fraud.

While elder abuse and financial fraud are addressed in state laws, insights on the current best practices can better protect benefit plan participants from potential fraud and financial abuse and will also help participants better navigate and understand their benefit options and plan for their futures.

In this background section, we define “diminished capacity” and provide some context around the scope of the potential issue (given the increase in the number of older Americans), the increased prevalence, the costs associated and the potential role of the government for diminished capacity-related issues. Later sections of this report explore the techniques and best practices that exist in different industries for identifying and handling instances of diminished capacity. Finally, we set out our observations and the reasons for our recommendations to the Secretary.

Defining Diminished Capacity

There are a variety of ways to define “diminished capacity.” For example, in its Investor Bulletin and Consumer Advisory: Planning for Diminished Capacity and Illness report issued on June 1, 2015, the SEC states:

Diminished financial capacity is a term used to describe a decline in a person’s ability to manage money and financial assets to serve his or her best interests, including the inability to understand the consequences of investment decisions. While the inability to manage one’s money is clearly a problem in itself, when people of any age lose the capability to manage their finances, they may also become more vulnerable to investment fraud and other forms of financial abuse.

Leslie Kernisan, in the Better Health While Aging website article, *Incompetence & Losing Capacity: Answers to 7 FAQ*, provides additional perspective on what the term “capacity” means with respect to decision making:

When we ask whether a person has the capacity to make a given decision, we are asking whether the person can show us that he or she has the mental abilities necessary to make the decision. Generally, capacity requires that individuals be able to understand: the situation they are in; the decision in question; the consequences of making a given choice. The person should also be able to explain his or her reasoning and express the choice to others. And the reasoning should not rely on anything that strikes most people as bizarre or delusional.

⁵ Finke, Michael S., John S. Howe, and Sandra J. Huston. 2017. "Old Age and the Decline in Financial Literacy." *Management Science*, vol. 63, no. 1: 213-230.

Additionally, it was noted that different types of decisions require different types of mental abilities. Therefore, “capacity” varies across domains and could be described as decision-specific. This means capacity needs to be evaluated in light of the specific decision being made.

Shifting Population Demographics

According to the U.S. Census, as of July 1, 2019, of the estimated 328 million Americans, 54.1 million or 16.5% are estimated to be over the age of 65.⁶ This group is expected to increase by 44% (to 80.9 million) by the year 2040.⁷ Individuals between the ages of 85 and 99 years old are expected to increase by over 100%.

While there is still a pronounced effect where participants in defined contribution plans tend to leave the plan upon retirement/termination—for example, 22% of individuals age 60 and older keep retirement assets in their former employer’s plans—the percentage who take a withdrawal within one year of termination has been declining.⁸ This suggests that not only will there be a rise in the number of older Americans participating in defined contribution plans, but a greater percentage are likely to remain in the plan upon retirement. Plan sponsor education was noted as an opportunity among those who testified.⁹

There is a significant gap in planning among the elderly (e.g., with respect to legal documents).¹⁰ For example, studies show that 58% of adult children become caregivers without prior planning.¹¹ Additionally, 64% of seniors do not have a durable Power of Attorney in place.¹² While some may assume a spouse can provide care (and identify diminished capacity), cognitive impairment is not easily diagnosed even among professionals,¹³ the spouse may not be knowledgeable of all financial issues and it is possible the spouse can be incapacitated. There are also many “solo ager” households, those with geographically distant families, and blended families with complex relationships where special care may be needed.¹⁴

The Increasing Prevalence of Elder Abuse

There is an increased prevalence of elder abuse. For example, one in 10 older adults are victims of abuse or neglect each year.¹⁵ Adult Protective Services (APS) programs responded to more than 65,000 reports of abuse per month in 2017 and approximately 18% are related to financial abuse.¹⁶ Over the past four and a half years, AIG’s Life and Retirement’s (L&R’s) Elder and Vulnerable Client Care (EVCC) Unit

⁶ <https://www.census.gov/newsroom/press-kits/2020/population-estimates-detailed.html>

⁷ <https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html>

⁸ <https://alight.com/getmedia/edf91888-fce3-46d3-9f2f-403b4606cfba/distributions-from-dc-plans.pdf?ext=.pdf>

⁹ Tassara testimony

¹⁰ Noted in testimony by Anna Rappaport and Marti DeLiema, among others.

¹¹ Kruger testimony

¹² AIG Plan for 100 Elder Financial Abuse Survey

¹³ Bleier testimony

¹⁴ DeLiema testimony

¹⁵ Ron Acierno, Melba A. Hernandez, Ananda B. Amstadter, Heidi S. Resnick, Kenneth Steve, Wendy Muzzy, and Dean G. Kilpatrick. 2010. “Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study.” *American Journal of Public Health*, vol. 100, no. 2: 292-297.

¹⁶ Hagenlock testimony

has handled over 1,570 cases in which concerns of elder financial exploitation and/or diminished capacity existed, and the volume of cases has trended upward.

A review of the cases handled by AIG L&R's EVCC unit found that approximately 70% of the cases reported to state adult protective services agencies or other authorities have involved someone known to the client (although this was rarely the "trusted contact," if available).¹⁷

Defined contribution plans represent an attractive asset to potentially exploit given the large balance and options for a lump sum distribution¹⁸ and, therefore, we also see this effect in the defined contribution space. For example, Fidelity noted a 23% increase in diminished capacity and financial exploitation cases in 2019 among their 22,000 employers and 25 million participants and beneficiaries and projects a 27% increase of diminished capacity cases in 2020.¹⁹

In addition to potential issues surrounding cognitive decline, there are also concerns that cybersecurity criminals are targeting the elderly with either financial scams or romance scams.²⁰

One issue that complicates identifying issues associated with diminished capacity in the defined contribution space is that plan sponsors tend to lose contact with separated participants over extended time periods.²¹ There is significant outsourcing within the defined contribution space²², and 40-50% of plan sponsors do not have direct contact with separated or retired participants. This is a task that is commonly delegated to the recordkeeper and there can be a lack of clarity regarding who has the fiduciary duty to separated and retired participants.²³

There is also a general lack of awareness of the issues surrounding cognitive decline, with seven in 10 plan sponsors surveyed saying they did know how cognitive decline was addressed.²⁴

The Costs of Financial Exploitation

The costs associated with financial exploitation have been significant and are likely to continue to increase. For example, there were 180,000 cases of financial exploitation reported from 2013 to 2019 according to the Consumer Financial Protection Bureau (CFPB) that involved \$6+ billion. Additionally, the CFPB noted that in suspicious activity reports (SARs) involving a loss to an older adult, the average amount lost was \$34,200. Fifty-three percent of Americans say that senior financial abuse is likely to compromise their ability to live a long, financially secure life.²⁵

Despite the notable estimates of losses, they likely significantly understate the actual losses experienced. For example, in one study it was estimated that financial abuse could rob America's elderly of as much as

¹⁷ Kryger testimony

¹⁸ Vernon testimony

¹⁹ Hanna testimony

²⁰ Rouse testimony

²¹ Rouse testimony

²² Levine testimony

²³ Cormier testimony

²⁴ Cormier testimony

²⁵ Kryger testimony

\$37 billion a year.²⁶ Only one in 44 cases are estimated to be reported to the authorities²⁷ and 31% of Americans would not know how to report an elder financial abuse incident.²⁸

The (Potential) Role of the Government

Americans believe that the government has a role to play in protecting seniors from financial abuse by raising awareness (77%), giving financial institutions more flexibility to protect their clients from senior financial abuse (55%) and increasing funding for agencies to protect seniors from financial abuse (49%). Increased funding for government agencies can support programs that aim to protect seniors from financial abuse and assist victims nationwide.²⁹

Additional potential solutions include online reporting tools that allow someone to report a potential instance of financial exploitation that could be transferred to the respective APS agency. A similar solution is available in three states and one county today.³⁰

²⁶ <https://www.bloomberg.com/news/features/2018-05-03/america-s-elderly-are-losing-37-billion-a-year-to-fraud>

²⁷ CFPB testimony

²⁸ AIG *Plan for 100* Elder Financial Abuse Survey

²⁹ AIG *Plan for 100* Elder Financial Abuse Survey

³⁰ Bleier testimony

IV. WITNESS TESTIMONY: IDENTIFYING DIMINISHED CAPACITY

The Council received testimony from many institutions that have already adopted policies and practices to identify diminished capacity in individuals. Many of these institutions invest significant resources in training individuals to identify potential instances of diminished capacity and, depending on the type of institution, apply different mechanisms to further explore whether an individual may be affected by diminished capacity. It is important to note that an individual affected by diminished capacity may not be impaired in all facets of his or her daily living and that the diminished capacity may be temporary. The practices described below reflect these institutions' consideration of how to tailor their policies and identification tools to narrowly apply determination of diminished capacity in a way that is protective of the individual's interests without a blanket or permanent application.

The Council heard testimony from the National Adult Protective Services Association (NAPSA), an organization that represents state and county agencies tasked in part with recognizing and responding to the needs to elders and adults who are victims of abuse, neglect or exploitation. NAPSA stated that its assumption is that all individuals have capacity unless the individual demonstrates that he fails to understand the choices and consequences of his decisions. NAPSA conducts functional assessments of an individual's ability to perform activities of daily living (*e.g.*, grooming, toileting, eating, etc.) and instrumental activities of daily living (*e.g.*, transportation, shopping, meal preparation, etc.) and determines diminished capacity based on the individual's ability to accomplish these activities.

The Financial Industry Regulatory Authority (FINRA), Consumer Financial Protection Bureau (CFPB), and Securities Industry and Financial Markets Association (SIFMA) have adopted policies to train staff or service providers on identifying responses or actions that may indicate that an individual suffers from diminished capacity. Organizations train staff to look for the following:

- Sudden changes in spending, saving or transfers of large amounts of money
- Inability to pay bills
- Making new or unusual gifts to family or others, such as a "new best friend"
- Abrupt changes in beneficiaries of a will, life insurance or retirement funds
- A relative, caregiver or friend isolates or exerts control over the individual

Fidelity Investments (Fidelity), a financial institution that provides plan recordkeeping and investment services to more than 25 million individuals, has also adopted extensive policies and procedures to identify individuals with diminished capacity. Fidelity conducts at least annual training for staff and employs a dedicated team that specializes in identifying diminished capacity in individuals. They are trained to look for:

- Confusion with simple concepts or familiar tasks
- Repeating instructions or questions
- Dramatic shift in investment strategy
- Memory loss
- Verbal confirmation of health issues
- Changes in trading strategy
- Confusion regarding account balance
- Request to add authorized individuals
- Third-party coaching or posing as participant

The Council heard from other recordkeepers who reported that they have similar criteria in place. The CFPB suggested the following characteristics or events that may indicate an issue:

- Some money or property is missing
- Sudden changes in spending or savings
- Tries to wire large amounts of money
- Uses the ATM a lot
- Is not able to pay bills that are usually paid
- Stops receiving bank statements or bills
- Puts new, unrecognizable names on bank or other accounts
- Changes beneficiaries of a will, life insurance or retirement funds
- Seems afraid of a relative, caregiver or friend
- Is kept isolated by a relative, caregiver, friend or someone else. Cannot speak for him or herself.

Social Security Administration (SSA)

Although the SSA did not provide written or verbal testimony to the Council, it did provide a significant amount of source material that described its policies and procedures when an SSA agent encounters a beneficiary who appears to suffer from diminished capacity. The SSA has extensive experience communicating with and helping retirees understand and make decisions about their Social Security benefits, rights and commencement under the Social Security Act.

This summary extracts those policies and procedures that apply in the determination of a payee's capability to manage or direct the management of their Social Security benefits.

A. Capability Determination³¹

Capability refers to a beneficiary's ability to manage or direct the management of his or her Social Security benefits. SSA agents are directed to presume that a legally competent adult beneficiary is capable of managing, or directing someone else to manage, the benefits to which they are entitled, unless there are indicators or evidence to the contrary.

When an agent suspects a beneficiary may not be capable, they must make a capability determination. Agents will only make a finding of incapability when it is clearly in the best interest of the beneficiary to do so, based on convincing evidence (legal, lay and medical), using sound and reasoned judgment.

If he or she determines a beneficiary to be incapable, the agent must identify and appoint a suitable representative payee.

After the initial capability determination, they must remain alert to indications of a change in the beneficiary's condition or circumstances that might require a new capability determination.

³¹ GN 00502.001 Capability Determination and Representative Payee Payment Overview

B. Determining Capability – Adult Beneficiaries³²

1. Policy

Unless judged legally incompetent, agents presume an adult beneficiary is capable of managing or directing the management of benefits. However, if they have information that the beneficiary has a mental or physical impairment that prevents him or her from managing or directing the management of benefits, the agents must develop evidence of capability. Such evidence includes the following:

- a. Does the individual have difficulty answering questions, getting the evidence or information necessary to pursue the claim, or understanding explanations and reporting instructions? If yes, does the agent think this difficulty indicates the beneficiary cannot manage or direct the management of benefits? Note: Agents do not delay or suspend benefits while developing capability evidence unless specific conditions exist.
- b. If the beneficiary has a mental impairment, agents assess capability only if there is an indication that the beneficiary lacks the ability to reason properly, appears disoriented, demonstrates seriously impaired judgment or is unable to communicate with others. If the beneficiary can direct someone else to manage his or her benefits, the agent must find him or her capable of designating the manager.

2. Types of Evidence Used for Capability Determinations

The evidence provided to SSA must be the basis of the agent's determination of whether to pay a beneficiary directly or through a payee, and the evidence must be documented. There are three types of evidence used for capability determination:

- Legal evidence: Required where there is an allegation that the beneficiary is legally incompetent.
- Lay evidence (nonmedical and nonlegal evidence): In the absence of legal evidence required of agents.
- Medical evidence: Indicates the beneficiary cannot manage or direct someone else to manage his or her benefits.

If legal evidence establishes that the beneficiary is incompetent to manage or direct someone else to manage his or her benefits, the beneficiary must receive benefits through a payee and no other determination is necessary. Otherwise, the agent must make a capability determination based on lay and medical evidence, including whether he or she finds representative payment or direct payment appropriate.

³² GN 00502.020 Determining Capability – Adult Beneficiaries

C. Developing Lay Evidence of Capability³³

1. Policy

Lay evidence of capability helps the agent understand how the beneficiary has been managing any benefits and other funds that have been available to them to meet daily needs (food, shelter, clothing and medical care), and gives the agent insight into a beneficiary's ability to manage or direct the management of their Social Security benefits. The agent requires as much lay evidence as necessary to have a clear understanding of the beneficiary's ability. Some of the examples of evidence they offer include:

- a. the beneficiary's behavior, reasoning ability, how they function with others;
- b. how effectively they pursue the claim;
- c. a statement made by the beneficiary that they are capable or incapable of managing their benefits;
- d. documentation or reports that the beneficiary has been unable to meet their basic needs in the past, despite available income;
- e. signed statements from, or contacts with, third-party sources with direct knowledge of facts or circumstances regarding the beneficiary's daily living (e.g., beneficiary's relatives, custodian, close friends, neighbors, landlord, representatives of community groups, social workers, therapists, clergy, and Adult Protective Services' workers) that describe the beneficiary's ability to manage benefits and meet daily needs;
- f. a court order that does not establish legal incompetence or an Administrative Law Judge's (ALJ) opinion regarding the claimant's capability when capability is not specifically set before the ALJ to decide.

Agents usually deem a beneficiary to be capable if he or she can tell the agent the amount of money received monthly, the source of the money, the amount of rent/mortgage, or the amount spent on groceries. The beneficiary is also capable if they can direct someone else to manage their benefits.

2. Obtaining Beneficiary Lay Evidence

Agents are required to complete a lay evidence interview with the beneficiary, unless the beneficiary's disability prevents them from understanding and participating in an interview. Example of questions they ask to gain an understanding of the beneficiary's ability to manage or direct the management of their benefits:

Financial management. SSA agents consider evidence of real-world financial performance as the most reliable basis for making a capability determination. The answers to the following questions demonstrate the beneficiary's self-awareness and ability to address current needs, their understanding of the value of money, their independence, their self-sufficiency and their ability to handle problems:

- a. What are the most important things you spend money on?
- b. What bills do you pay each month?
- c. When you live on your own, what bills do you pay (rent/utilities/food/transportation)?

³³ GN 00502.030 Developing Lay Evidence of Capability

- d. Do you pay your bills or does someone else pay them for you?
- e. Do you ever forget to pay some bills?
- f. If you forgot to pay a bill, what did you do about it? How did you find out about it?
- g. Do you have any problems with making change?
- h. Do you go to the bank? If yes, how often?
- i. Do you have a bank account? If yes:
 - i. Is it a checking or savings account?
 - ii. Is there anyone else named on any of your bank accounts?
 - iii. How often do you get a statement from the bank? What do you do with the statement? Do you read and understand it?
 - iv. Do you handle online banking transactions? If not, does someone else handle your online banking transactions?
 - v. Do you write checks? If not, does someone else write checks from your account for you?
 - vi. Did you ever write a check for insufficient funds ("bounced" a check) or been charged a fee for an overdrawn account? If so, how often has this happened? Why do you think this happened? What did you do when it happened?

Agents ask additional questions to determine essential information in determining the beneficiary's ability to meet basic daily needs, stability in living arrangements and existing support network. They also ask questions to gain insight into the beneficiary's thought processes, ability to reason or value system that could give clues regarding a beneficiary's vulnerability to predators.

If a third party is involved in providing evidence, the agent is required to ask additional questions to obtain specific information about the beneficiary's financial performance. The agent must document all information provided and obtain a detailed signed statement from them.

D. Making a Capability Determination³⁴

The determination that a beneficiary is incapable effectively takes away his or her right to decide how benefits are used. Therefore, the agent must carefully consider all evidence and use sound and reasoned judgment. When making a capability determination, the agent is instructed to give primary consideration to the beneficiary's best interests and to not feel compelled to find a beneficiary incapable as a matter of convenience. The agent must also complete and document their capability determination.

Field Office technicians are responsible for making the final capability determination.

³⁴ GN 00502.060 Making a Capability Determination

E. Documenting A Capability Determination³⁵

A capability determination for a competent adult requires lay evidence, medical evidence (if available), and proper documentation. The agent must document their capability determination and the details of their reasoning following specific instructions:

1. Record all facts
2. Reports of contacts
3. Paper evidence to support the capability determination
4. A concluding statement of determination and evidence considered.

³⁵ GN 00502.065 Documenting a Capability Determination

V. WITNESS TESTIMONY: APPROACHES USED TO ADDRESS DIMINISHED CAPACITY

Over four days of testimony from 21 expert witnesses, the Council heard information about research, experience, challenges and practices of identifying and addressing the issues that arise when individuals demonstrate characteristics of diminished capacity. Many reported on the prevalence of the encounters, the practices and procedures employed, and some of the outcomes of their efforts. We categorized the information as follows: governmental and enforcement entities, other organizations and individuals, and the ERISA community, including plan sponsors, financial advisors and related professionals, recordkeepers, and health and welfare professionals. Many of the witnesses offered recommendations for approaches the Department may want to take to help employers, plan sponsors, fiduciaries, plan service providers and recordkeepers consider and better prepare for assisting and advising participants facing these challenges. All witnesses agreed that the Department could offer tremendous assistance to the benefits community through sharing information and guidance on this topic in the form of public and benefits community education, outreach and fiduciary guidance.

Below is a summary of key points made for consideration.

Governmental and Enforcement Entities

Social Security Administration (SSA)

As mentioned in Section IV above, the SSA did not provide written or verbal testimony to the Council. However, the SSA's source material included policies and procedures that apply in cases where a beneficiary was found to suffer from diminished capacity, the steps required if the determination is that the payee is incapable of financial management, and the voluntary steps that an individual can take to designate an alternative payee in advance of needing one.

1. In brief, the SSA agent can assign a Representative Payee to manage the funds that the beneficiary receives from the SSA.
2. The SSA source material also provides guidance on voluntary steps that an individual can take to designate an alternative payee in advance of needing one: an Advance Designation of a Representative Payee.³⁶ The SSA, by way of Advanced Designation, permits capable beneficiaries and claimants to designate an individual(s) to serve as payee should the need arise. The SSA will give the designated person first consideration for becoming the payee if the beneficiary is found to need one, but the voluntary designation is not binding. It is, however, helpful to have a person identified. The following are key considerations when designating a future representative payee:
 - a. Advance designation is voluntary;
 - b. Advance designation does not expire with time but can be changed by the beneficiary at any time;
 - c. The choice to designate in advance is not an indication of the beneficiary's current capability to manage or direct the management of SSA benefits;
 - d. Advance designation is not an indication of an individual's suitability to serve as payee;
 - e. Advance designation is not a Power of Attorney.

³⁶ GN 00502.085 Advance Designation of Representative Payee

- f. NOTE: While SSA allows individuals to designate in advance one or more potential payees, only one payee can serve the beneficiary at a time.

The Financial Industry Regulatory Authority (FINRA)

Jeanette Wingler, Associate General Counsel for FINRA, in her testimony to the Council, described some key steps that FINRA and its member organizations have taken to address the issue of individuals suffering from diminished capacity or from financial fraud, abuse or questionable decision-making.

In April 2015, FINRA launched a securities help line, conducting rulemaking to give firms tools to address suspected financial exploitation and identifying senior investor issues. FINRA's Investor Education Foundation published three research papers using data from the Rush Memory and Aging Project and shared one that may be of particular interest to the Council in which they found that an older adult who has higher levels of competence in their financial knowledge actually has lower risk of Alzheimer's dementia.

FINRA adopted Rule 2165 in February 2017 to permit brokerage firms to place a temporary hold of 15 business days, which can be extended for an additional 10 business days, on disbursements of funds and securities from the accounts of specified customers when there is a reasonable belief of financial exploitation. In February 2018, these rule changes became effective and provide brokerage firms with the means to respond quickly to suspected financial exploitation. Rule 2165 is the first uniform national standard for placing temporary holds on disbursements to address suspected financial exploitation. The rule includes important safeguards for customers to help ensure that there is no misapplication of the rule. For example, a firm must provide notification of the hold and the reason for the hold to all parties no later than 10 business days after the firm first places the hold. The firm needs to document and develop training policies and procedures that are reasonably designed to ensure that associated people at the firm comply with the requirements of the rule.

FINRA's recent report for the five-year anniversary of the FINRA Securities highlights several examples that illustrate the positive impact of the placing of temporary holds on disbursements. The examples in the report describe temporary holds that were placed to prevent vulnerable seniors from losing \$200,000 in an enrollment scam, \$10,000 in a lottery scam, \$65,000 in an enrollment scam and \$50,000 in financial exploitation by a family member.

Ms. Wingler also discussed FINRA's proposed amendments to Rule 2165. FINRA would like to see the current period for a temporary hold to be extended. A second proposed amendment would permit the period to be extended by a court of competent jurisdiction. To provide firms with additional time, FINRA is proposing to amend Rule 2165 to permit extending the temporary hold for an additional 30 business days if the firm has referred the matter to a state agency or a court of competent jurisdiction. Regarding this proposed amendment, while placing a hold pursuant to Rule 2165 stops funds or securities from leaving the customer's account, the rule currently does not apply to transactions in securities. Several stakeholders recommended extending the rule to permit a firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited.

While under some state laws the customer agreements permit placing holds on transactions, FINRA is proposing to amend 2165 to create the first uniform national standard for placing holds on transactions related to suspected financial exploitation.

Ms. Wingler also discussed FINRA Rule 4512, which provides guidance on establishing a “trusted contact” for an investor. The rule does not prohibit brokerage firms from opening and maintaining the account if the customer does not identify a trusted contact person, which gives customers who may have reservations in allowing firms to contact someone else about their accounts the ability to decline to name a trusted contact person. In further discussing trusted contacts, a firm may, consistent with the rule, contact a customer’s contact person to discuss concerns about possible financial exploitation or of the customer’s health, including suspected cognitive decline. In testimony Ms. Wingler emphasized that even a trusted contact is not authorized to conduct business on behalf of an individual. The trusted contact is a resource for the FINRA member firm in case an issue regarding the investor’s competence arises.

The Consumer Financial Protection Bureau (CFPB)

Two witnesses associated with the CFPB provided written and verbal testimony to the Council. Naomi Karp is presently a Consulting Research Scholar at the Stanford Center on Longevity and was Senior Policy Analyst at the CFPB’s Office for Older Americans where she helped set the Office’s priorities when the agency opened in 2011. Lisa Schifferle is a Senior Policy Analyst in the Office for Older Americans at the CFPB. She serves as the national lead of the *Managing Someone Else’s Money* program. During their testimony, Ms. Schifferle and Ms. Karp made the following recommendations for plan sponsors, plan administrators and plan fiduciaries.

1. Provide mandatory training for the staff of employers, plan sponsors and service providers on both diminished capacity and financial exploitation.
2. Educate plan participants on the risks posed by diminished capacity and ways to plan in advance to protect against those risks. Employers and plans should offer programs and resources on several aspects of this—financial exploitation and scams and how to avoid them, risks posed by unanticipated health problems, the benefits of advanced planning for future money management—and provide tools and resources for advanced planning.
3. Implement a broad set of practices, policies and resources to prevent and respond to elder financial exploitation. In 2016 CFPB issued a broad set of recommendations for banks and credit unions. Most of these recommendations could apply to plan sponsors and service providers, and many could apply to employers as well.
4. Report all cases of suspected exploitation to the relevant federal, state and local authorities.
5. Offer participants the opportunity to consent in advance so that a plan provider or servicer that suspects diminished capacity or financial exploitation can reach out to a designated trusted third party. This concept is similar to FINRA’s trusted contact.
6. Offer protective opt-in account features such as the ability to set alerts for specified account activity and provide read-only access for authorized third parties. With such a feature, a designated family member or friend can monitor an account for irregularities without having access to funds or transactions.
7. Develop protocols on holding transactions or not disbursing funds in accordance with applicable laws. This recommendation is similar to FINRA Rule 2165 and provisions in several states that permit transaction or disbursement holds if the financial institution suspects exploitation.
8. Implement procedures to ensure that decisions on whether to accept a Power of Attorney are made promptly and are only based on appropriate legal considerations. Frontline staff should be able to recognize red flags for the Power of Attorney issues.
9. Develop new ways to provide services, training and communication in a socially-distant virtual world. Older adults may feel a heightened awareness now of the need to get their affairs in order. Take advantage of this moment to engage them in issues of advanced planning for incapacity and financial caregiving.

10. Make online and mobile platforms more accessible and be aware that business and advanced planning transactions requiring notarization can now be conducted remotely in almost all states based on state emergency orders and new legislation.
11. Support research and evaluation of interventions introduced to minimize the financial impact of diminished capacity.

The National Adult Protective Services Association (NAPSA)

Michael Hagenlock, the current president of NAPSA, provided written and verbal testimony to the Council. He explained that NAPSA's mission is to strengthen Adult Protective Services (APS) programs across the country to improve the safety and independence of individuals 18 years of age or older who have a disability, or people age 60 and older who are victims of abuse, neglect, self-neglect or financial exploitation.

NAPSA personnel, much like SSA agents, "assume all persons have capacity until proven otherwise. When a report is made to APS, the staff must examine the issues and facts surrounding the individual and what choices the individual is trying to make or is not making."

"Financial institutions play an important role in preventing and stopping financial exploitation, as they are often able to first spot suspicious activities in an older person's account; are required to report suspected financial exploitation to APS in over half the states; and want to protect their customers' assets. Financial institutions include banks, credit unions, broker-dealers, investment advisors, insurance companies and others."

In response to Council questions, Mr. Hagenlock emphasized the need for institutions to be aware and have some way to notify/intervene when behaviors become suspicious, preferably before any fraud or serious mistake is committed. He also mentioned that he was not aware of any lawsuits arising from an institution acting on general concerns.

His prepared testimony concluded with five recommendations:

1. Train personnel of employers, plan sponsors and plan service providers to recognize abuse and how to report it and to identify indicators of potential capacity issues.
2. Make reports to APS. Contact information for APS in all states is available at <https://www.napsa-now.org/get-help/help-in-your-area/>.
3. Ask plan participants and beneficiaries to identify a "trusted contact" who plan sponsors, plan service providers and others can contact if they see problems much like FINRA and the SEC's Office of Investor Education recommends (<https://www.finra.org/investors/insights/consideradding-trusted-contact-to-your-account>).
4. Ask plan participants and beneficiaries to review their trusted contact person preferences on at least an annual basis.
5. Consider that your employees are aging and may experience diminished capacity while still working and handling accounts.

Other Organizations and Individuals

The American Institute of Certified Public Accountants (AICPA)

Howard Silverstone, a current member and past chair of the AICPA Forensic and Litigation Services Fraud Task Force, provided written and verbal testimony to the Council. Mr. Silverstone's testimony included a discussion of the top 10 financial scams targeting seniors today. In addition, he discussed potential signs of financial abuse and ways to counter those issues. He stated the primary way to address and reduce potential abuse is through the education of plan participants and financial providers. He felt that participants could be educated by plan sponsors, plan providers, the Department and other financial professionals.

Many of the recommendations and observations that Mr. Silverstone discussed were shared by the witnesses discussed above. Some special points emphasized by Mr. Silverstone include the following:

1. **Safety:** The first consideration for any suspected financial abuse is the safety of the person who is the target. If there are visible signs of abuse or there is concern that the person may be in danger, then the incident should be reported to the local law enforcement agency.
2. **Rapport:** Developing a rapport with the victim is very important as they may be reluctant to talk about it. In some situations, they may have been relying on and trusting the abuser for assistance with daily activities including cooking and cleaning and do not have any other source of assistance. It takes time to build a bond with the victim and be respectful.
3. **Documentation:** As with any allegation of fraud, documentation needs to be gathered, including bank statements, receipts, bills, Power of Attorney, wills and any other documents which may be required to provide to the authorities.
4. **Take Notes:** Write down anything that the victim has said regarding events that have taken place as it often assists with any follow-up which may be required later. In some situations, there may be others that have been victimized or other people that may have been involved.
5. **Specific ways that the Department can assist in the effort:**
 - a. Work with and seek continued input and assistance from professional accounting organizations, such as the American Institute of Certified Public Accountants (AICPA) and State Certified Public Accountants (CPA) societies, because they are aware of the new challenges.
 - b. Commit resources among interested organizations to provide an expedited exchange of knowledge.
 - c. Provide the general public with continued education and warnings through the resources available, including the Social Security Administration and other departments and organizations with access to the vulnerable.
 - d. Establish an ongoing task force, routinely identifying new threats and acknowledging achievements.
 - e. Use various kinds of media resources to reach out to potential victims. Many are not internet savvy, so continued messages on and about the dangers are vital.

The Pension Rights Center

Norman Stein, Senior Policy Advisor for the Pension Rights Center and a professor at the Drexel University School of Law, provided written and verbal testimony to the Council. Professor Stein's testimony was titled "Considerations for Recognizing and Addressing Participants with Diminished

Capacity.” His testimony gave the Council additional background information about participants with diminished capacity and then focused on three key areas.

First, he identified some of the situations in which plan participants with diminished capacity can be harmed with respect to their benefits and rights in an ERISA plan, whether because of unethical and/or illegal behavior by third parties or because of their own impaired judgment in financial matters. Second, he explained why he was skeptical about the overall utility of looking at current plan practices to identify a sort of gold standard that other plans can adopt, although he agreed that there were steps plans should take and that some probably are taking to prevent abuse in certain situations. Lastly, he described the types of regulatory and legislative safeguards that addressed the specific problems that he identified in the first part of this testimony.

Key areas of concern surround several topics:

- Should the participant take a lump sum distribution or accelerate plan distributions.
- How to allocate investments within a self-directed defined contribution plan.
- Whether to annuitize benefits in a defined contribution plan.
- How to apply for benefits.
- How to understand communications from the plan.
- How to divide pensions or retirement savings in a divorce.
- Elections regarding retiree health plans and giving informed consent to medical procedures.
- Keeping beneficiary designations current.

Professor Stein then gave the reasons he was skeptical that there are things that could be done at the plan administrative level, at least on a voluntary basis, to effectively address these issues. They were:

- Identifying people experiencing cognitive decline is a difficult task, even for people whose specialties are medicine and gerontology.
- Plans who identify participants with possible impaired cognitive functioning may find it difficult to develop processes that adequately address impairment in all or even most cases.
- Assessing participants for dementia will be both over- and under-inclusive, producing false negatives and false positives.
- There are times when the plan sponsor and a plan participant may have conflicting interests.
- Financial advisors who give advice to participants to take a lump sum distribution may have a conflict of interest if they manage the distributed assets for a fee.
- Even if a successful program can be designed, it may require substantial resources that plans may not be legally obligated to incur, and if they do devote resources to policing third parties for elder abuse, they may risk ERISA liability for doing so.

Finally, Professor Stein went on to discuss the many regulatory safeguards that are already in place to the specific areas of concern he spelled out in the first part of his testimony.

Anna Rappaport Consulting

The Council also heard testimony from former Council member Anna Rappaport, who has previously served as the President of the Society of Actuaries, and currently serves as chairperson of the Society of Actuaries’ Committee on Post-Retirement Needs and Risks and its Aging and Retirement Steering Committee. Ms. Rappaport’s testimony focused on describing the complexity in identifying diminished

capacity and summarizing the results of research conducted by the Society of Actuaries. She described the results of a Society of Actuaries' 2013 survey of pre-retirees and retirees ranging in ages from 45 to 80 that showed that most participants expected three phases of retirement: a go-go phase, a slow-go phase and a no-go phase, but none were preparing or planning for these phases.

Ms. Rappaport indicated that employers may want to consider integrating the diminished capacity issue into other employer programs, like their retirement planning programs, or other financial wellness programs, so that employees may be able to start thinking about this risk earlier in their career and plan for it. And it would even go a bit broader, to encourage employers to integrate a broad range of risks in their thinking about retirement planning, and to encourage employees to have awareness of that broad range of risks.

Ms. Rappaport's testimony also addressed potential strategies that could assist retirees in planning for retirement and a potential cognitive decline. She identified several actions that employers could take including: educating employees about diminished capacity in financial wellness programs, offering employee assistance plans and prepaid legal programs, and providing information about long-term care options. She also emphasized that it would be helpful for employers to find ways to better support caregivers by offering more flexible work schedules, assistance with stress management and employee assistance programs.

Possible actions for employers include:

1. Remind people to consider these matters when planning for retirement. Two things to think about in this regard are that many financial planning systems do not consider the need to think long-term, and that they do not consider diminished capacity and related issues.
2. Include long-term care related options in planning systems and software.
3. Help employees and/or retirees identify and implement strategies for dealing with diminished capacity using an employee assistance program.
4. Offer access to legal services through a prepaid legal plan.
5. Provide information about long-term care options and its financing.
6. Offer access to insurance products through a group purchasing arrangement to help finance long-term care.
7. Provide information on diminished capacity through financial wellness programs.
8. Where employee benefit services are offered on an automated basis, provide options to help those with diminished capability who have communication and/or technology challenges.

Some of the topics that might be considered for financial wellness offerings include helping employees understand:

1. How to recognize and deal with diminished capacity and cognitive decline
2. How the potential need for long-term care affects retirement planning
3. How a potential caregiver should consider diminished capacity in retirement planning
4. The options for financing long-term care
5. Where to find information about local support groups, community and public sector activities and support services
6. Legal issues, resources to understand them and what types of documents are needed

The Department could help employers, service providers including plan administrators, wellness providers and Employee Assistance Plans, as well as individuals by providing fact sheets and information

about resources that can help. The Department could also make suggestions about good practices for issues to be included in due diligence.

Stanford Center on Longevity

Steve Vernon is the Research Scholar at the Stanford Center on Longevity and President of Rest-of-Life Communications. He currently serves as a member of the Institutional Retirement Income Council (IRIC), is a Fellow in the Society of Actuaries and a Member of the American Academy of Actuaries.

Mr. Vernon first reviewed in detail specific steps that retirees and pre-retirees can take to protect their financial resources in the long and short term. The earlier steps do not directly address issues of diminished capacity but provide a strong foundation for an individual who may become incapacitated in the future. He then reviewed the various roles that the financial advocates can assume.

Mr. Vernon observed that financial competence is one of first things to suffer with encroaching incapacitation. Judgment is needed about when to start transitioning to an advocate. It would work better for everyone if plan sponsors, plan administrators and financial institutions were aware of warning signs and could act.

Defined contribution plans and other large sums, such as an option for a lump sum payment of a pension, are especially vulnerable to fraud or poor decision making. To prevent fraud or mistakes, an individual could annuitize with a standard annuity or design a bridge until Social Security eligibility. Some funds also permit an individual to lock in investments (such as a target-date fund), establish a set payment schedule, and make it difficult to change investment or payment options.

Mr. Vernon concluded with several suggestions for plan sponsors and employers that would reduce the likelihood of fraud or error of a retiree with diminished capacity:

1. Plan sponsors and administrators could sponsor pre-retirement employee study groups to explore how to make the later retirement years more secure. Many people prefer to study this issue together. Employers could also support retirees in later years when they need it.
2. Design, administer and communicate a robust retirement income menu in defined contribution plans.
3. Sponsor retirement planning workshops and educational campaigns.
4. Deliver focused communications on risks of lump sum option in defined benefit plans.
5. Host financial wellness programs/employee study groups that address advanced financial care planning.
6. Long-term care insurance plans, which are more favorable terms for group plans. If the sponsor does not offer a group plan, could still educate employees/future retirees about individual plans.
7. Implement procedures to acknowledge authority of financial advocate(s).
8. Offer account lockdown in defined contribution plans and other online security features.
9. Deliver warnings about potential noncompliance resulting in penalties.
10. Provide conduit to supportive services.

It is critical that pre-retirees and retirees carefully develop their own convoy of support as they age into their later years. Financial advocates, family, friends, financial institutions, employer-sponsored retirement and benefit plans, and service providers can all play significant roles to help protect the financial resources of their plan participants and families.

Marti DeLiema

Marti DeLiema is an interdisciplinary gerontologist and Assistant Research Professor in the School of Social Work at the University of Minnesota. Using both quantitative and qualitative research methods, Dr. DeLiema studies the causes and consequences of elder financial victimization.

Dr. DeLiema started by presenting the problems created by lack of financial planning for a time when an individual becomes incapacitated. She listed key advantages such as less chance of fraud or poor decisions. She also pointed out that people tend to be overly optimistic and do not make strong plans. Barriers to planning include denial of need, desire for privacy, resistance from family, mistaken belief that only wealthy people need to arrange for someone to oversee their assets. Consistent education, communication and positive messaging can help overcome barriers. Simple step-by-step guides would also help.

Some key points that Dr. DeLiema emphasized:

1. There is no one formula or single sign that a person needs help. Before that time comes, it is best to identify an advocate and work together. “I do it; we do it together; you do it.”
2. There can be more than one advocate. There can be one for health issues, another for daily financial management and a third to oversee investments.
3. The things to look for in a financial advocate:
 - a. Trust
 - b. Stable themselves
 - c. Knows you well
 - d. Cares about you
4. Dr. DeLiema also mentioned that relying on a spouse to act as an advocate does not always work well. The spouse may not have knowledge of or access to all assets. It is also possible that the spouse becomes incapacitated. Finally, one of the two spouses will be left as a solo adult eventually. She also explained that having a joint account with advocate may expose the retiree to the advocate’s debts and may affect inheritance.

Care Right, Inc.

Annalee Kruger is the founder of Care Right, Inc., a virtual full-service concierge style senior care planning company. She is a pioneer in Aging Planning, was a social worker and director in long-term care for more than 25 years.

Ms. Kruger noted that financial planners need to understand the red flags of dementia, so they are aware of symptoms of diminished memory capacity. Identifying the red flags can allow the financial planning industry to support clients and their families’ needs.

Studies show that 58% of adult children become caregivers without prior planning. Families should have meetings and gain an understanding of what aging relatives have in place. The relative may be a veteran, and qualify for veterans’ benefits, or have long term care insurance, or a reverse mortgage on the house. Those that are working with the elderly population should encourage families to determine:

1. the actual plan for care if a relative’s dementia progresses,

2. who is going to provide caregiver services,
3. how will the cost of care be paid, and
4. what is the plan if they cannot continue living at home.

An important part of an aging plan is to ensure all necessary documents are in order with a “grab and go” binder that includes insurance documents, powers of attorney, estate documents, funeral plans and passwords.

Financial planners often say they had no idea that a client suffered from dementia until the family calls and asks why are you having this individual sign documents? Financial planners need to understand the Senior Safe Act. (The Act provides statutory protection against liability in any civil or administrative proceeding for reporting any case of potential exploitation of a “senior citizen” to the appropriate “covered agency.”) If there are red flags with a client, financial planners should not meet alone with a diminished capacity client. They should develop diminished capacity protocols to use to identify the “trusted contact” and keep a log of documentation covering conversations.

In the construct of a defined contribution plan, qualified plan administrators are not going to have a lot of interaction with participants individually. There needs to be more education about this issue in the nation and about the needs of this demographic.

John M. (Jack) Towarnicky, Member of the Public

The Council received a written statement from Mr. Towarnicky in which he offered his comments based on his extensive experience in the employee benefits arena. He recognizes the importance of the issue but commented that identifying or assessing participants with cognitive impairments is beyond the capability of plan sponsors, plan administrators, fiduciaries, advisors and service providers. He emphasized that mandates on employer-sponsored plans to address participant’s (and perhaps the surviving spouse’s) cognitive decline may be inconsistent with rewards and business priorities, risk and compliance challenges, employment and retirement trends. And that actions that address cognitive decline might also trigger an increase in expenses and risk exposure. He expressed that given the employment marketplace and trends, the Department’s best alternative may be to collaborate with other agencies and Congress—encouraging and facilitating asset retention, account aggregation/consolidation and leakage avoidance. The goal of this effort that he expresses are policies, processes and plan designs that address cognitive decline among participants in ways that may *concurrently* reduce participant expense and risk exposure for plan sponsors, plan administrators and fiduciaries. His suggested best approach is keeping assets in a well-designed plan that offers participants some of the best protections against cognitive decline.

Mr. Towarnicky recommended that the Department should embrace, encourage and facilitate a simple, perhaps simplistic strategy that favors asset retention, leakage avoidance, and account consolidation/aggregation in tax-qualified individual accounts and employer-sponsored retirement savings plans. He offered specific recommendations for plan sponsors, agencies and Congress to accommodate and effect his recommendations. Some of the key recommendations that are consistent with the mission statement of this Council included:

Plan Sponsors:

1. Adopt policies or conduct training regarding cognitive decline among term vested and retired participants.

2. Embrace plan provisions/structures/administration that may accommodate “householding” strategies.
3. Perennially solicit updates of beneficiary designations and adopt “order of payout” provisions where there is no beneficiary designation or the beneficiary designation is incomplete or invalid.
4. Add timely education and processes that create a limited, durable Power of Attorney in a trusted advisor.

Agencies:

1. Clarify options to customize automatic enrollment defaults: pre-tax for some, Roth for others.
2. Reconfirm that a plan’s contractual relationship with participants is not affected by changes in employment.
3. Encourage two-step account access security plus added verification for payouts (loans, withdrawals, etc.).

ERISA Community

Plan Sponsors

Warren Cormier, Defined Contribution Institutional Investment Association (DCIIA)

The Council heard testimony from Warren Cormier who is the executive director of the Defined Contribution Institutional Investment Association (DCIIA) Retirement Research Center and previously CEO and co-founder of Boston Research Technologies. He is a veteran of the retirement and financial services industries with more than 30 years of quantitative and qualitative experience including extensive experience in the areas of behavioral economics, group dynamics, workplace culture, employee engagement and employee benefits. The Retirement Research Center, headed by Mr. Cormier, is the division that conducts retirement research.

The Retirement Research Center conducted a pulse survey among a small but significant sampling of large market plan sponsors at the request of the Council. There were 38 respondents, of which 83% had over \$1 billion in defined contribution assets and 89% that had over \$50 million. Innovation and thought leadership tend to originate in the large market segment of retirement plans. While the number of respondents was small, the size of their plans indicates a significant issue for the ERISA community at large.

The Retirement Research Center surveyed staff in the senior leadership roles in their employer organizations within the defined contribution plan area of responsibility. The survey covered cognitive decline issues, what kind of services large plans are aware of, and questions they are getting about the issue. Approximately 40-50% of plan sponsors indicated that they do not have direct contact with separated or retired participants, and therefore do not have the opportunity to detect cognitive decline. This responsibility has been delegated to the plan recordkeeper via service agreements. When asked how prevalent cognitive decline is among their participants, seven out of 10 said they do not know, and 11% said zero with no awareness of cases of cognitive decline. More than half said it is a low priority to help those with diminished capacity, and that there have been no discussions on that issue.

About 8% of respondents said diminished capacity was a very high priority, and they have, or are working toward, specific policies and practices. About 80% of respondents said it was a low priority, or

they did not know what priority it was, and their company has not dealt with the issue of cognitive decline.

When asked if they had created a formal policy about what actions to take if they suspect cognitive decline in a defined contribution participant the responses are as follows:

- One out of 9 said that they do have a formal policy,
- 75% said that they did not, and
- 14% said they do not know if a policy has been established.

When surveyed, more than half of plan sponsors without a policy said that if they saw a defined contribution participant with cognitive decline or suffering the consequences of cognitive decline, that they would refer the matter to legal counsel. About half said that they would investigate the matter further.

There was a lack of clarity on respondents' fiduciary duty to plan participants who demonstrate potential diminished capacity and, in this regard, specifically to separated and retired participants with a balance in the plan. When answering a question about their fiduciary duty relative to diminished capacity, the plan sponsors responded as follows:

- 22% stated they *do have* fiduciary responsibility,
- 25% stated they *do not have* fiduciary responsibility, and about
- 53% stated they *did not know* if they have fiduciary responsibility.

Consultants and registered investment advisors, also polled in a pulse survey, indicated that if diminished capacity becomes a fiduciary duty, the trend of encouraging separated and retired participants to keep their balances in the plan, where there is fiduciary oversight and lower fees, might be affected, as fewer employers may want to keep retirees in their plan. Mr. Cormier indicated that this is not the outcome that the Department, or any of us, wants to see. It would be valuable to have some clarity on that, and it is also important to recognize that there should be some safe harbor or process by which the plan sponsor could alleviate that fiduciary responsibility, i.e., the trusted contact approach.

It was felt that education and guidance would help plan sponsors in developing policies to address diminished capacity.

The Council heard from academics and researchers that financial wellness programs and employee assistance programs do not consider the need to think long-term in retirement and specifically about planning for diminished capacity. Expanding these programs to focus on post-retirement planning issues, including diminished capacity, would be an effective way to educate plan participants on these needs.

Jan M. Jacobson, American Benefits Council (ABC)

The Council also heard testimony from Jan Jacobson who is senior counsel for retirement policy for the American Benefits Council (ABC) and a former Council member. The ABC represents approximately 440 large, multi-state employers that provide benefits to their active and retired employees. Ms. Jacobson and ABC were extremely helpful to the Council in that they conducted an informal survey of their plan sponsor and plan service provider membership to identify their current experience with participants who may exhibit diminished capacity, how they handle those interactions, and whether they feel that guidance

from the Department would be helpful. Ms. Jacobson presented the results from the survey for 37 employers that responded as follows:

- 32% reported that they had encountered participants exhibiting signs of diminished capacity, and
- 61% reported that they did not have policies or guidelines for interacting with participants exhibiting signs of diminished capacity.

The survey showed that most employers believed that Department guidance would be helpful.

Ms. Jacobson indicated that the ABC agrees that it would be helpful for the Department to issue guidance, including best practices relating to:

1. identifying and taking steps to address participants that exhibit signs of diminished capacity or financial exploitation,
2. supporting the use of “trusted contacts” and a Power of Attorney, and
3. educational training opportunities.

She also mentioned that it is important for the Department to provide liability relief, such as for a subsequent drop in value, or loss of a subsequent potential gain in value, for putting reasonable restrictions on participant plan accounts temporarily preventing the distribution of assets where participants exhibit signs of diminished capacity or financial exploitation. The relevant guidance should not put plan fiduciaries between a rock and a hard place where any action they take can result in additional liability.

David Levine, Groom Law Group

David Levine is a principal at Groom Law Group, where he advises plan sponsors, advisors and other service providers on a wide range of employee benefits matters, from health and welfare to retirement and executive compensation matters. He indicated that no one wants to pay money to the wrong person and no one wants people to be taken advantage of. However, there are a variety of potential conflicting information sources: the plan document, state laws, various legal and fiduciary standards and contracts, that can create a disconnect and can make dealing with a participant who exhibits diminished capacity difficult, especially for plan sponsors who often do not want to get involved in this level of plan operation. In addition, incorporating new procedures and processes to address this issue will result in new costs, and therefore the community needs a practical implementation guide plan. He recommended that the Council develop a framework—a safe harbor, not a rigid standard—that says if you have this process in place, you have a valid process under ERISA.

Financial Advisors and Consultants

Warren Cormier, Defined Contribution Institutional Investment Association (DCIIA)

The Defined Contribution Institutional Investment Association (DCIIA) Retirement Research Center, as mentioned above, also conducted a survey with defined contribution plan consultants and Registered Investment Advisors (RIA) where each represented experience with thousands, or hundreds of thousands, of plan sponsors. The Registered Investment Advisor (RIA) survey entailed six in-depth telephone interviews with practice leaders within their defined contribution consulting firms. They were sympathetic and empathetic about the consequences of this malady. Most of their awareness about the

consequences of diminished capacity were related to, or came from, experiences they had with family, friends or acquaintances.

RIA respondents were not aware of specific incidences of cognitive decline among their clients' plan participants. They pointed out that they were not normally able to know that because they do not have direct contact with plan participants. However, they would know if there were some type of issue, legal action or investigation that came up in plan committee meetings.

RIAs consistently reported that their clients have neither been asking them for advice on the issue nor asking that the RFPs they send for service provider searches include questions about the vendors' capabilities or practices in addressing diminished capacity. When asked specifically if they included questions about special training for their recordkeeper's telephone representatives in recognizing and reacting to cognitive decline, the answer was no. They have not been asked to investigate that question, nor have they ever asked that question. They agreed that within the industry, at conferences, discussions internally, or with colleagues, they had little discussion about this matter.

RIAs did say this may come up as part of the broader issue of cybersecurity, but cognitive decline specifically was not a focus. Some suggested that the best approach is prevention through education with plan participants, that plan participants should establish a clear financial plan before or while they initially are feeling any effects of cognitive decline.

The RIAs noted a trend towards keeping participants in the plan for post-retirement, or participants working longer than they would expect, and that diminished capacity could become more of a focus and more prevalent in the future. The consultants and RIAs felt that diminished capacity was either not a matter of fiduciary responsibility, or they were not sure if it was a matter of fiduciary responsibility.

During the interviews, all six RIAs asked if their answers were like what their colleagues had responded to, meaning they really do not know what is occurring in their channel on this issue.

The RIA and consulting industry need training about the Senior Safe Act and the protections it provides for an individual who reports the potential for diminished capacity to the appropriate agency. When working with an individual plan participant, financial advisors need to have an identified "trusted contact" name when an account is opened and for existing accounts. While they can request a trusted contact, there is no requirement to have this information.

RIAs and consultants stated that unless somebody reaches out to the recordkeeper or to the plan sponsor, they do not know about potential diminished capacity issues. Consultants said that some transactions are clearly strange, but because neither the plan sponsor nor the consultant have a full picture of what is going on, they cannot make a judgment. They could delay the transaction for a while. Appointing a trusted contact is a start, but it is not going to stop the problem.

Conversations with the consultant community indicate that many of them felt that if the plan sponsor were considered to have a fiduciary role for participants that separated from service or retired, with indications of diminished capacity, that plan sponsors would be more reluctant to have those participants remain in the plan. That is not the outcome that the Department, or any of us, want to see.

The industry needs to establish written policies and procedures to identify "red flags" that may indicate diminished capacity and how to deal with it. If diminished capacity is suspected, advisors and consultants should meet with the client only in the presence of another staff member who is taking notes and

maintaining a log of discussions and actions. Advisors and consultants need a network of professionals who can support clients and families dealing with diminished capacity.

Lisa Bleier, Securities Industry and Financial Markets Association (SIFMA)

The Council heard the testimony of Lisa Bleier who is Managing Director and Associate General Counsel at SIFMA, and head of its Private Client, Retirement & State Government Affairs teams. In this capacity, she supervises and coordinates SIFMA's outreach to Congress and government regulators on retirement and senior investor matters, as well as managing the teams engaged in state and retail issues. The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks and asset managers operation in the US and global capital markets. They serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance and efficient market operation and resiliency.

SIFMA has been addressing and researching issues surrounding diminished capacity and cognitive impairment for over 12 years, which led to the first protective legislation in 2010 in the state of Washington. After the legislation was implemented, other states became interested in using similar language as a potential safe harbor.

The trusted contact concept has become part of the FINRA Safe Harbor, and it has been helpful in several ways. When fraudulent situations arise around diminished capacity, it is usually a family member or caregiver (not an outside fraud). There was a study done by the NY Protective Care Agency which found that in 70% of instances the perpetrator of the fraud was a family member or caregiver.

The first step of any solution involves training on cognitive decline and financial exploitation. Cognitive impairment is not easily diagnosed even among professionals so guidelines to address suspected diminished capacity are difficult to develop across such a wide range of institutions.

Currently if potential diminished capacity is identified, the FINRA Safe Harbor allows a hold time of 25 days for only a particular disbursement, not for all transactions for the account. The participant still has access to his or her funds for other normal expenditures while the disbursement under research is being resolved. The average time to investigate is 50-100 days and consideration is underway to revise the safe harbor to more closely align with the time required for resolution. Additionally, it is important to revise the safe harbor to look at all transactions, not just disbursements. For example, someone could convince an older person to sell an annuity if the bad actor wants cash/liquidity.

The biggest red flags³⁷ are related to “changes” in behavior, and therefore it is important to focus on the changes. For example, if someone is always forgetful, forgetting something would not necessarily be a red flag. Red flags are things like beneficiary changes and unexpected withdrawals and transfers.

A recurring theme among those that testified was to implement broader training on identifying red flags and the steps an institution can take to address diminished capacity. Among those steps are the following:

1. First, escalate internally the concern about diminished capacity.
2. Have a deep discussion with the client about the nature of the distribution.

³⁷ <https://www.sifma.org/wp-content/uploads/2017/07/toolkit-red-flags-aarp-no-logo.pdf>

3. Reach out to the trusted contact and other trusted contacts that surround the client, like family members, medical personnel, multi-disciplinary support from Adult Protective Services and local law enforcement.
4. Hold the withdrawal to allow time for research and to speak with the trusted contact.
5. Partner with others like Local Law, District Attorney, Women's Institute for a Secure Retirement (WISER) or the National Adult Protective Services Association (NAPSA).
6. Employ technology to identify changes in behavior like a change in the risk profile of the account.

SIFMA has been working on a portal solution with the US Department of Justice and EverSafe. The portal is an online reporting tool that allows someone to report a potential instance of financial exploitation that would then be transferred to the appropriate adult protective services agency. This simplifies the reporting process since it is not always clear who someone would need to report something to. It provides information only to those who should be aware of the situation. It is a secure site that cannot be downloaded and is accessed only by authorized individuals. This solution is currently available in three states and one county.

Recordkeepers

The Council heard testimony that indicated recordkeepers vary significantly on their policies and procedures addressing diminished capacity ranging from having a dedicated team of representatives, with annual required training modules addressing diminished capacity and fraud, to other recordkeepers who state they have experienced no cases of diminished capacity and fraud and have had no requests from clients to address the issue. The Council also learned that there is no information on how prevalent procedures are across the industry or how much consistency exists.

The data seem to indicate that, if the recordkeeper felt something inappropriate was occurring in a participant account, one fourth of them would delay the distribution and see if there is anything else to learn from the participant's data in their account. However, if nothing showed up, they would release the transaction without any further investigation. The only data available to them for review is what was experienced in a call. If it is an electronic transaction, there is virtually no data to review for appropriateness.

The Council learned that there is a significant upward trend in the number of individuals suffering from diminished capacity and making poor investment decisions or becoming victims of financial abuse or exploitation. However, when somebody is doing something insidious it is difficult to detect. Testimony indicated the belief that cases are underreported and individuals are often ashamed or embarrassed to report fraud, especially when the fraud was perpetrated by a relative.

It can be more difficult to recognize exploitation when it is being perpetrated by someone who knows the victim well. Some fraud measures, such as security questions or online passwords, may be easy for the exploiter to authenticate. Even though cyber criminals target the elderly, the majority of reported cases of fraud are perpetrated by a relative or a caregiver.

Tim Rouse, Society of Plan Administrators and Record Keepers Institute (SPARK)

The Council heard the testimony from Tim Rouse who is the executive director of the Society of Plan Administrators and Record Keepers Institute (SPARK). Mr. Rouse has over 35 years of experience in the financial services industry dealing with the retirement services of large mutual fund companies. The

SPARK Institute represents defined contribution recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms and investment managers. Mr. Rouse's testimony reflected the work of SPARK's members, including the work of the Fraud Prevention Committee. SPARK members are on the front line with plan participants and interactions with them. SPARK has not identified red flags for diminished capacity, but members have said that they have procedures covering fraud.

Mr. Rouse indicated that the larger issue of cognitive decline has broad implications and requires more research before consistent guidelines can be adopted in the recordkeeping industry. Research is needed about the other regulatory regimes and how they deal with diminished capacity. The testimony from FINRA, AICPA, and SIFMA regarding their approaches will be of value to the recordkeeping industry.

However, as noted by Mr. Rouse, applying the approaches of an individual one-on-one client relationship is different than the relationship that SPARK members have because of the role of the employer as a fiduciary. That can complicate the process. If a participant remains employed by the plan sponsor, the recordkeeper can alert the plan sponsor and await other instructions when diminished capacity or cognitive decline is suspected.

In many cases, while legally still being a participant in a plan, the employer no longer has a relationship with participants after they separate from service but leave their assets in the plan. Plan sponsors hire SPARK members as directed recordkeepers to process all transactions in a prompt manner. When a participant is properly identified and validated, if the participant executes a transaction, recordkeepers are obligated to process it regardless of the wisdom of that transaction. This is exacerbated when the transaction is initiated via an online electronic system.

The recent trend has been to promote participants staying in the plan for sound and good reasons. The downside of that trend could be an increase in encounters that SPARK members face with participants who are showing signs of cognitive decline. One solution might be to offer employers a new option. This option may allow the employer to better manage their responsibility for former employees if, at the time of separation from service, they obtain a trusted contact. By completing a trusted contact form the employer may be able to address the fiduciary liability and the recordkeeper would have an alternative source for diminished capacity concerns. This is a model from FINRA that might be applicable to the retirement and employee benefits marketplace.

It would be helpful for the Department to define whether they feel that the issue of diminished capacity is a fiduciary responsibility. The RIAs, consultants and plan sponsors are making decisions under uncertainty. Given the trend of asking people to stay in the plan, plan sponsors should be advised whether there is fiduciary responsibility for diminished capacity so that they can make appropriate decisions, in the best interests of the participants, and not find out after there is an incident. However, fiduciary responsibility for diminished capacity, without also providing some mechanism like the trusted contact option, could be detrimental to the goals of the Department in helping participants remain in the plan.

Michele Kryger, AIG Life & Retirement

The Council also heard the testimony of Michele Kryger who is the Senior Compliance and Elder & Vulnerable Client Care Officer at AIG Life & Retirement. She has been actively presenting on this important topic at industry events, to client groups and in other arenas, including through her participation in various senior investor protecting working groups. She pointed out that diminished capacity can affect employees as well as retirees. Although diminished capacity is usually associated with the elderly, it can

occur at any age. When people of any age lose the capability to manage their finances, they may also become more vulnerable to investment fraud and other forms of financial abuse.

Ms. Kryger shared the guidance AIG provides to financial advisors and other client-facing employees with respect to protections employees, plan participants, retirees and other individuals can put in place to provide a system of checks and balances. This guidance includes the following: providing use of a Power of Attorney, trusted contacts, inviting someone trusted into conversations about finances and working with a financial advisor or professional.

Christine Hanna, Fidelity Investments (“Fidelity”)

The Council heard testimony from Christine Hanna, senior legal counsel for Fidelity Investments (“Fidelity”), a retirement service provider that provides recordkeeping services for more than 22,000 employers and 25 million participants and beneficiaries. Their plan services include a dedicated team of representatives trained in identifying potential diminished capacity and financial exploitation signs during interactions with plan participants. She noted that when it appears that diminished capacity concerns may have merit, Fidelity works with plans to take actions including establishing a trusted contact or a Power of Attorney and limiting distributions from the account.

Fidelity representatives are required to participate in regular training modules, at least annually, to assist them in identifying potential diminished capacity and financial exploitation signs during interactions with plan participants. This training includes the identification of red flags related to diminished capacity and financial exploitation such as:

- Confusion with simple concepts or familiar tasks
- Repeating instructions or questions
- Dramatic shift in investment strategy
- Memory loss
- Verbal confirmation of health issues
- Changes in trading strategy
- Confusion regarding account balance
- Request to add authorized individuals

When a Fidelity phone representative identifies a participant that appears to be exhibiting signs of diminished capacity or may be a potential victim of financial exploitation, such matters are escalated. If, upon reviewing the circumstances, a plan sponsor concurs with the concerns escalated to them by Fidelity, the participant is asked to provide a Power of Attorney or contact a trusted friend or relative and execute a Power of Attorney to provide assistance with their plan account. In instances where financial exploitation is suspected, a referral is made to Adult Protective Services in the state of the participant’s residence. Fidelity may also contact local law enforcement to request a wellness check where concerns may warrant.

Diminished capacity is an important emerging issue in an aging U.S. population where there is no substantive research or guidance for plan sponsors, plan financial advisors and recordkeepers to rely on. Ms. Hanna made the following recommendations to the Council to consider supporting and recommending:

1. Clear guidelines for plan sponsors to follow in identifying and taking steps to address participants that exhibit signs of diminished capacity or financial exploitation.

2. That plan sponsors execute reasonable restrictions on participant plan accounts temporarily preventing the distribution of assets where participants exhibit signs of diminished capacity or financial exploitation and that the Council support a recommendation to relieve plan sponsors from potential fiduciary implications for instituting reasonable account restrictions.
3. That plan sponsors adopt the use of a “trusted contact” selected by plan participants, where the “trusted contact” could be approached where concerns related to diminished capacity or financial exploitation are raised.
4. That the plan sponsor community adopt programs to have participants designate and maintain a Powers of Attorney related to their workplace savings plans.
5. Educational training opportunities to assist plan sponsors in assessing and taking action where participants exhibit signs of diminished capacity or financial exploitation.

Lisa Tassara, Charles Schwab

The Council also heard from Lisa Tassara who is Managing Director of Charles Schwab Client Services. She oversees the activities of Schwab’s Client Services teams, which include onboarding new clients and accounts, and daily servicing of all third party administrators.

Ms. Tassara indicated that Schwab’s first (known) instance of fraud occurred in January 2017 and all potential types of fraud are treated the same. If there is fraud, it is typically after-the-fact, when the individual receives the 1099 and Schwab starts the recovery process. They are not capturing trusted contacts or POAs. Opportunity in the plan sponsor space is through educating plan sponsors (other companies are doing this through SPARK as well). She indicated that there is a need to educate on tools that are available.

Jessica Tuman and Michele White, Voya Financial

The Council also heard from Jessica Tuman, who is the Vice President of Voya Financials’ Voya Cares[®] program, and Michele White, who is the Senior Vice President, Enterprise Contact Centers at Voya Financial. Mses. Tuman and White shared that Voya provides training in various disability domains and they categorize aging as one of the four categories of disabilities. They agree that the costs of elder care can be significant. There is a significant amount of training around fraud and all employees must take training specifically focused on things like elder abuse, fraud and exploitation. They review documented policy and procedures, call logs and recorded calls and provide examples.

Employees are specifically trained to identify fraud and, in particular, diminished capacity. They must follow a documented set of policies and procedures when someone in the call center suspects an issue. They communicate with the caller that they are going to call the participant back, and then the issue gets escalated to a customer advocacy team, where they review all previous calls and activity. Everything is documented and a flag is placed on the account, so that a note would pop up in future instances. If further investigation is needed, the situation is referred to their legal group and the plan sponsor.

Stacey Barrow, Marathas Barrow Weatherhead Lent LLP

The Council also reviewed the incidence and implications of diminished capacity in the health and welfare benefits arena. The Council heard testimony from Stacey Barrow, who is a partner at Marathas Barrow Weatherhead Lent LLP, a boutique employee benefits, executive compensation and employment law firm that he co-founded in 2015. Mr. Barrow indicated that in the health and welfare arena the issue

of diminished capacity is not addressed in contracts, as it doesn't change delivery of care. He indicated that dealing with diminished capacity:

- Is not as prevalent in the health & welfare space;
- Is not systemic in the Third-Party Administrator or Telemedicine Medicine arena (reliance on health care proxy, Power of Attorney or HIPAA authorization to discuss with a family member or perhaps trusted contact);
- Could potentially impact plan sponsors with retiree-only group health plan benefits (little protocols or processes);
- Could potentially be referred to the local Office of the Aging, outside counsel or Employee Assistance Programs (EAP);
- There is no reliance or direction on what the obligation of the fiduciary is if they know that someone has diminished capacity;
- They look to the terms of the plan (typically provisions such as authorized representative and facility of payment language).

Mr. Barrow suggested employers may want to:

1. Refer employees and family to Employee Assistance Programs
2. Secure additional documentation at enrollment, add a contact person, HIPAA authorization, remind participants about beneficiary designation. (possibly use HIPAA authentication and trusted contact combined). Let the employer decide. He suggested the Department may want to provide employers with FAQ guidance, and felt that would be helpful to address:
 - a. Reliance
 - b. Direction on what to do and not to do
 - c. Clarify obligation of fiduciaries in these markets
 - d. The Department may want to produce a Model Health Care Proxy (may need to be State specific)

He suggested that TPAs would need a letter from a doctor, direction from plan sponsor and a Health Care Proxy.

VI. COUNCIL OBSERVATIONS AND REASONS FOR RECOMMENDATIONS

Council Observations

The Council concluded that this topic is extremely important, is of increasing concern and deserves attention and further research. In this regard, the Council agreed that information and/or guidance from the Department on this topic would be welcome, with one caveat: any such information or guidance should be flexible and allow the employee benefits community in particular to tailor the ways in which they carry out the recommendations and guidance of the Department.

One of the key things the Council observed is that there is already *a lot* of information, much of it publicly available, on the topics of diminished capacity and the financial exploitation of aged populations. Academics, trade groups and many governmental and regulatory organizations are grappling with, or have grappled with, these issues already and have developed and implemented policies and processes intended to address identified concerns. In some respects, then, the Department really has a head start on this issue and may borrow or piggy-back on work that has already been done. A key challenge, however, for the Department is how best to get this existing information into the *right* hands (employees, family members, employers and service-providers) and at the *right* time.

With respect to individuals themselves (employees, retirees, their family members and others who are close to them), the Council observed from the testimony that it seems as if some individuals are well prepared for the challenges of aging in retirement—they have identified trusted contacts and executed Powers of Attorney, healthcare proxies and directives, and perhaps also executed wills and taken other steps to prepare financially for later-in-life circumstances. Other individuals, however, are less well-prepared for the eventuality of aging and the potential of suffering from diminished capacity. Indeed, it appeared to the Council, based on the testimony of professionals on aging, that many Americans are not even aware of the need, at least, to think about this issue. Here again, the public policy challenge is, how does one highlight this need?

In the retirement/welfare benefits space, the Council also observed that perhaps these issues have not yet taken on a “crisis” footing, meaning that the Department has a unique opportunity to address these issues in a thoughtful manner and with a view on the long-term, as opposed to needing to address an urgent issue that requires immediate remediation. In this regard, the Council heard from retirement plan recordkeepers and other service providers who noted that this topic has only recently started to become a focus. It is also the Council’s understanding that the Department’s Benefit Advisors, although occasionally encountering this topic, have not yet seen it develop into a predominant problem.

Although all Council members viewed FINRA’s “trusted contact” approach favorably, certain Council members observed that, in the retirement space, it is often a challenge to get participants to take action on routine benefits issues, such as filling out a beneficiary designation form or keeping an address up-to-date. Another potential challenge with respect to, e.g., the “trusted contact” approach in the employee benefits context is determining which entity is in the best position to solicit this information: the employer (when the employee is still actively at work), the plan administrator (not only for current employee-participants but also for terminated employee-participants and retirees in payment status), and/or the recordkeeper (the entity often having the most direct contact with participants). Here, though, some Council members observed that plan sponsors and administrators could easily inquire of their plan’s recordkeepers what practices and procedures the recordkeepers have in place to address this issue. The

topic could also easily be included as part of request-for-proposal questionnaires used when evaluating recordkeepers and other plan service-providers.

With respect to the approaches currently in place at FINRA, some Council members wondered how easily those approaches could be implemented in the context of employee benefit plans. For example, some members questioned whether, absent statutory or regulatory relief, a plan administrator would voluntarily impose restrictions on participant accounts—whether limited to distributions or, more broadly, to other plan transactions such as investment decisions. In this regard, some Council members (and some witnesses) expressed the concern that such restrictions might be viewed as voiding the fiduciary protection of ERISA §404(c), which provides a carve-out from fiduciary liability for investment losses in individual account plans provided the participant is able to exercise control over the assets in the participant’s account. In this regard, Council members observed that ERISA §206(d) expressly permits plan administrators to place a temporary hold (which can last up to 18 months) on certain plan distributions while it determines whether a domestic relations order constitutes a “qualified” domestic relations order for purposes of ERISA, requiring payment of some or all of a participant’s pension or retirement plan benefits to an “alternate payee.”

Another issue the Council has grappled with is figuring out the best role for the Department to take on these issues. The Council debated whether formal guidance was needed in specific areas, such as instituting a “trusted contact” process and/or permitting plan fiduciaries and recordkeepers to impose a temporary hold on participant transactions, where the administrator or recordkeeper suspects the participant is suffering from diminished cognitive capacity or is the target of financial fraud, or whether the best approach was for the Department to share information with and educate the general public, and the benefit plan community, with the short-term goal of raising awareness of this issue. Some Council members, who are more familiar with the Department’s role as a regulator under ERISA, were less familiar with its outreach and educational missions in retirement security. Similarly, some Council members were unsure of the Department’s, or at least EBSA’s, regulatory authority with respect to employers *as employers*, as distinct from employers acting as administrators under ERISA with respect to their benefit plans. For example, it might be wonderful, from a public policy perspective, for employers to offer robust financial wellness programs and provide legal services plans so that all employees, regardless of resources, could have a Power of Attorney, healthcare proxies, and wills and other estate planning documents put in place in advance of cognitive decline. However, in the absence of statutory mandates, the Department likely lacks legal authority to do this. Other Council members observed that, even if the Department did have such authority, such efforts—coming during the period of active employment for an employee—might be “too soon,” coming years before the employee might actually need the benefit of those efforts, with employees’ circumstances likely to have changed significantly in the intervening period. Other Council members understand well the important role of the Department’s educational mission and believe that adding information regarding diminished capacity to the Department’s educational resources would be extremely helpful. That all said, the limitations, or perceived limitations, with regard to the Department’s roles and resources affected, somewhat, the scope of the recommendations that the Council ultimately is making.

In light of these observations, the Council developed the three recommendations, as set forth at the beginning of this report. In this regard, the Council was of the view that the Department might wish to focus on its information and guidance in three separate categories:

- Education measures: things that will encourage people to take action *before* they begin to experience cognitive decline;
- Identification measures: steps that individuals and entities can take to identify the problem; and

- Remedial measures: steps that individuals and entities can take after the problem of diminished capacity has been recognized.

Reasons for Recommendations

Based on the testimony heard and the research performed by this Council, and for the reasons stated herein, the Council makes three recommendations that highlight the issue of the risks to ERISA plan participants resulting from diminished mental capacity, including potential financial exploitation, and outlines the steps the Department can take to provide help and guidance to ERISA plan fiduciaries, plan sponsors and plan service providers, as well as plan participants and beneficiaries, to anticipate and address the potential of diminished capacity risks participants may face.

EDUCATE THE PUBLIC AND THE ERISA COMMUNITY ABOUT THE RISK OF DIMINISHED CAPACITY

As part of the Department's outreach and education programs, the Council recommends that the Department provide the general public education through brochures, webinars, educational material and/or training material to highlight the topic of diminished mental capacity, the associated risk of potential financial exploitation, and the steps one can take to forestall the risk. There is a tremendous amount of material available from a multitude of sources that identifies the risks, red flags that should trigger action and possible intervention, and steps that can be taken, in advance, as well as at the time of an event, to protect the potential victim. The Council feels that the benefits community, in addition to the general public, would be well-served if those resources were identified, organized for consumption, and made readily available.

ISSUE GUIDANCE THAT OUTLINES STEPS THAT CAN BE TAKEN BY THE ERISA COMMUNITY IN ANTICIPATION OF THE RISK OF DIMINISHED CAPACITY

The Council recommends that the Department publish information for fiduciaries, plan sponsors, as well as for third-party administrators, recordkeepers and other plan service providers on the topic, with a focus on and, as applicable, links to the best practices recommended by the financial services industry and the steps it takes to identify and address individuals who exhibit signs of diminished mental capacity and to reduce the risk of financial exploitation. Fiduciaries could then work with their current plan service providers and recordkeepers to establish policies and procedures that are appropriate for their plans and plan participants to address this issue. This material would also be available to help better prepare fiduciaries in their efforts to solicit, select and contract with future plan service providers.

ISSUE GUIDANCE THAT OUTLINES STEPS THAT CAN BE TAKEN BY FIDUCIARIES ONCE A PARTICIPANT DEMONSTRATES DIMINISHED CAPACITY

The Council recommends that the Department issue guidance that recognizes that fiduciaries may voluntarily adopt policies or procedures that:

- (1) impose reasonable temporary restrictions on participant plan actions, accounts or benefit payments to prevent the distribution of assets when participants exhibit signs of diminished capacity or financial exploitation, and/or

(2) encourage actions by participants such as the identification of a “trusted contact,” require confirmation of a Power of Attorney authorization’s continuing effectiveness, or take other reasonable steps to help in the investigation to protect participants from potential fraud and financial abuse.

The Council believes that from a public policy perspective and, in a perfect world, if employers were to establish programs such as legal services, employees would have ready access to help with Power of Attorney authorizations, wills, “trusted contact” selection and designations, etc. However, we recognize that establishing these programs is beyond what many employers may be able to do and actually beyond EBSA’s scope. The Council does, however, believe that the better prepared the plan participant is in advance for the potential risk of diminished capacity, the better, and from a plan administration stand point, the objective should be to deal with this issue at the front end of a transaction and not after an event has transpired, when it may be too late. The Council also heard that larger recordkeepers have adopted and are effectively administering processes that address cognitive issues and hope that plan fiduciaries will look for similar capabilities from their plan service providers and recordkeepers. So, this recommendation is intended to give fiduciaries the ability to establish, on a voluntary basis, policies and procedures that would allow them, or their plan service providers, the time, prior to distribution of plan assets, to investigate their concerns, engage identified trusted contacts or other professionals and notify the Adult Protective Services agency and/or law enforcement when concerns and suspicions are confirmed as founded.

The Council considered but did not add a recommendation, made by some witnesses, for the Department to provide fiduciary relief for implementing these types of policies and procedures, as the Council did not reach consensus that such relief is necessary or appropriate.

The Council recognizes that the topic of diminished capacity is extremely important, of growing concern and deserves further research and regards our recommendations as interim actions that the Department could implement while it continues to study this topic.