UNITED STATES
DEPARTMENT OF LABOR

In the Matter of:)
)
PUBLIC HEARING ON IMPROVING)
INVESTMENT ADVICE FOR)
WORKERS AND RETIREES)

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UNITED STATES DEPARTMENT OF LABOR

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

In the Matter of:)
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PUBLIC HEARING ON IMPROVING)
INVESTMENT ADVICE FOR)
WORKERS AND RETIREES)

Remote Hearing
Suite 206
1220 L Street, N.W.
Washington, D.C.

Thursday,
September 3, 2020

The hearing commenced, pursuant to notice, at 9:00 a.m.

PARTICIPANTS:

Government Panel:

JEANNE WILSON
Acting Assistant Secretary, EBSA

YOUNGOK LIM
Senior Economist, EBSA

KAREN LLOYD
Chief, Division of Class Exemptions, Office of Exemption Determinations, EBSA

LYSSA HALL
Director, Office of Exemption Determinations, EBSA

PARTICIPANTS: (Cont'd.)

Panel 1:

On behalf of Committee on Investment of
Employee Benefit Assets (CIEBA):

DENNIS SIMMONS
ROBIN DIAMONTE

On behalf of RetireAware:

DANIEL S. ALEXANDER

On behalf of DALBAR, Inc.:

LOUIS HARVEY
CORY CLARK

On behalf of Covington & Burling LLP:

JASON LEVY

Panel 2:

On behalf of AFL-CIO

BRANDON REES

On behalf of Pension Rights Center:

NORMAN STEIN

On behalf of Public Investors Bar Association:

SAMUEL B. EDWARDS
JOSEPH PEIFFER

Panel 3:

On behalf of American Council of Life Insurers:

JAMES SZOSTEK

PARTICIPANTS: (Cont'd.)

Panel 3: (Cont'd.)

On behalf of American Association of Life Underwriting/GAMA International Committee of Annuity Insurers, Indexed Annuity Leadership Council, Insured Retirement Institute, National Association for Fixed Annuities, National Association of Independent Life Brokerage Agencies, National Association of Insurance and Financial Advisors:

BRADFORD CAMPBELL

On behalf of Federation of Americans for Consumer Choice:

KIM O'BRIEN

On behalf of Groom Law Group:

STEPHEN M. SAXON
JON W. BREYFOGLE

Panel 4:

On behalf of AARP:

DAVID CERTNER

On behalf of Public Citizen:

BARTLETT NAYLOR

RON A. RHOADES

Panel 5:

On behalf of Securities Industry and Financial Markets Association:

KEVIN CARROLL

On behalf of Cetera Financial Group, Inc.:

MARK QUINN

PARTICIPANTS: (Cont'd.)

Panel 5: (Cont'd.)

On behalf of Davis & Harman LLP:

KENT A. MASON

Panel 6:

On behalf of Consumer Federation of America:

BARBARA ROPER

On behalf of North American Securities Administration Association, Inc.:

ANDREA SEIDT

On behalf of CFA Institute:

JAMES ALLEN

On behalf of National Employment Law Project:

JUDITH M. CONTI

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

2 (9:00 a.m.)

3 MS. WILSON: Good morning, and welcome to
4 today's hearing. This is the Employee Benefits
5 Security Administration's public hearing on the
6 proposed exemption on improving investment advice for
7 workers and retirees. I'm Jeanne Klinefelter Wilson,
8 the acting Assistant Secretary at EBSA.
9 Before we get started with testimony, I'll
10 say just a few words about why we are here today, and
11 then I'll cover a few procedural matters.
12 Thank you for participating in this next
13 step in the rulemaking process. On July 7th, we
14 published the proposed prohibited transaction
15 exemption. During the comment period, which closed
16 August 6th, we received 106 comments, and today's
17 hearing will continue the dialog.
18 The proposed exemption offers a new
19 prohibited transaction class exemption for investment
20 advisers, who are fiduciaries under the five-part test
21 set out in the Department's 1975 regulation. The
22 proposed exemption would provide relief that is
23 broader and more flexible than the Department's
24 existing exemptions.
25 It would also provide regulatory certainty

1 and streamline regulatory requirements so investment
2 advice fiduciaries could comply with one exemption for
3 a variety of different types of transactions.
4 We are grateful for all the valuable input
5 we have already received as part of the notice and
6 comment process, and we look forward to your
7 observations today. We will add today's testimony to
8 the public record, and we will take this feedback into
9 account as we continue our work on this important
10 project.
11 But before we get started, there are a few
12 procedural matters we should cover. Due to the COVID-
13 19 pandemic, we are conducting this hearing virtually.
14 So some of the logistics will be different. Notice of
15 today's hearing was posted on EBSA's web site on
16 August 21st. The hearing is open to the public, and
17 we posted information on viewing the hearing on EBSA's
18 web site.
19 The public comments submitted on the
20 proposal, agenda for today's hearing, and requests to
21 testify with outlines of the testimony are also posted
22 on EBSA's web site.
23 We have six panels today. There are three
24 to four witnesses on each panel. We have a full
25 agenda, so we ask the witnesses to watch your time.

1 Each witness has 10 minutes to present their
2 testimony. Multiple individuals will speak on behalf
3 of some of the organizations testifying today. So
4 I'll clarify that the 10-minute allotment is per
5 organization, not per individual.
6 A timer will show up on the screen to help
7 with time management, and we will be enforcing the 10-
8 minute allotment to ensure that we stay on schedule.
9 The witnesses will present their testimony, and then
10 the government panel members will have an opportunity
11 to ask questions.
12 We are not accepting questions from the
13 audience or the witnesses. Also, you should not draw
14 any inferences or conclusions based on the way we
15 happen to frame a particular question or questions.
16 Our goal today is not to suggest or communicate any
17 particular resolution of pending issues, but rather to
18 develop the public record and learn from what you have
19 to say.
20 Today's hearing is being transcribed. The
21 hearing transcript will be available to the public on
22 EBSA's web site within about a week. Witnesses will
23 testify in the order in which they appear on the
24 hearing agenda.
25 To assist us today, we have a few requests

1 for those testifying. First, it would be very helpful
2 if before you testify you identify yourself, your
3 affiliation, and the organization that you're
4 representing, if any.
5 Second, please limit your remarks to the
6 allotted 10 minutes. Pay attention to the timer that
7 will appear on your screen.
8 Third, please remember to speak directly
9 into your phone or computer microphone. That's
10 critical to get a complete and accurate transcript.
11 To make sure speakers are correctly identified,
12 including for the Q&A session, please identify
13 yourself each time you speak.
14 Now, I would like to introduce the other
15 members of the government panel: Lyssa Hall, Director
16 of the Office of Exemption Determinations; Karen
17 Lloyd, Chief of the Division of Class Exemptions; and
18 Youngok Lim, a Senior Economist in the Office of
19 Regulations and Interpretations.
20 So now let's start with the first panel.
21 Dennis Simmons from CIEBA, please begin.
22 MR. SIMMONS: Great. Thank you, Jeanne.
23 And good morning, everyone. Thank you for
24 the opportunity to testify today regarding the
25 Department's proposed investment advice exemption, and

1 more generally the standards applicable to advisers
2 making rollover and other recommendations to plan
3 participants.
4 My name is Dennis Simmons, and I'm the
5 chief -- I'm the executive director of CIEBA, the
6 Committee on Investment of Employee Benefit Assets.
7 I'm joined today by Robin Diamonte, the chief
8 investment officer of Raytheon Technologies
9 Corporation, and a member of CIEBA's board.
10 CIEBA is a trade association that represents
11 many of the nation's most experienced investment
12 fiduciaries. CIEBA's members include more than 110 of
13 the country's largest pension fund and 401(k) plan
14 investment fiduciaries, and our members manage more
15 than $2 trillion of defined benefit and defined
16 contribution plan assets on behalf of more than 17
17 million plan participants and beneficiaries.
18 CIEBA represents the interests of CIOs, who
19 have decades of experience in serving as investment
20 fiduciaries for many of the country's largest and most
21 sophisticated pensions and 401(k) plans. CIEBA and
22 our members are committed to promoting policies that
23 are protective of plan participants and the retirement
24 system.
25 We sincerely appreciate the Department's

1 efforts to ensure that those providing advice to plan
2 participants are held to the highest possible
3 standard. Over the past three decades, as we all
4 know, there have been profound changes in the
5 retirement system, not least of which is the fact that
6 401(k) plans have largely replaced defined benefit
7 plans as the predominant retirement plan for employees
8 throughout the United States.
9 Because of the shift from a DB to a DC
10 system, participants are now much more involved in
11 managing their own retirement savings. That gives
12 participants more flexibility to manage their savings
13 in a way that meets their personal objectives, but it
14 also means participants may need more help in making
15 decisions about managing their savings.
16 That is particularly true when a participant
17 leaves employment and has to make a decision about
18 whether to stay in the plan or roll over. Rollover
19 decisions are particularly daunting for most people,
20 and the decision to roll out of a low-cost,
21 professionally managed 401(k) plan into a potentially
22 higher-fee IRA can have a devastating impact on a
23 person's retirement prospects.
24 Participants need advice from trusted
25 experts and safeguards from conflicted advice when

1 considering whether and how to roll over their
2 retirement savings. Effective measures to ensure
3 participant retirement savings programs stay on course
4 throughout the participant's lifetime is a topic that
5 CIEBA's chief investment officer members regularly
6 discuss during our periodic meetings and workshops.
7 I'll turn it over to my colleague, Robin.
8 (Pause.)
9 MR. SIMMONS: Are you muted, Robin?
10 (Pause.)
11 MS. DIAMONTE: Hi every -- good morning.
12 Can everyone hear me?
13 MR. SIMMONS: Got you.
14 MS. DIAMONTE: Great, wonderful. So as
15 Dennis mentioned, I am the CIO for Raytheon
16 Technologies Corporation. Prior to that, it was
17 United Technologies Corporation. And in that role, I
18 am an investment fiduciary for both our defined
19 benefit and defined contribution retirement plan.
20 Our 401(k) plan is one of the largest in the
21 country. We have roughly 200,000 participants and 50
22 billion of assets in the plan. We have worked very
23 hard to make sure that our employees and retirees have
24 access to the best possible retirement savings
25 program.

1 We are able to leverage the plan size in our
2 institutional relationships to give participants
3 access to low-cost, high-performing investment options
4 with a dollar-weighted expense ratio of 20 basis
5 points. As a matter of fact, our target date funds
6 have an expense ratio of six to seven basis points.
7 And our plan is specifically designed to help guide
8 participants to and through retirement.
9 In fact, we added a lifetime income option
10 to our plan several years ago so that participants
11 have the option to convert their retirement savings
12 into guaranteed income stream for life. Everyone's
13 circumstances are unique, and there are certainly
14 reasons a person would want to roll out of the
15 Raytheon Technologies 401(k) plan.
16 But the vast majority of people are better
17 off staying in the plan, where they have access to
18 investments that are generally both much more cost-
19 effective than those available to retail investors and
20 selected by professional fiduciaries such as myself.
21 Despite this, it has been my experience that
22 participants all too often make the decision to roll
23 out of the plan based on recommendations from
24 financial professionals who may not have the
25 participant's best interest in mind.

1 While many brokers and advisers in the
2 industry offer effective programs and products to meet
3 participants' retirement savings needs, they
4 oftentimes go to great lengths to encourage our
5 participants to roll over because they have a
6 financial incentive to do so.
7 They actively pursue our participants, and
8 in many cases our participants make rollover decisions
9 based on slick sale pitches instead of unbiased
10 advice.
11 I want to call your attention to the
12 photograph that we submitted. So if you can please
13 show the first slide of our presentation, that would
14 be very helpful.
15 (Pause.)
16 MS. DIAMONTE: Thank you. So this is a
17 billboard right outside the corporate headquarters of
18 one of our subsidiaries. This billboard encouraged
19 participants to leave the plan and roll over into an
20 IRA. I think we can all agree that this type of
21 drive-by advice and guidance should be at a minimum be
22 closely scrutinized, and actors engaged in these
23 practices should be held to very high standards.
24 It's critically important that those making
25 recommendations to participants be held to the same

1 fiduciary standard that I am, and they should be
2 required to clearly state that they are acting in a
3 fiduciary capacity. Thank you.
4 Dennis, I'll turn it back to you.
5 MR. SIMMONS: Great. Thanks, Robin. And if
6 we could pull up the second slide of the presentation
7 that will summarize some things.
8 So Robin's experience is consistent with
9 virtually all of CIEBA's membership. That's why CIEBA
10 is supportive of the Department's proposed prohibited
11 transaction exemption. The exemption requires those
12 providing investment advice to put the participant's
13 interest first. And equally important, it requires
14 those making recommendations to acknowledge
15 affirmatively that they're acting as a fiduciary.
16 If a person is providing fiduciary
17 investment advice, there is simply no reason that they
18 shouldn't be required to say that they are acting as a
19 fiduciary.
20 Moreover, we strongly agree with the
21 Department that a person shouldn't be permitted to
22 simply disclaim away fiduciary status. Fiduciary
23 status under ERISA is and always has been dependent on
24 a person's actions, and should never turn on a
25 disclaimer buried in the endnote of a contract or a

1 presentation.

2 CIEBA also sincerely appreciates the

3 Department's efforts to expand the application of

4 ERISA in the context of rollovers, by clarifying the

5 five-part test used to determine if a participant is

6 providing fiduciary investment advice. For example,

7 the Department clarified that whether a rollover

8 recommendation is fiduciary investment advice is

9 determined by facts and circumstances that include

10 existence of an ongoing financial relationship after

11 the rollover.

12 CIEBA also supports the withdrawal of

13 Advisory Opinion 2005-23A. It can -- it created an

14 unlevel playing field that made it far too easy for

15 people to make conflicted rollover recommendations. Of

16 course, there's still more to be done. CEIBA continues

17 to believe that the five-part test itself needs to be

18 revised, to make it clearer that those making rollover

19 recommendations are always fiduciaries. Additionally

20 some financial professionals, particularly th -- those

21 who are focused on IRAs and the retail market, are

22 unfamiliar with the prohibited transaction rules, and

23 therefore CEIBA encourages the Department to do more

24 to educate those folks who may not be familiar with

25 those rules about the -- to educate those

1 professionals about their duties. And we urge the
2 Department to focus the agency's oversight and
3 enforcement efforts on the rollover market to better
4 protect savers.
5 Again, we sincerely appreciate the
6 opportunity to testify today on behalf of CIEBA's
7 chief investment officer members, and we'd be pleased
8 to answer any questions you may have.
9 MS. WILSON: Thank you. Thank you, Mr.
10 Simmons and Ms. Diamonte, for that important
11 testimony. At this point, I'm going to ask our
12 government members if they have any questions.
13 MS. LLOYD: Not at this time. Thank you.
14 MS. WILSON: Okay. So please stand by
15 because there may be more questions at the end of this
16 particular panel.
17 Next we have Mr. Alexander from RetireAware.
18 MR. ALEXANDER: Hey. Good morning. Can you
19 hear me okay?
20 MS. WILSON: Yes.
21 MR. ALEXANDER: Excellent. Well, thanks for
22 the opportunity to present, and I certainly do
23 appreciate Ms. Diamonte's and Mr. Simmons' comments
24 regarding the proposed rule.
25 As stated, my name is Dan Alexander. I am

1 the managing director with RetireAware. We are a firm
2 that is solely committed to better help plan sponsors
3 understand the conflict of interest structures that
4 not only undermine plan health, but undermine
5 participants' savings. I've worked for a number of
6 years as well with a large retirement plan
7 recordkeeper, where I served in several roles, not
8 only as a financial adviser interacting directly with
9 plan participants, but as a manager as well direct --
10 interacting with plan sponsors, all the way up through
11 an officer of the firm's broker-dealer and a regional
12 vice president overseeing plan sales in the ERISA
13 space.
14 I want to focus my commentary today on one
15 very specific contingent of the investment advisery
16 and financial adviser world, and that is of the plan
17 representatives, service providers that provide
18 services under the covered plan. There is something
19 very unique about this certain segment of the
20 financial representative population. They are
21 different, and they're different really in three
22 capacities that they maintain that investment
23 advisers, broker-dealer registered representatives,
24 and insurance agents outside the world of a covered
25 plan do not maintain.

1 That is access, endorsement, and data. And
2 to briefly describe, access is the direct the ability
3 to engage in person, remotely via the phone, or via
4 certain web portals with plan participants.
5 Next is the use of data, not only
6 participant data, confidential, personal information
7 about themselves, but plan data that can be sorted,
8 queried, and used for the purpose of non-plan-related
9 sales that generate undisclosed revenue with
10 unchecked, unchecked products, such as their
11 suitability that those investment -- for those plan
12 participants.
13 And then lastly is endorsement. Endorsement
14 exists in two various capacities. One is implicit,
15 and explicit. These specific representatives of the
16 service providers receive the explicit endorsement of
17 the plan sponsor in -- in this case the covered plan.
18 They're allowed not only direct access to
19 these participants through this direct, explicit
20 endorsement, but they also receive implicit
21 endorsement as a result of products and services they
22 may offer in connection to providing services to the
23 plan.
24 To give you a better idea of, of what this
25 looks like in terms of a covered plan, I want to

1 introduce a concept to the committee known as capture
2 rate. For example, capture rate would represent in a
3 given covered plan if $10 million rolled out in one
4 year, and $3 million was retained by the incumbent
5 service provider or recordkeeper. That would maintain
6 a 30 percent capture rate.
7 Capture rate is supported by certain sale-
8 specific strategies, sales performance reporting, and
9 a directive from the service provider to financial
10 representatives to be able to maintain rollovers into
11 proprietary products.
12 This even becomes exacerbated when you
13 include the clearing firms of these service providers
14 that maintain rollovers into various forms of managed
15 accounts that might not easily be identified by a
16 fiduciary wanting to identify where assets are being
17 rolled to.
18 The GAO referenced in a 2011 report how
19 important the ability to cross-sell is for a service
20 provider. It is a significant form of revenue. Now,
21 I wanted to talk a little bit today about the various
22 areas in which rollovers become problematic, not only
23 for plan participants, but for the actual health of
24 the plan itself and the pricing of the plan itself.
25 Those four key areas rely on, one, is

1 product. Two is compensation as it relates to the
2 service plan provider representative. The third is
3 compensation and comparative compensation as it
4 relates to the firm and reasonable comp. And the
5 fourth deals with plan health, specifically how plan
6 health is impacted by these rollover and sales
7 recommendations.
8 So first to talk on product. As we know,
9 the underlying product a service provider provides to
10 a retirement plan is vetted through plan fiduciaries.
11 They look at the investment performance. They look at
12 investment fees, administrative fees, administrative
13 capabilities, size of an organization, and relative
14 experience before they're hired as a product provider.
15 However, when the actual service provider
16 has a financial incentive to transfer that underlying
17 group retirement plan product, and their, their
18 incentive to do so in connection to services offered
19 to the plan to non-disclosed products, unrelated
20 products of the plan for the purpose of generating
21 higher margin, that becomes highly problematic.
22 Not only do these products and services
23 maintain a higher degree of fees and expenses than the
24 incumbent institutional product. It's important to
25 note that these are individual contracts, they're not

1 subject to employer direction to another custodian
2 should that plan decide to change who they use as a
3 service provider.
4 Next, I want to talk about compensation as
5 it relates directly to the service provider
6 representatives. A common question asked by a
7 fiduciary in vetting conflicts of interest as it
8 relates to an individual investment adviser or service
9 provider is identifying how those individuals are
10 compensated.
11 What our firm typically finds is the common
12 question is asked, how do you pay your people? If you
13 ask yourselves individually here on the committee how
14 your investment professional is paid, and they were to
15 tell you that they were paid a salary and leave it at
16 that, that is a common answer received by fiduciaries,
17 only to find out that that salary is no more than
18 $5,000 to $10,000 per year, and another 100- and
19 $150,000 per year is made out of variable
20 compensation, highly dependent on the ability for that
21 service provider to transfer in-plan assets to non-
22 plan-related product.
23 Third, is compensation as it relates to the
24 plan and reasonable compensation. If you were to
25 envision in front of yourself right now on your left

1 hand side is direct fees and compensation paid to the
2 service provider, on your right column is indirect
3 fees paid directly to -- paid to the service provider
4 by a third party, consider what would happen if
5 indirect fees became a larger and a larger part of a
6 recordkeeper's relationship with a group retirement
7 plan, and those direct fees continually begin to drop.
8 What would eventually happen is service
9 providers that were in the business of providing fair
10 and transparent pricing for recordkeeping services
11 will be undermined by recordkeepers that had ill
12 intent in that recordkeepers had the intention of
13 using undisclosed products and services that to
14 generate undisclosed revenue.
15 To the extent that that revenue remains
16 undisclosed, fiduciaries will have a harder and harder
17 time identifying the differentiation between pricing
18 between recordkeepers. One recordkeeper may charge
19 $200,000 all in, and that is their fair and explicit
20 fee for providing recordkeeping services directly to
21 the plan. A less and more ill-intent recordkeeper may
22 provide $100,000.
23 A fiduciary may immediately look at the
24 lower cost platform, not realizing that that platform
25 will generate multiples of that direct fee as a result

1 of cross-sales and transferring plan participant
2 assets at a distributable event into a rollover IRA in
3 the higher margin per proprietary products that remain
4 undisclosed.
5 Lastly, as it relates to plan health, two
6 important considerations for the committee to consider
7 in the pricing of a group retirement plan is average
8 account balance and total assets under management.
9 When a recordkeeper and service provider of a covered
10 plan have a direct incent even as disclosed in form
11 ADV2 -- form ADV, part 2A of their, of their filings,
12 when there is a specific intent to transfer that asset
13 from the plan to a non-plan product, they're placing
14 downward pressure on the average account balance that
15 a plan may have by moving out those larger balances to
16 IRAs, and they're putting downward pressure on plan
17 assets.
18 Despite the fact that their role as a
19 service provider is there to help grow the plan and
20 provide the best pricing they can possibly provide, if
21 a fiduciary is in a position to make sure that pricing
22 is the best that it can be for the plan participants
23 in the plan, they're engaged in permitting a practice
24 that continually harms the plan and impairs the health
25 of the plan by reducing those two important actuarial

1 considerations.

2 I'd like to leave you with one quick
3 anecdotal story that I think is applicable and very
4 practical to individuals that save inside group
5 retirement plans, and I'm going to use the example of
6 my own mother.

7 She moved here 35 years -- you know, some 35
8 years ago from Jamaica, and she worked for a large
9 private organization that had a large 401(k) plan that
10 gave her access to institutional-class shares, the
11 very same shares that someone like a Warren Buffet or
12 a Bill Gates should be able to invest in.

13 She is solicited on a monthly basis, though
14 she has been retired for several years. On a monthly
15 basis, she is solicited to transfer those assets to a
16 IRA for the sole purpose of access to your investments
17 and control over your investments.

18 That is wrong. That's precisely what
19 millions and millions of Americans in group retirement
20 plans face on a daily basis, and they require the
21 protections of ERISA in order to be able to protect
22 them from these predatorial sales practices.

23 I thank you for your time.

24 MS. WILSON: Thank you, Mr. Alexander. We
25 really appreciate your testimony today.

1 Does our government panel have any questions
2 for Mr. Alexander at this time?
3 MS. LLOYD: Not at this time.
4 MS. WILSON: Okay. Please standby because
5 there may be more questions at -- at the end of this
6 particular panel.
7 At this point, I'd like to introduce Mr.
8 Harvey and Mr. Clark from DALBAR, Inc. Thank you.
9 MR. HARVEY: Good morning, and thank you
10 very much. I thank you for the opportunity to really
11 give some perspective to the comments that we have
12 submitted to the Department.
13 I should actually really point out that my
14 objective today is to really give perspective and
15 background, and not necessarily to repeat the comments
16 that we've made in writing. We'd like to also answer
17 your questions.
18 So with no further ado, can you bring up the
19 first slide?
20 (Pause.)
21 FEMALE VOICE: No. Give me just a second.
22 It actually is thinking about bringing up your slides.
23 (Pause.)
24 MR. HARVEY: Well, as you do that, the first
25 thing that I really want to touch on is the

1 vulnerability of the retirement investor. You know,
2 we've had some discussion about that, but I'd like to
3 really introduce a somewhat different perspective, and
4 that is that at the start of retirement, that
5 retirement investor is moving from a world of comfort,
6 of convenience, of safety and security analogous to a
7 gated community, where there -- these people are
8 protected by the responsible plan fiduciary, into a
9 new world and an -- and another opportunity, so
10 greater opportunities that are outside those gates of
11 the community.
12 But in doing so, as has been pointed out,
13 they lose protection, they lose convenience, and they
14 lose the ability to make easy choices. Adding to that
15 is the fact that there is enormous scale in the
16 marketplace that we're talking about. The
17 Department's own comments pointed out -- pointed to
18 $2.4 trillion in rollover between 2016 and 2020. And
19 importantly, this trend is expected to continue in
20 perpetuity.
21 This will attract opportunities. This will
22 attract opportunities. Few institutions have built
23 practices in systems that are outside of this gated
24 community that offer protection. But unfortunately,
25 many have not. And I would like to point out that

1 self-policing is an effective tool for the well-
2 intentioned members of the community. It is, however,
3 entirely useless for opportunists. They will simply
4 ignore it.
5 We must make it difficult for opportunists
6 to escape the regulatory framework. And with that,
7 I'd like to turn it over to Cory Clark. He'll talk a
8 little bit about the practices that we're talking
9 about, and a little background.
10 Cory?
11 MR. CLARK: Thanks, Lou. My name is Cory
12 Clark. I'm chief marketing officer of DALBAR. DALBAR
13 is a certifier and an auditor of business practices in
14 the financial services community. And in doing so,
15 we've had the opportunity to see firsthand how both
16 internal and independent due diligence reviews can
17 lead to more prudent practices.
18 DALBAR itself has been conducting ERISA
19 examinations for decades, which include assessment of
20 reasonableness under 408(b)(2), 408(g) audits and
21 certifications, voluntary reviews of computer models
22 and practices, as well as the dissemination of
23 practice aids and checklists for firms and
24 practitioners to comply with various regulations, and
25 in some cases to help them set up their own due

1 diligence reviews.

2 So it's this perspective and experience
3 which will inform the views that we will share with
4 you today.

5 And I'll turn it back over to Lou.

6 MR. HARVEY: Thank you very much, Cory.

7 The chart that you're looking at right now
8 sort of represents the framework that I want to talk
9 about. And it starts off with the responsible plan
10 fiduciary, which is analogous to the gatekeeper in our
11 gated community. And under that responsible plan
12 fiduciaries, there are three popular mechanisms that
13 act in the interest of the plan participants of the
14 retirement investor.

15 The 3(38), where the adviser is acting on
16 behalf of the participants, 3(21), where
17 recommendations are made, and 96-1 that describes
18 education. These three mechanisms really afford the
19 support that this community offers to individuals.

20 What is interesting is that this support is
21 lost at the time that the rollover decision is made,
22 and that rollover decision is irreversible. Once that
23 participant is rolled over, there is no going back to
24 the plan as a, as a practical matter.

25 It's only the plan fiduciary -- it's only

1 the responsible plan fiduciary who is in a position to
2 provide this protection. They can, the responsible
3 plan fiduciary can, enable the retirement investor to
4 make informed and educated rollover decisions.
5 And I'd like to go back to Cory to describe
6 some of the issues associated with that rollover
7 decision.
8 Cory?
9 MR. CLARK: Thanks, Lou.
10 So, yeah. So I'd like to talk a little bit
11 about --
12 MR. HARVEY: Maybe we should move to the
13 next slide perhaps.
14 MR. CLARK: Oh, yes, please. Yup. So I'd
15 like to talk a bit about some of the unique
16 considerations that are attendant to a roll over
17 recommendation. While there is a vast body of
18 generally accepted theories and practices with respect
19 to investment recommendations, there's really no such
20 uniform standard with respect to rollover
21 recommendations.
22 We've worked with several firms in tackling
23 the challenge of providing a best-interest
24 distribution recommendation. And this slide
25 highlights nine of the unique considerations. But I'd

1 like to just cover three of the most important ones
2 with you this morning, but we'd be happy to discuss
3 any others should you have questions.
4 The first unique consideration is
5 priorities. So the distribution recommendation has to
6 be influenced by a far wider array of personal factors
7 than those that govern the investment decisions. So
8 the relative importance of each of these individual
9 factors has to be established in order to arrive at a
10 prudent recommendation. And these are highly
11 personalized factors, and they can only be determined
12 through a conversation with the retirement investor.
13 And, getting at these preferences requires
14 some different skills on the part of the investment
15 professional, interrogative skills that are aimed at
16 identifying the relevant factors and their relative
17 importance. So explaining, documenting, and applying
18 these priorities in a best-interest recommendation,
19 and pursuant to the retrospective review, will
20 certainly be challenging for practitioners and for
21 firms, but it is our view that it is necessary for the
22 protection of investors.
23 The second is compensation, the second
24 unique consideration. So this is very difficult as
25 well for firms and practitioners because there are

1 going to be varying sources of compensation, some
2 direct, some indirect, some being paid now, some
3 payments being delayed down the road.
4 Also, the overall compensation that will be
5 received is speculative. The full level of service
6 that will be provided down the road may not be known
7 at the time of the rollover recommendation. To make
8 things more complicated, the other side of that
9 equation in assessing reasonableness would be cost,
10 which is also very much unknown because the service is
11 unknown.
12 And the last is the participant's needs.
13 And I just would want to leave you with an example of
14 some of the novel considerations here. And that's
15 creditor protection. To what extent does the
16 retirement investor have an actual or perceived
17 credit -- exposure to credit failure? How would
18 rolling into an IRA affect that? How does the
19 participant's state of residence affect that analysis?
20 All of these are vital questions that need
21 to be answered, and that are very novel and foreign to
22 most advisers, again costly, difficult, but very much
23 necessary for the protection of investors.
24 MR. HARVEY: I guess our time is up. Thank
25 you.

1 MS. WILSON: Thank you very much for the
2 testimony. We very much appreciate it.
3 Our next testifiers are from Covington and
4 Burling, and the representative is Mr. Jason Levy.
5 MR. LEVY: Hello. Thank you and good
6 morning. I'm Jason Levy with the law firm Covington
7 and Burling. I really appreciate the chance to
8 testify today. Our comments address and offer the
9 straightforward solution to the unintended collateral
10 consequences of the Department's proposal otherwise
11 could have on ERISA retirement plans.
12 We offer these comments from the perspective
13 of the fiduciaries and the sponsors of these plans,
14 and we do so in the spirit of helping to improve
15 whatever final guidance you develop in this area by
16 making sure that the guidance promotes the continued
17 healthy functioning of the retirement plan system.
18 Unlike other commentators, we do not take a
19 position, pro or con, on the merits of any specific
20 proposal to classify vendor conduct as fiduciary or
21 non-fiduciary. Plan fiduciaries and sponsors have a
22 strong interest in any proposal that aims to ensure
23 that recommendations to roll over funds from an ERISA
24 retirement plan are made in participants' best
25 interests.

1 Every year, plan sponsors collectively
2 contribute hundreds of billions of dollars to their
3 retirement plans. Plan fiduciaries in turn dedicate
4 themselves to maximizing the prudent growth of those
5 dollars into secure retirement income for
6 participants. This massive undertaking by plan
7 sponsors and fiduciaries would be frustrated were
8 those dollars then to be diverted into costly and
9 inappropriate investment arrangements to roll overs
10 that are not in participants' best interests.
11 That's a principle we think everyone here
12 today can agree on. However, we leave it to others to
13 figure out the best way to avoid such undesirable
14 outcomes. Our comments instead focus on a narrow, but
15 important point, which if left unaddressed could
16 undermine not only the workability of any final
17 guidance in this area, but also the continued healthy
18 functioning of ERISA retirement plans.
19 I'm happy to answer questions about our
20 comment, but today I'd like to cover three points.
21 First, the impact the Department's proposal would have
22 on plans of varying size and negotiating strength;
23 second, the steps the Department could take to address
24 this impact; and third, why our recommendations will
25 make the Department's final rule more effective.

1 On the first point, statements indicating
2 that roll overs often may be subject to the fiduciary
3 standard result in a significantly changed landscape
4 for many service providers. Service providers who
5 will now have to contend with the prospect that the
6 roll over communications could be subject to the
7 fiduciary standard.
8 This changed legal landscape raises two key
9 questions about plans' monitoring obligations. First,
10 where service providers acknowledge fiduciary status
11 and avail themselves of the PTE, does the Department
12 contemplate that plans will need to police their
13 service providers' compliance with ERISA's fiduciary
14 standards and the PTE?
15 If yes, the task of doing so would place an
16 enormous burden on plans and plan resources. For
17 example, plans would have to interject themselves into
18 a resource-intensive review of the facts and
19 circumstances governing individual rollover
20 communications. Then the plans would have to draw
21 legal conclusions as to whether the individual
22 communications satisfy ERISA's fiduciary standards,
23 and whether the institution complies with the PTE.
24 These are all inherently legal questions.
25 But the vast majority of plan fiduciaries

1 are not lawyers. They would need a lawyer on constant
2 retainer to draw out what facts and what circumstances
3 might be relevant to this review, and then go offer
4 their best assessment as to whether the legal
5 standards are satisfied. While that might be good for
6 business for us ERISA lawyers, it's not a good use of
7 plan resources.
8 Second, for service providers that do not
9 acknowledge fiduciary status, does the Department
10 contemplate that plans will need to assess the legal
11 merits of those positions? As before, reviewing,
12 questioning, and potentially challenging service
13 provider legal positions on individual roll overs
14 would require substantial plan resources and serve
15 little purpose.
16 Plans and their lawyers are not in a
17 position to divine how the Department or a court would
18 interpret the Department's rollover guidance in a
19 given circumstance, and should not be forced to take
20 sides in a hypothetical legal dispute.
21 The burdens arising from these unanswered
22 questions are especially pronounced for smaller
23 businesses. Smaller business plans simply do not have
24 the resources to conduct this kind of oversight, nor
25 do they have the leverage to extract concessions that

1 might make oversight somewhat less burdensome.
2 For example, larger plans may be able to
3 reach an agreement with service providers to prohibit
4 them from making rollover recommendations altogether,
5 or to limit the circumstances in which rollover
6 recommendations may be made. But smaller plans simply
7 do not have the bargaining power to extract such
8 concessions.
9 The Department should address these burdens
10 by making clear that plans of all sizes are not
11 required to scrutinize and potentially second-guess
12 the legal and factual positions of their service
13 providers concerning rollover communications.
14 Our comment proposes a safe harbor to
15 accomplish this goal. Under the safe harbor, plans
16 could satisfy their obligations by having their
17 service providers provide an annual certification in
18 which the service provider acknowledges either, one,
19 that its rollover recommendations constitute fiduciary
20 investment advice, and that such advice satisfies
21 ERISA and the PTE; or two, that either its rollover
22 communications do not constitute fiduciary investment
23 advice, or that it is not providing investment advice
24 of any kind with respect to rollovers.
25 This recommendation would make your proposal

1 more effective by ensuring that plans of all sizes are
2 not required to needlessly divert resources to
3 policing legal positions of service providers, or to
4 take sides in a hypothetical future legal dispute
5 between the service provider and the Department or
6 some other third party.
7 In addition, this approach avoids a
8 bifurcated regulatory regime that would require a plan
9 oversight based only on the happenstance that a
10 rollover recommendation comes from a plan service
11 provider. In practice, it is common for a financial
12 institution that is unaffiliated with a plan to make
13 rollover recommendations to a participant in that
14 plan. In such cases, the financial institution must
15 comply with the PTE if it acknowledges fiduciary
16 status. But the plan does not have a monitoring
17 obligation.
18 Since plan involvement in monitoring the
19 legal positions of non-service providers is not
20 necessary to protect retirement investors in that
21 context, such involvement should not be necessary to
22 protect retirement investors when the financial
23 institution making the recommendation happens to be a
24 plan service provider.
25 In sum, our recommendation would

1 significantly reduce uncertainty and would eliminate
2 unnecessary burdens imposed on plans, and at the same
3 time would support our shared goal of ensuring that
4 advice concerning rollovers is in the best interest of
5 participants, and that plan resources are spent
6 efficiently to maximize benefits.
7 I'll close by emphasizing our willingness to
8 work with you to clarify these issues and address
9 these concerns. I'd be grateful to reserve the
10 remainder of my time to answer any questions you might
11 have of me.
12 MS. WILSON: Thank you so much for that very
13 important testimony.
14 At this time, I'd like to open up the panel
15 for questions from all government participants. And
16 your questions may be directed to anyone on the panel.
17 Karen, Lyssa, Youngok, do you have any
18 questions?
19 MS. LLOYD: Sure, I'll go ahead if that's
20 okay. I guess I'd like to go back to the CIEBA
21 panelists. I'd like to talk a little bit about the
22 written acknowledgment of fiduciary status part of the
23 proposed exemption.
24 I think you indicated that you support that
25 part of the proposal. And I don't know if you've had

1 the opportunity to look at some of the other comments
2 on this aspect of the proposal, but there are comments
3 that suggest that this is unnecessary and that we
4 should eliminate the written fiduciary acknowledgment
5 from the proposed exemption that perhaps more
6 financial institutions would comply with the exemption
7 if we did remove it, um, that there may be customer
8 confusion, and that maybe it's even misleading in
9 terms of the standards that the exemption establishes.
10 And I'm just, I'm wondering if you have any
11 reaction to those comments, you know, and should we
12 consider eliminating this requirement, or do you think
13 that those concerns are not as important as keeping
14 the requirement in?
15 MR. SIMMONS: Yeah. Thanks, Karen. This is
16 Dennis Simmons from CIEBA. And, yeah, we are
17 supportive of that affirmative acknowledgment. And it
18 seems to me it should probably be table stakes in
19 terms of participating in this area. So, I mean, if
20 firms want to take advantage of the protections that
21 the exemption gives, we really -- we would support
22 that.
23 And I've not really digested some of the
24 counter arguments in terms of the hindrances that that
25 might impose. But, I mean, at a fundamental level, I

1 think playing in this game, taking -- you know, giving
2 advice, especially where there is going to be an
3 ongoing relationship -- and again, credit to the
4 Department for, you know, sort of capturing that in
5 terms of the ongoing relationship with an individual.
6 I credit the Department for bringing that in as a
7 factor and whether or not it's advice.
8 If you're going to play in that space, then,
9 you know, it seems to me that -- and our members I
10 think would agree that that acknowledgment is I think
11 at a minimum what somewhat should be affirmatively
12 stating in order to get the protection under the
13 exemption.
14 MS. DIAMONTE: Yeah. This is Robin
15 Diamonte. I completely agree with Dennis. I have
16 not, unfortunately, read those comments, and don't
17 understand why somebody wouldn't want to be as
18 explicit as possible in letting people know that they
19 are holding true to their fiduciary duty.
20 MS. LLOYD: Thank you.
21 Okay. So I think I might move on to Mr.
22 Alexander. You talked a lot about the plan service
23 providers and the access and the way that they can
24 interact with plan participants. And you also talked
25 in your comment, I think, about some concerns that you

1 had about the exemption and gaps and workarounds. And
2 I was wondering if you might want to talk a little bit
3 about what your concerns are about the exemption, and
4 if you have any suggestions for how the various gaps
5 that you perceive could be addressed.
6 MR. ALEXANDER: Yes, sure. And thanks for
7 the question, Karen. This is Daniel Alexander with
8 the RetireAware.
9 What makes again the service provider
10 representative so unique is that they're presented a
11 different set of circumstances as it relates to
12 services provided to the plan than non-service
13 providers. So even those service providers that take
14 on a fiduciary responsibility, or, or in this case
15 will meet the, the PTE, and are able to engage with
16 plan participants and make the recommendation that
17 they move their money outside of the plan, this begins
18 to create additional problems within the walls of the
19 plan because it begins to speak to things such as
20 indirect compensation.
21 Specifically, when I move a plan asset as a
22 representative of a plan I have financial interest,
23 even if I'm making the recommendation as a fiduciary,
24 there is still a financial interest to transact that
25 group retirement plan asset to a non-plan product, an

1 IRA, an annuity, an index annuity, a variable annuity,
2 a wrap account, you name it, it creates a additional
3 forms of compensation that that service provider is
4 able to experience that can go -- that if it's
5 undisclosed to that of the plan, if it's undisclosed
6 to that of the plan fiduciary, the plan fiduciary will
7 now have a difficult time in assessing reasonable
8 compensation.
9 And so, for someone that is responsible for
10 a retirement plan -- you know, Ms. Diamonte mentioned
11 she's responsible for a large retirement 401(k) plan.
12 When she comes down to a sense the differentiation
13 between provider A that is engaging in transactions,
14 whether or not the service provider is acting as a
15 fiduciary, but if they're engaging in transactions
16 that transfer plan assets from the plan to a non-plan
17 product for the purpose of generating indirect comp
18 versus another service provider that is not engaged
19 and does not maintain those same conflicts with a
20 financial incentive to transfer plan assets from the
21 plan to a non-plan product, it becomes increasingly
22 difficult, and quite opaque for a fiduciary to compare
23 the direct cost and the reasonableness of compensation
24 between two investment advisers.
25 And so it's my primary concern that the

1 ability for service providers to be able to engage in
2 this activity will create these problems. The solve
3 and the recommendation that I would make to the
4 committee, at least for consideration moving forward,
5 is for any compensation generated as a direct result
6 of assets being transferred from the plan to a non-
7 plan product be treated as indirect compensation and
8 reportable to that of the plan fiduciary.
9 MS. LLOYD: So would that be more of a
10 408(b)(2) disclosure or disclosure under this
11 exemption?
12 MR. ALEXANDER: Well, I believe, I believe
13 it would certainly be a disclosure under 408(b)(2)
14 very similar to that of the direct fees that are
15 experienced inside of a plan with its own investments.
16 And I also believe in consideration of this --
17 exemption it should be a consideration that the
18 individual service provider be isolated and have a
19 different set of rules and circumstances apply to it
20 than the non-service provider, primarily due to the
21 degree of conflict that exists within the service
22 provider versus the non-service provider.
23 MS. LLOYD: So existing plan service
24 providers would have a different structure for their
25 compliance under the exemption?

1 MR. ALEXANDER: That would be correct. And
2 that would be the reporting of indirect compensation
3 received as a result of recommendation of these
4 transactions.
5 MS. LLOYD: Okay.
6 MR. ALEXANDER: That will allow now total
7 reasonable compensation to be compared from one
8 provider to another provider.
9 MS. LLOYD: I see. And I don't know -- do
10 you have an opinion -- but the exemption has a
11 requirement that the advice provider document its
12 best-interest determination in recommending a
13 rollover.
14 MR. ALEXANDER: Sure.
15 MS. LLOYD: Did you have a reaction to the
16 factors that we talked about in the preamble, you
17 know, things such as the investments available in
18 either side and the level of services and the fees?
19 Do you --
20 MR. ALEXANDER: Yeah.
21 MS. LLOYD: -- if those were --
22 MR. ALEXANDER: So I will comment in general
23 to those, and I can probably speak -- as I mentioned
24 before, I have been on both sides of the fence when it
25 comes to providing not only advice, but rollover

1 recommendations and sales to retirement plans. I've
2 been on the sales side of the fence. I'm now on the
3 defense side, where RetireAware is solely engaged in
4 helping plan sponsors undersign these conflicts, as
5 well as plan participants.
6 I think any service provider that's engaged
7 in a desire to transact rollovers from the plan to a
8 non-plan product with a financial interest will be
9 able to provide recommendations that will satisfy any
10 best-interest standard that's put in front of them.
11 If the desire is to move from product A to
12 product B, and you have to satisfy the best-interest
13 standard, there will be a significant amount of time
14 and resources deployed into being able to justify why
15 that transaction meets a best-interest standard. And
16 I don't think, at least in my experience, that there
17 has been any best-interest standard that has been put
18 in place that can work around that. There will always
19 be a desire to be able to either circumvent or put in
20 place language that allows for a service provider to
21 move assets from point A to point B, and satisfy
22 whatever a best-interest standard may be.
23 MS. LLOYD: Okay. Thank you. Okay. Thank
24 you. That was helpful background for us.
25 I guess I'll move on to the DALBAR

1 representatives. Um. I guess I wanted to clarify.
2 You presented the -- what I wrote down, the unique
3 role for considerations, I think, on your slide. And
4 I just -- I wanted to clarify whether -- do you see
5 those in addition to evaluating the investment options
6 that are available in the plan versus the IRA, or do
7 you think those factors are more important, or how do
8 those factors relate to the investment options?
9 MR. HARVEY: All right. Thank you very
10 much. This is Lou Harvey. And I think that the four
11 of our points here is that the importance of those
12 factors can only be determined by the individual
13 participant. So there is no global priority.
14 What we're saying is in Case A, with person
15 A, the most important thing to them could be their
16 health. However, for person B, the most important
17 thing to them could be the plan fees and expenses. So
18 it would be inappropriate to try to generalize and
19 categorize which factors are important.
20 I think that is the art and skill that an
21 adviser needs to bring to the table to draw out those
22 important factors and use them in the determination of
23 what is in the best interest of the client.
24 MS. LLOYD: Okay. And there was something
25 on the slide about compensation. I wasn't sure I

1 fully understood that in terms of the point you were
2 trying to make. I'm not sure if you were trying to
3 say that it, that it's hard to compare the cost
4 because you don't know what the future is going to
5 hold. Is that -- was that the point?
6 MR. HARVEY: The real point is that it is
7 difficult and therefore expensive to make that
8 determination, as well as being unreliable. In other
9 words, if at the point in time somebody recommends a
10 rollover, they have really only to guess what the
11 future is going to be like. You know, is that person
12 going to be in a, you know, a managed account with
13 this kind of compensation? Is that person going to be
14 in a fixed annuity with another kind of compensation?
15 It's just that it's not a reliable measure. It's very
16 different from, for example, simply looking at an
17 expense ratio and saying, oh, these are the fees and
18 expenses that I can expect in the future.
19 MS. LLOYD: Okay. Thank you, because I was
20 going to ask -- I think we did get a comment from
21 another commenter that said that the rollover
22 evaluation should consider some of the long-term
23 impacts of increased costs. If the rollover is going
24 to happen to result in increased costs, you wouldn't
25 want to consider the long-term impact. And are you

1 saying that you think that's difficult or --
2 MR. HARVEY: Yes. It is -- well, I'm saying
3 it's difficult and unreliable. But it has to be done
4 anyway.
5 MS. LLOYD: Okay.
6 MR. HARVEY: Whether we do it in ranges,
7 it's something that is essential. You know, you can't
8 very well go out and buy a product and say I have no
9 idea what the cost is. Even if you don't have a
10 precise idea, you still need an estimate.
11 MS. LLOYD: Okay. Thank you for that
12 clarification.
13 I'm just going to pose I think a couple of
14 questions to Mr. Levy then. I think I understand the
15 concerns that you have identified. What I wanted to
16 ask a little bit more about is the idea of a safe
17 harbor that you're suggesting. I wasn't clear on
18 whether that -- are you suggesting that that would be
19 folded into the final exemption as a prohibited
20 transaction type of safe harbor? Or is it something
21 that's sort of a separate regulatory product --
22 project that you're suggesting that the Department
23 should consider?
24 MR. LEVY: Thanks, Karen. And again, this
25 is Jason Levy from Covington and Burling.

1 Our request would be that the safe harbor
2 ideally be articulated in the preamble to the PTE, in
3 the PTE itself, at least with respect to service
4 providers that acknowledge fiduciary status with
5 respect to rollovers, and finally in a separate form
6 of guidance that would be posted on DOL's website,
7 consistent with its recent regulatory efforts related
8 to guidance.
9 MS. LLOYD: Okay. So would it be a
10 prohibited transaction type of safe harbor or broader
11 safe harbor from other --
12 MR. LEVY: I think it -- I think it would be
13 broader. I mean, the concerns that we are focused on
14 from the perspective of employer plan fiduciaries
15 relate to fiduciary obligations to monitor their
16 service providers. I think that concern would arise
17 outside of the prohibited transaction context, or at
18 least not be exclusively within the prohibited
19 transaction context.
20 MS. LLOYD: Okay. Thank you for that
21 clarification. And these are all the questions that I
22 have, so I would pass along to any other panelists.
23 MS. LIM: I have a question to RetireAware,
24 Mr. Alexander.
25 MR. ALEXANDER: Yes. Hi.

1 MS. LIM: We're trying to better understand
2 the commonly done, like fee arrangements between
3 service providers and plan sponsors marketplace. So
4 could you explain more about the typical or usual
5 common fee arrangement between plan sponsors and the
6 service providers, and if there is any notable trends
7 recently?
8 And also, if you have any anticipated
9 impacts of this proposal on that common practice,
10 could you share that with us?
11 MR. ALEXANDER: Yes, certainly will. So
12 this is Daniel Alexander with RetireAware. And thank
13 you for the question.
14 And so in terms of the relationship between
15 a service provider and the plan, so the key
16 arrangements -- and this has been historical, right?
17 The key responsibilities of a service provider,
18 particularly in large 401(k) ERISA, large 403(b)
19 ERISA, is to provide certain specific services to that
20 of the plan, including investments, including
21 recordkeeping, including administration.
22 One key component that has been provided
23 consistently has also been education services to the
24 participant, whether they be to some web portal,
25 remote phone call center, or direct onsite service

1 provider representatives that are able to engage with
2 plan participants.
3 That has always been a mainstay. That has
4 been existent in the recordkeeping in the service
5 provider community as it relates to their interactions
6 with plan sponsors.
7 What has happened that has changed over the
8 years is the degree of profitability in where the buck
9 is going, right? It has always been on the
10 recordkeeping side, and there was a certain level of
11 profitability to be gained through recordkeeping, and
12 that is what was promoted.
13 Over years, through fee compression of
14 recordkeeping fees -- through competitive bidding, it
15 continues to be depressed. Where that revenue is not
16 walked away from, where that revenue is picked up on
17 is on the other side of the fence, which is non-plan
18 products and services, specifically the rollover
19 activity upon a distributable event from the plan to
20 non-plan-related assets.
21 That begins to generate additional revenue
22 for the plan. So where that has gone today is the
23 amount of revenue generated in our experience from
24 non-plan product sales has begun to eclipse the amount
25 of revenue generated on recordkeeping fees. And so,

1 anecdotally -- anecdotally, in the industry there is
2 common terms that are used, right, that engage in that
3 transaction.
4 You're shooting fish in a barrel. A group
5 of people sitting inside of a group retirement plan
6 marketplace, I'm explicitly endorsed by the plan
7 sponsor as a service provider representative. I
8 leverage my implicit endorsement to say now you've
9 gone from accumulation. Now it's time to move into
10 distribution of your asset. We need to move you to an
11 IRA for this purpose.
12 That transaction not only begins to increase
13 revenue for that provider. It pays for distribution
14 and allows them to continue to provide recordkeeping
15 services.
16 Where I see the puck going on this is that
17 recordkeeping now becomes the ends to a mean. If I
18 want access for the 200,000 plan participants that
19 might be at Raytheon participating in a retirement
20 plan, I'm going to low-ball and present the product
21 and service that gets me in front of those 200,000
22 people because I know when they read a distributable
23 event, and not necessarily retirement, mind you.
24 They may reach that point from service at
25 35, 40, 45, with several hundred thousand, tens of

1 thousands of dollars in their account, and they'll now
2 be solicited to move it to a non-plan product upon
3 distribution. That becomes my main moneymaker. It's
4 no longer recordkeeping that buys second homes and
5 beach houses and Rolexes. It's the idea that I am
6 able to solicit plan participants whether or not I'm a
7 fiduciary, solicit plan participants for the purposes
8 of satisfying a business model that increases revenue
9 as a direct result of having access and the implicit
10 endorsement of an employer to move those assets to
11 higher revenue-generating products at a distributable
12 event.
13 That's where the puck is going when it comes
14 to recordkeeping.
15 MS. LIM: Thank you.
16 MS. WILSON: Do we have any other questions,
17 Lyssa, Youngok?
18 (No audible response.)
19 MS. WILSON: Okay. I have just a couple of
20 followup questions for Ms. Diamonte.
21 Are you still available, Ms. Diamonte?
22 MS. DIAMONTE: Yes, absolutely.
23 MS. WILSON: Okay, great. So you spoke in
24 support of the written acknowledgment of fiduciary
25 status. We have had some comments that -- an

1 acknowledgment of fiduciary status is misleading
2 because the best-interest standard falls short of
3 fiduciary status. What would be your reaction to
4 that?
5 MS. DIAMONTE: You know, I think full
6 transparency is of the utmost importance -- is
7 important. So, you know, I think that if a person is
8 going to be held to a fiduciary standard, that that
9 should be in the written commentary, and people should
10 understand, to the extent possible, what that exactly
11 means.
12 MS. WILSON: Okay.
13 MS. DIAMONTE: If that's helpful.
14 MS. WILSON: That's helpful. What if the
15 Department relied on disclosure describing someone's
16 standard of conduct instead of a written
17 acknowledgment of fiduciary status?
18 MS. DIAMONTE: So if that standard of
19 conduct has the same standard that a fiduciary would
20 have, then it would -- I think would be fine. If it
21 was a lower standard of conduct, then I wouldn't think
22 it would be as adequate.
23 MS. WILSON: Okay. Thank you.
24 MS. DIAMONTE: Sure.
25 MS. WILSON: I want to thank again all of

1 our panelists, everyone who has testified during this
2 panel today. Thank you so much for your important
3 comments, for your time, and for your input. We
4 appreciate your appearance. Thank you again.
5 MALE VOICE: Thank you.
6 MS. WILSON: And at this point, I think
7 we're ready to move on to panel two.
8 FEMALE VOICE: Excuse me. Yes, Jeanne.
9 We've actually promoted the folks for panel two. If
10 you want to take a moment to quickly test your video
11 and your sound, you should have the ability to do
12 that. And folks from panel one we'll start to
13 actually demote, so those features will be gone for
14 you. Thank you.
15 (Pause.)
16 FEMALE VOICE: Mr. Rees, did you want to go
17 ahead and do a sound check?
18 MS. REES: Good morning. It's Brandon Rees
19 with the AFL-CIO. Can you hear me?
20 MS. WILSON: I can, thank you.
21 MS. REES: Great.
22 MS. WILSON: Okay, great. Well welcome, Mr.
23 Rees. We want to welcome you and invite you to begin
24 your remarks.
25 MS. REES: Good morning. I'm Brandon Rees,

1 the deputy director for corporations and capital
2 markets for the AFL-CIO. Thank you for inviting me to
3 testify today on behalf of the AFL-CIO in today's
4 hearing in improving investment advice for workers and
5 retirees.
6 The AFL-CIO is a voluntary federation of 55
7 national and international labor unions that represent
8 12.5 million working people. Members of the AFL-CIO
9 affiliated unions participate in participant private
10 sector retirement plans that will be affected by the
11 Department of Labor's proposed rulemaking on
12 retirement investment advice.
13 The AFL-CIO provided written comments to the
14 Department of Labor regarding the proposed prohibited
15 transaction exemption in our letter dated August 6,
16 2020. In our comment letter, we expressed the AFL-
17 CIO's grave concern that the proposed prohibited
18 transaction exemption will place the retirement income
19 security of working people at risk by exposing them to
20 conflicted investment advice without any meaningful
21 protections to mitigate conflicts of interest.
22 In my testimony today, I will address labor
23 market developments since the close of the Department
24 of Labor's comment period on the proposed rulemaking
25 on August 6th. In particular, continued high

1 unemployment rates and reductions in federal
2 unemployment insurance have been a one-two punch to
3 working families' retirement savings.
4 Now more than ever, working people need
5 unbiased and conflict-free investment advice regarding
6 their retirement savings. We are living through a
7 tremendous period of economic insecurity, the likes of
8 which we have not seen since the Great Depression.
9 One of the cruelest aspects of the COVID-19 pandemic
10 has been the disproportionate impact on the lives of
11 working people.
12 The pandemic has resulted in tremendous
13 dislocation of the labor market in the form of
14 employment turnover as workers lose their jobs,
15 particularly in hard-hit economic sectors such as
16 leisure and hospitality.
17 In July, thanks to pandemic-related job
18 losses, the national unemployment rate exceeded 10
19 percent after a nearly 15 percent peak in April.
20 Communities of color have been disproportionately
21 impacted by this unemployment. This COVID-19
22 unemployment crisis is far worse than what we
23 experienced in 2008 after the Wall Street financial
24 crisis.
25 But late last month, we saw new unemployment

1 insurance claims exceeding over 1 million claims per
2 week. The COVID-19 unemployment crisis has been
3 exacerbated by a reduction in federal assistance for
4 unemployed workers.
5 Last month we suffered the expiration of the
6 $600 in weekly supplemental federal unemployment
7 assistance under the CARES Act. Millions of
8 unemployed working people who depend on these
9 supplemental federal benefits now face hard choices of
10 how to meet their family's basic needs for food,
11 shelter, healthcare, and other necessities.
12 President Trump's August 8th executive order
13 to create a lost-wages assistance program was too
14 little, too late. The new program promises only half
15 the weekly benefit that the CARES Act provided, and
16 only a few states have started distributing the
17 promised $300 in weekly benefits because of antiquated
18 state computer systems.
19 Moreover, FEMA's disaster relief funds for
20 the grant program are expected to be depleted in a
21 matter of weeks. It is thus not a surprise that
22 unemployed workers and their families are increasingly
23 withdrawing their retirement savings to cover their
24 living expenses.
25 Indeed, the CARES Act expanded the

1 retirement savings distribution options, with
2 favorable tax treatment for up to $100,000 for COVID-
3 19 related distributions. Such a withdrawal decision
4 requires sound investment advice, given the
5 significant impact on one's future retirement income
6 security.
7 To us, it is crystal clear that working
8 people need unbiased and conflict-free investment
9 advice now more than ever because of COVID-19. For
10 example, the decision to borrow from a 401(k) plan has
11 long-term financial consequences. The loan must be
12 repaid with interest, and must be paid back more
13 quickly if you leave your job.
14 Moreover, there are tax consequences, and
15 401(k) borrowers miss out on potential gains on the
16 withdrawn amount.
17 American workers have suffered -- who have
18 suffered a job loss are being forced to decide how to
19 handle their retirement savings at a time of
20 tremendous financial and emotional pressure. As they
21 transition between jobs due to COVID-19-related
22 unemployment, they should be able to rely on unbiased
23 financial advice about rolling over their 401(k) plan
24 retirement savings or taking a lump sum distribution
25 from a defined benefit pension plan.

1 At the time when so many Americans are
2 financial vulnerable due to COVID-19, we view the
3 Department of Labor's proposed rulemaking as being
4 particularly wrong-headed and problematic. Notably,
5 the proposal contains loopholes that will permit
6 conflicted investment advice regarding rollovers and
7 lump-sum distributions.
8 Because such advice is not given on a
9 regular basis, it may not be subject to the fiduciary
10 standard under certain circumstances, such as a one-
11 time sale of an insurance product. In addition,
12 unscrupulous investment advisers may claim that they
13 did not intend for their conflicted advice to serve as
14 the primary basis for a rollover decision.
15 The proposed documentation requirements for
16 investment recommendations to roll over a 401(k) plan
17 or IRA assets are a poor substitute for the advice of
18 an unconflicted ERISA fiduciary. It is highly
19 improbable that the Department of Labor will have the
20 enforcement resources to review even a tiny fraction
21 of the trillions of dollars in rollovers that are
22 expected over the next several decades, and the
23 proposed rule does not provide a private right of
24 action.
25 We are deeply concerned that the proposed

1 prohibited transaction exemption incorporates the
2 SEC's regulation best-interest standard. The so-
3 called best-interest standard is not a fiduciary
4 standard, and will allow conflicted compensation
5 incentives that will otherwise be illegal.
6 Retirement savers, now more than ever,
7 deserve the full protection of ERISA's fiduciary
8 standards, and not the less rigorous and vaguely
9 defined best-interest standard. Because many workers
10 do not have the financial expertise required for
11 retirement savings, they turn to financial
12 professionals for investment advice. And all too
13 often, unbeknownst to the individual investor, the
14 compensation of these trusted financial professionals
15 is based on a business model that is rife with
16 conflicts of interest and subject only to weak
17 regulation.
18 The COVID-19 unemployment crisis has raised
19 the stakes of relying on such conflicted advice. For
20 these reasons, I respectfully urge that the Department
21 of Labor withdraw the proposed prohibited transaction
22 exemption and go back to the drawing board to draft a
23 genuine fiduciary standard for providing retirement
24 investment advice.
25 Thank you, and I look forward to your

1 questions.

2 (Pause.)

3 MS. WILSON: First the panel, and there may

4 be questions that are directed to you. Thank you

5 again for your testimony.

6 Next we have Mr. Norman Stein from the

7 Pension Rights Center.

8 Mr. Stein --

9 MR. STEIN: Yes.

10 MS. WILSON: -- welcome and thank you for

11 your testimony.

12 MR. STEIN: Well, thank you for inviting me

13 to present testimony today on behalf of the Pension

14 Rights Center. I'm Norman Stein. I'm a professor at

15 the Kline School of Law at Drexel University, and an

16 adviser to the Pension Rights Center.

17 The Pension Rights Center is a nonprofit

18 consumer organization that has been working since 1976

19 to promote and protect the retirement security of the

20 American workers and their families.

21 I want to begin my testimony today with an

22 Upton Sinclair epigram from his 1934 run for governor

23 of California, which has sometimes been misattributed

24 to H.L. Mencken or Samuel Clemens. What Sinclair said

25 85 years ago is as true today as when -- it was when

1 he said it. What he said was this, "It is difficult
2 to get a man to understand something when his salary
3 depends on his not understanding it."
4 And that is at the heart of the long and
5 tortured history of the debate over what investment
6 advice means under ERISA. In the limited time I have
7 this morning, I would like to do four things: first,
8 comment on the timing and administrative track that
9 the Department has created for considering the
10 proposed exemption; second, provide an example on how
11 conflicted investment advice adversely affects
12 retirement outcomes for real people; third, discuss
13 some of the ways that the proposed exemption fails to
14 adequately protect participants from conflicted
15 advice, and how the exemption conditions may make it
16 difficult for financial institutions, participants,
17 and the Department to monitor compliance; and finally,
18 commend the Department for its position that advice on
19 distribution of benefits is generally investment
20 advice, and suggest how the Department can improve its
21 guidance in this area.
22 I am concerned -- but first turn -- turning
23 to timing and procedure. I'm concerned the public
24 input into this prohibited transaction exemption is
25 being rushed, to the detriment of a sound policy. The

1 Department permitted only 30 days for the submission
2 of written comments, and in fact only three days for
3 the preparation of oral testimony.
4 The parallel 2016 exemption had an initial
5 75-day comment period, which was extended by two
6 weeks. Hearings were held three weeks after the
7 comment period ended. The Department then permitted
8 submission of additional comments for a month
9 following the hearing, which I hope the Department
10 will decide to do here.
11 In contrast, the compressed comment period
12 in use now, particularly in the unusual circumstances
13 that we're all living through, deprives the Department
14 of meaningful input. It especially blunts the voices
15 of those whose interests are represented by public
16 interest organizations, such as the Pension Rights
17 Center, many of which lack the resources to produce
18 fully-considered comments in an artificially truncated
19 time frame.
20 We also believe that the Department should
21 have submitted this exemption with a revised
22 definition of what constitutes fiduciary investment
23 advice, something that the press reported that the
24 Department was preparing, and that we do not think was
25 foreclosed by the split Fifth Circuit panel decision

1 vacating the 2016 revision of the rule.
2 I want to give you a perspective from one
3 participant. We have lots of stories like this. When
4 the Department of Labor initially proposed a new rule
5 when a person or institution became an ERISA fiduciary
6 because they gave investment advice, we began hearing
7 from participants across the country who told us about
8 their experiences.
9 One of those individuals, Janice Winston,
10 was invited to make a presentation to a special
11 information session on Capitol Hill. Ms. Winston was
12 a telecommunications engineer for Verizon for 29 years
13 when she retired. She planned to take a lump-sum
14 distribution and pick an investment firm recommended
15 to her by several individuals.
16 She said she was looking for a firm she
17 could trust because, as she said, I really have no
18 good way to evaluate whether my investments are
19 performing well or whether I am paying too much in
20 fees. Ms. Winston, after several years, had her
21 portfolio examined by an independent investment
22 fiduciary who is testifying later this afternoon, who
23 advised her that she was paying very high fees, which
24 despite disclosure she said she never knew about, nor
25 could have understood without the help of the

1 independent fiduciary with whom she consulted.
2 She said she felt betrayed. "I worked long
3 and hard to earn a decent retirement, and I should be
4 able to depend on the investment advice given to me."
5 Given the time limits, I'm going to try to
6 identify only two of the problems with the proposed
7 exemption. First and most important, the best-
8 interest standard in the proposed exemption has two
9 interlocking parts. The first part provides that
10 advice is in a retiree's best interest, that such
11 advice reflects the care and skill prudence and
12 diligence that a prudent person acting in a like
13 capacity would use in the conduct of a like
14 enterprise.
15 This part of the standard is virtually
16 identical to that used by the Department in its 2016
17 exemption. The second part of the standard in the
18 2016 exemption provided clearly and unequivocally that
19 the adviser's recommendation must be made without
20 regard to the financial interest or other needs of the
21 adviser.
22 In contrast, the proposed exemption drawn on
23 the SEC's best-interest standard provides that the
24 adviser's financial and other interests must not be
25 put ahead of the investor. The subtle variation in

1 language eviscerates the quality of protection for the
2 retirement investor.
3 What does it mean for an adviser to consider
4 her financial interests so long as she doesn't place
5 them ahead of her client's? Does it mean her interest
6 can be a tiebreaker when there are two exactly
7 equivalent investment options? Does it mean an
8 adviser can consider his compensation so long as he
9 also considers as strongly the interests of his
10 client?
11 The 2016 standard was clear and protective.
12 In contrast, the standard in the proposed exemption
13 provides far less protection and is inherently
14 ambiguous. It is, as a number of people have already
15 testified, difficult to monitor compliance when we are
16 not sure what the standard really means.
17 The proposed exemption would thus be
18 improved if the second part of the best-interest
19 standard simply provided that the adviser cannot
20 consider the adviser's financial or other interest.
21 The second part of the exemption that is troubling --
22 actually, there are, I'm only talking about two of
23 them -- is that in the 2016 exemption, the financial
24 institution was prohibited from using certain
25 enumerated compensation mechanisms that invite

1 conflicts of interests. This list has disappeared
2 from the proposed exemption, and should be restored.
3 Turning to lump-sum rollover advice, we
4 agree with the Department and commend it for its
5 position that a recommendation to a retirement
6 investor that they take a lump-sum distribution is not
7 only investment advice, but also the single most
8 consequential advice that the investor will receive.
9 And it is often advice that generally will enrich the
10 person providing it and the institution that is on the
11 receiving end of the rollover.
12 At the Pension Rights Center, we have seen,
13 for example, that retirees in some defined benefit
14 plans receive cold call sales from representatives of
15 financial institutions following their plan's creation
16 of a window period in which a retiree can convert his
17 or her remaining annuity into a lump sum.
18 This practice is venal and in our view a
19 form of corporate elder abuse. It is investment
20 advice, and the Department is correct in so providing.
21 But we also believe that the Department's position, as
22 stated in the preamble, that the advice is continuous
23 and satisfies that leg of the five-part test if it is
24 expected that the adviser of the benefitted financial
25 institution will continue to provide advice in the

1 investment in the future might be circumvented by
2 carefully constructed language that such continuing
3 investment advice is not expected by the participant
4 or by similar means.
5 We would thus urge the Department to create
6 a presumption that advice to take a lump sum and roll
7 it over to a particular institution is presumptively
8 investment advice. All right. Of course, we hope the
9 Department will place its regulatory agenda
10 modifications to the five-part test.
11 In conclusion, it is, as Upton Sinclair
12 recognized, human nature for people to put their own
13 interests first while managing at the same time to
14 convince themselves that they're not doing so. There
15 are, of course, major exceptions to this aspect of
16 human behavior: a parent sacrificing for a child, a
17 soldier displaying uncommon bravery in combat, an
18 activist seeking to make the world a more just place.
19 But an investment adviser giving advice across a desk
20 to a client, it is too often only effective regulation
21 that will ensure that the adviser is working to the
22 exclusive interest of his or her client.
23 The center does not believe that the
24 proposed exemption and the reinstatement of a 1975
25 regulation without modification will provide that

1 effective regulation. Thank you.

2 MS. WILSON: Thank you very much for that

3 important testimony, Mr. Stein.

4 Do any of the government panelists have

5 questions at this time?

6 (No audible response.)

7 MS. WILSON: Okay. Please standby for

8 questions at the end of the panel period.

9 Next we have Mr. Edwards from Public

10 Investors Advocate Bar Association.

11 Mr. Edwards?

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

13 MS. WILSON: Yes.

14 MR. EDWARDS: Okay. Sorry.

15 MS. WILSON: We can hear you.

16 MR. EDWARDS: Good morning. And like the

17 other speakers, I want to thank the Department for the

18 opportunity to speak here today. My name is Sam

19 Edwards, and I am the current president of PIABA,

20 which is the Public Investors Advocate Bar

21 Association.

22 PIABA is an international bar association

23 whose mission is to represent wronged investors and

24 promote the interest of all public investors, which we

25 do in part by working with legislators and regulators

1 to craft the best laws and rules to protect investors.
2 I also have with me Joe Peiffer. Joe is a past
3 president of PIABA, a current member of our board of
4 directors, and one of our members who was
5 significantly involved in working with the Department
6 when it issued its prior fiduciary rule.
7 PIABA's attorney members have represented
8 tens of thousands of investors from all over the
9 country. Those investors are often retirees. They've
10 worked their entire lives, saved their whole lives,
11 but that hard work and savings is all too often lost
12 as a result of poor and typically conflicted
13 investment advice.
14 PIABA members have seen firsthand the impact
15 that weak standards can have on the hard-earned
16 retirement savings of investors. PIABA has two chief
17 concerns about the Department's proposed rule. First,
18 PIABA urges the Department to reconsider its
19 reinstatement of the 1975 regulation as applying the
20 five-part test to determine whether an adviser is a
21 fiduciary.
22 Reinstatement of this regulation will result
23 in ERISA's fiduciary obligations applying to very few
24 of the advisers who investors rely on.
25 Second, PIABA believes the new regulation,

1 to the extent that it would apply to any adviser,
2 weakens the fiduciary standard in the name of
3 harmonization, rather than fulfilling the objectives
4 of ERISA, which is to require a higher duty of care
5 for retirement assets.
6 If these two rules are implemented, they
7 will negatively impact workers and retirees. This
8 one-two punch will have the practical effect of
9 repealing ERISA's fiduciary duty. The Department
10 itself has previously recognized that many who provide
11 investment advice do not meet the five-part test, and
12 as a result would not be deemed investment advice
13 fiduciaries, despite the critical role they play in
14 guiding plan and IRA investments.
15 Take, for example, one of our members' cases
16 involving Jack, a schoolteacher. Schoolteacher Jack
17 had been saving for his retirement for 25 years. He
18 invested that savings with a financial adviser, who
19 put the retirement savings in conflicted investments.
20 Sadly, the investments lost all their value.
21 Given that the investments were made through
22 only two transactions, Jack's financial adviser could
23 conceivably argue he was not a fiduciary for Jack, as
24 only handling two transactions may not be deemed to be
25 giving advice on a regular basis.

1 Even in situations where an adviser or their
2 firm would otherwise meet the test, we have seen firms
3 use carefully tailored language in their account
4 agreements to ensure that they do not meet the five-
5 part test. For example, in the section entitled
6 Limitation of Our Liability, in Merrill Lynch's IRA
7 account agreement, Merrill Lynch includes language
8 that it will not render advice that is individualized
9 for your IRA unless any mutual agreement -- or under
10 any mutual agreement arrangement or understanding that
11 the advice will serve as a primary basis for your IRA
12 investment decisions.
13 This language is very clearly meant to avoid
14 the application of ERISA to IRA accounts with Merrill
15 Lynch. Tragically Merrill Lynch is not alone.
16 Virtually every other major Wall Street firm includes
17 similar language in their IRA and retirement plan
18 agreements, including Morgan Stanley, Wells Fargo,
19 Edward Jones, and LPL, just to name a few.
20 Investment firms will continue to use this
21 language buried deep in complicated IRA and plan
22 agreements to make investors unknowingly agree that
23 the firms should not be held to fiduciary obligations
24 that are properly owed to workers and retirees.
25 Without being held to a true fiduciary standard,

1 investment professionals will continue to seek to
2 engage in the misconduct that allows them to profit at
3 the expense of our most vulnerable investors.
4 There are many examples of workers and
5 retirees being harmed by bad and conflicted investment
6 advice, advice that will never be captured by the
7 Department oversight if this regulation is
8 implemented. For example, let me tell you the story
9 of one of our members' clients, Greg.
10 Greg had been saving for his retirement and
11 looking for investment advice. He turned to an
12 adviser who has a local radio show. The adviser
13 touted that he is a well-recognized retirement
14 planning authority. The adviser recommended that Greg
15 invest the IRA in two private placements, describing
16 them as secure and safe.
17 However, turned out that both investments
18 were not as they had been represented, and Greg lost
19 his retirement savings, almost $200,000. Here again
20 it's unclear whether the adviser would meet the five-
21 part test necessary to be deemed an investment advice
22 fiduciary. Was the advice on a regular basis? Was it
23 pursuant to an agreement or an understanding that it
24 would serve as the primary basis of the investment
25 decision, or did the adviser actually explicitly

1 disclaim in any such agreement that they would have
2 this understanding?
3 The simple reality is that reinstating the
4 five-part test will result in the fiduciary obligation
5 being completely voided by almost anyone who wants to
6 avoid it, rendering the ERISA fiduciary obligation
7 meaningless. Moreover, even assuming a broker adviser
8 is captured by the regulation, the Department is
9 proposing to weaken the standard of care that would be
10 owed to workers and retirees.
11 My colleague, Joe Peiffer, is going to
12 address the second point from PIABA's perspective.
13 MR. PEIFFER: Thank you, Sam.
14 Hello. My name is Joe Peiffer, and I've
15 devoted both my law practice and my adult life to
16 representing investors and retirees. I'm proud to
17 have represented thousands of retirees in cases
18 against their brokers, large financial services firms,
19 and investment banks.
20 I have twice served as chairperson of the
21 Business Tort Section of the American Association for
22 Justice, served as the president of PIABA, currently
23 sit on the board of directors of PIABA, served on the
24 FINRA task force, and testified extensively on behalf
25 of the fiduciary rule. And I've testified at the DOL

1 on the very topic at hand.

2 Whenever I have the opportunity to speak for
3 investors, I feel compelled to talk about retirees of
4 a major oil and gas company in Louisiana who lost most
5 of their life savings to a conflicted broker. Some
6 didn't have enough money for lodging and stayed with
7 me at my house throughout the course of the 90-day
8 trial. I understand the pain of someone losing their
9 life savings.

10 When someone walks in our doors, typically
11 they are absolutely devastated. And when I say
12 devastated, I think of a man who had to rent a room
13 from his ex-wife because he ran out of money. I think
14 of countless others who either contemplated or
15 attempted suicide. My vocation has truly become my
16 avocation.

17 This summer, as infection rates started
18 spiking again, and COVID-19 death rates soared, the
19 SEC began the implementation of its controversial
20 alternative from the fiduciary standard with the
21 misleading name regulation best interest.

22 The new SEC rule doesn't just rewrite
23 FINRA's flawed suitability standard. It creates a
24 safe harbor that allow financial advisers to not work
25 in a client's best interest as long as they disclose

1 their conflicts.

2 What good is a disclosure in a packet of
3 documents like a house closing going to do when my
4 clients, who are blue collar workers in large part,
5 other than to give bad advisers a defense to their
6 conflicted titles? By basing the impartial conduct
7 standards on the SEC's regulation best interest, the
8 Department is abdicating its responsibility to ensure
9 that retirement savings are protected.

10 The goal of the Department should not be to
11 unify the regulation of retirement investments,
12 thereby lowering the standard of conducted expected by
13 those who provide advice for retirement investors.
14 Rather, the goal of the Department should be to ensure
15 that those providing advice for retirement investors
16 are held to the highest fiduciary standards.

17 Workers and retirees deserve more. They
18 deserve real protections. As PIABA said in its
19 comment letter, the Department should not reinstate
20 the 1975 regulation. Rather, the Department should
21 adopt new regulation. Any individual providing
22 investment advice for a fee should be deemed an
23 investment advice fiduciary and held to the highest
24 fiduciary standards.

25 To the extent the Department establishes

1 exemptions, such exemptions should not lower the
2 fiduciary obligations of investment advice
3 fiduciaries. Frankly, my clients and retirees already
4 think they're getting a fiduciary standard. They
5 already think they're getting fiduciary advice.
6 Retirement investors deserve to have their
7 retirement savings protected, as was intended by the
8 enactment of ERISA. PIABA urges the Department to
9 adopt standards that go beyond those adopted by the
10 Commission in regulation BI, which the Commission
11 itself conceded was not a fiduciary standard.
12 Thank you for the time.
13 MS. WILSON: Thank you very much for your
14 testimony, and thank you to all of the panelists for
15 your testimony. At this time, I'd like to open up the
16 floor for questions from government representatives,
17 and we'll start with Karen Lloyd. I would like to
18 also first say that for those of you who did not hear
19 my remarks this morning, I would like to remind the
20 audience and the witnesses not to draw any inferences
21 of conclusions based on the way that we happen to
22 frame a particular question or questions.
23 Our goal today is not to suggest or
24 communicate any particular resolution of pending
25 issues, but rather to develop the public record and

1 learn from what you have to say.
2 Karen?
3 MS. LLOYD: Thank you. I think I might
4 start with the PIABA representatives and go backwards
5 for this panel. I wanted to start off by talking
6 about the idea that the exemption is lowering the
7 standard of conduct for ERISA fiduciaries. And this
8 is not to suggest that the -- I understand that the
9 exemption standard does not mirror ERISA Section 404.
10 But just as a technical matter, the
11 exemption is only an exemption from prohibited
12 transactions. And to the extent ERISA's fiduciary
13 duty is applied to a particular situation, the
14 exemption doesn't actually remove those fiduciary
15 duties from ERISA. And that's kind of a technical
16 point, but I'm just wondering if that's something that
17 we -- if we made that clear in the final exemption,
18 does that provide any comfort about the exemption
19 standards themselves.
20 MR. PEIFFER: Sam, do you want to go on that
21 first?
22 MR. EDWARDS: Sure. I mean, I don't think
23 that it's made clear in terms of what the exemption
24 will mean, but I think what is made more clear is the
25 representation that it's meant to fall in line with

1 the regulation best interest. And so the fact that
2 the regulation best interest specifically says that
3 it's not a fiduciary standard, by it's nature it's
4 basically a, a rule reversal, which is we're not
5 talking about an ERISA-based fiduciary standard as it
6 was meant to be, but rather a harmonization of let's
7 move away from fiduciary and let's move towards this
8 idea of best interest.
9 And the problem is that best interest
10 conveys and suggests to the average person that it
11 means the same thing as being a fiduciary, but it
12 doesn't. And the SEC has made that clear, and PIABA's
13 concern is that that's going to get lost on investors,
14 and it's going to be taken advantage of by financial
15 advisers who know how to get around the rules to be
16 able to make sure that they do things that profit the
17 adviser instead of what is really appropriate and in
18 the best interests of the investor.
19 MR. PEIFFER: And also I might add, you
20 know, we see literally, you know, scores of people
21 come in our office that are -- you know, have worked
22 their entire life. They've worked 30 years. They've
23 put their kids through college. They've saved money
24 for retirement, and now they're done being a plant
25 worker at Exxon or a telephone line person at Niagra

1 Mohawk, or something of that sort, and they're
2 expected to be a portfolio manager.
3 They go to these people for advice. They go
4 to people because they don't know what they don't even
5 know. And when they hear regulation best interest,
6 they think, well, they have to put my -- that's my
7 best interest. It's a fiduciary.
8 That's just not the case. And would it
9 help? Yes, it would help if you made clear that a
10 fiduciary standard under ERISA is an ERISA fiduciary
11 standard, not the SEC's misnamed best interest.
12 MS. LLOYD: Okay, thanks. And just to be
13 clear, I'm not saying that the exemption standard is
14 necessarily going to be changed or moved to align.
15 I'm just saying that that standard exists regardless
16 of what is in the exemption.
17 And so I guess another thing I wanted to
18 follow up on is -- I mean, obviously, we've had a
19 number of comments that expressed concern about the
20 standard. And in thinking about them, I wondered if
21 one, one other way to address the concerns is to focus
22 on the exemptions requirements regarding conflict of
23 interest mitigation. And I'll probably ask Mr. Stein
24 about this again when I talk to him.
25 But his suggestion was that the exemption

1 conflict of interest mitigation provisions should be
2 more specific, should be, you know, beefed up, I
3 guess. And I'm wondering what you think of that idea.
4 MR. EDWARDS: We definitely agree with that.
5 That was one of our principal comments and concerns
6 about reg BI, was -- that we made with the SEC is that
7 there is a discussion about mitigation, but there is
8 no actual representation of what that means and the
9 vague nature of it is, is not really very comforting.
10 Mitigation certainly, you know, is one way
11 to go about it. But avoidance really is the key from
12 PIABA's perspective -- is mitigating the conflicts of
13 interest is not anywhere as good as avoiding them
14 completely. And that's really what is appropriate, is
15 to make it clear that in every instance where it's
16 possible, any conflict of interest needs to be
17 avoided, as opposed to let's mitigate it.
18 The biggest concern with mitigation also,
19 especially if we would try to relate the Department's
20 rule back to regulation best interest, is the idea
21 that you can mitigate through disclosure.
22 We know unbelievably clearly that disclosure
23 doesn't work. It just -- it's not an appropriate
24 mechanism. People don't read these disclosures. They
25 don't rely on these disclosures. They rely on their

1 actual conversation with their financial adviser.
2 And so to the extent that mitigation can be
3 accomplished through disclosure, that is an incredible
4 concern of PIABA, that that's going to be abused, and
5 that we're going to see a lot of retirees as a result
6 of it.
7 MR. PEIFFER: And I would add, you know, my
8 clients already expect that they're getting
9 unconflicted advice. I'm going out to visit some
10 clients in Houma, Louisiana today. And each one of
11 them, to a person, in the thousands of people we
12 represented over the course of my career, their jaw
13 drops when I tell them that their broker can have
14 conflicts, so I think it needs to be conflict
15 avoidance, not conflict mitigation. Further, to the
16 point on the disclosures, I don't, if anyone had to
17 look through the telephone book of disclosures to see
18 what their broker or adviser was telling them was
19 true, what is the point of having a broker or adviser?
20 I just don't think -- it doesn't work. The research
21 shows that this stuff is not read, that it is not paid
22 attention to. And what people pay attention to is
23 just what we're paying attention to here today, each
24 other as we're sitting here and talking about these
25 issues. And they're entitled to do that. And that's

1 the way brokers advertise themselves. So they should
2 get that unconflicted advice.
3 MS. LLOYD: Thank you. I wondered if we
4 could turn for a brief minute to comments that you
5 made in your comment about the exemption's eligibility
6 provisions. You know, I know there are comments. We
7 received comments from a number of sources about
8 enforcement and concern about how to enforce the
9 provisions of the exemption.
10 And to me, the eligibility requirements are
11 designed to support -- at least at certain financial
12 institutions would not be allowed to use the exemption
13 going forward, you know, based on certain types of
14 conduct. And I think that your, your comment was, you
15 know, that we didn't go far enough maybe in those
16 provisions. And I'm wondering if you might be able to
17 just talk about that for a minute.
18 MR. EDWARDS: Joe, do you have something you
19 want to start this on?
20 MR. PEIFFER: Well, I'm trying to find
21 the -- go ahead, Sam, for a second, if you don't mind.
22 I'm trying to find it here.
23 MR. EDWARDS: We definitely don't feel like
24 it went far enough and, in terms of, you know, who is
25 going to be eligible and who isn't going to be

1 eligible. The problem with it is that, you know,
2 clever attorneys, quite frankly, you know, who will
3 look at this, will find ways to carve it out. And so
4 -- and find ways to avoid all of this.
5 And so like I said in our opening, we've
6 already seen that, so it already exists, and virtually
7 every Wall Street firm has already purposely carved
8 out in every IRA agreement language that, you know,
9 they're not going to be giving any advice that should
10 form the primary basis of any of the decisions that
11 are being made in the account.
12 The clear purpose of that is we're trying to
13 avoid ERISA. And we see that really in any of these
14 scenarios, where you have a carveout, where you have
15 an exemption, and you have this language. There is
16 going to be ways that people look to get around it. I
17 heard one of the other speakers call it the loopholes,
18 and that's what I think that we're going to see.
19 We're going to see these advisers look for
20 loopholes, find the loopholes, and really get around
21 the intention of ERISA, which is to make sure that
22 we're actually protecting retirement assets. That
23 should be the goal of all of this, is how do we best
24 protect it.
25 MR. PEIFFER: I think that that's exactly

1 right. And what we've seen time and time again from
2 defendants when they are called to account for their
3 breaches of their duties is although they have acted
4 and advertised like fiduciaries, and the investors
5 expect them to behave like fiduciaries, when they're
6 called to account for their actions, they claim that
7 there is no fiduciary duty.
8 They strongly defend on the basis that there
9 is no fiduciary duty whatsoever. And I would expect
10 that we'll be seeing any disclosures that are part of
11 this rule, any exemptions that allow them to contract
12 around this rule. All those things are things that we
13 see when we have investors that have been devastated
14 by conflicted advice, and we try and hold the brokers
15 and broker firms to account.
16 MS. LLOYD: Thank you. I think just in the
17 interests of time, I'm going to -- I'd like to move on
18 to go back to Mr. Stein.
19 I wanted to just, I guess go -- you
20 identified two issues with the exemption, one of them
21 being the best-interest standard, and one of them -- I
22 think the, the provisions on conflict mitigation, and
23 you recommended that we should put some of the
24 specific provisions about mitigating conflicts of
25 interest and compensation packages into this proposal,

1 in the final. And I'd just like to know if you think
2 that that, would that help, with concerns about the
3 standard? And also, if you had any reaction to the
4 point I made about how, you know, the ERISA 404
5 standards would still be applicable.
6 (Pause.)
7 MS. LLOYD: Did we, did we lose Mr. Stein?
8 (Pause.)
9 MR. STEIN: Hello? Can you hear me?
10 MS. LLOYD: Yes.
11 MR. STEIN: Okay. I've lost the screen, so
12 I didn't -- I could hear you, I didn't know if you
13 were able to hear me -- we're able to hear you. Okay,
14 so, actually, the comment that you asked about, 404 of
15 ERISA, was something that I would have included in my
16 testimony. I thought about it, and I actually thought
17 there were two separate problems with the conflict
18 between 404 and this exemption. And one of, one of
19 the problems it was, um, that I thought it had, it
20 could work mischief, right, that you have a prohibited
21 exemption -- a prohibited transaction exemption that
22 seems to allow people, at least arguably allow people
23 to avoid their obligations of loyalty under section
24 404, and I thought that troubling and clarifying that
25 that's the case is -- you know, would certainly be

1 helpful.
2 But the other problem is why should an
3 exemption essentially have lower standards than people
4 who were subject to it are going to be required to
5 meet under section 404, right? So the purpose of the
6 exemption, the way it's written, seems undercut by
7 section 404.
8 But I, I think from the first point, the
9 mischief that this might create in the future would
10 really be helped by some clarification that this does
11 not -- it is not intended to diminish the absolute
12 duty of loyalty that fiduciary investment advisers
13 have under section 404.
14 So I thought that was an excellent -- really
15 an excellent point. And if I had 11 minutes, I think
16 I would have had it in my testimony.
17 MS. LLOYD: Okay. I guess just in terms
18 of -- so I take away from this also that you would
19 like to see the conflict mitigation provisions more --
20 MR. STEIN: Yeah, yeah. Actually, in my
21 testimony, you know, of the things that I think could
22 be improved in this exemption, if it's going to go
23 forward, that was one of the two things that I
24 particularly pointed out, that the 2016 kind of
25 parallel exemption banned certain sales practices that

1 I think just invite people to give into conflicts of
2 interest. And I thought that was helpful and very
3 good, and it disappeared from this exemption. So I
4 think restoring that and providing even greater
5 specificity would be helpful. I mean -- I wouldn't
6 use that as a replacement for the general, the general
7 idea that you need to do conflict mitigation at the
8 end, but providing specific ruled that have to mean
9 that, indicating what kinds of compensation practices
10 are simply off limits, would be very helpful.
11 MS. LLOYD: Thank you. I think I'm going to
12 see if any of the other panelists have any questions,
13 at this point. I have no other questions at this point
14 because I know we're getting low on time.
15 MS. WILSON: Lyssa Hall?
16 (No audible response.)
17 MS. WILSON: Youngok Lim, are there any
18 other questions?
19 MS. LIM: No, not at this moment.
20 MS. WILSON: Okay, great. I think Karen got
21 my questions quite well. So I want to thank all of
22 the panelists for testifying today. We really
23 appreciate your important comments, and appreciate
24 your participation in this process. Thank you so
25 much.

1 At this point, we'll move on to the next
2 panel.
3 FEMALE VOICE: Thank you, Jeanne.
4 Everyone for panel three should actually now
5 be promoted as a panelist, and folks from panel two,
6 you'll start to be demoted back to a standard user.
7 Thank you.
8 (Pause.)
9 FEMALE VOICE: Anyone that would like to
10 test their video and audio can do so now.
11 (Pause.)
12 MR. SZOSTEK: This is Jim Szostek.
13 Hopefully you can see me and hear me.
14 FEMALE VOICE: We can. Thank you.
15 MR. SZOSTEK: Good.
16 MS. WILSON: Okay. I would like to welcome
17 our next set of panelists this morning, and would like
18 to start this panel with a reminder for those of you
19 who did not hear me, my remarks this morning, I'd like
20 to remind the audience and the witnesses not to draw
21 any inferences or conclusions based on the way we
22 happen to frame any particular questions.
23 Our goal today is not to suggest or
24 communicate any particular resolution of pending
25 issues, but rather to develop the public -- record and

1 learn what you have to say, learn from what you have
2 to say.
3 So I'd like to start with our first
4 panelist, Mr. Szostek.
5 Welcome, and thank you for appearing. We'd
6 like to hear your remarks.
7 MR. SZOSTEK: Well, thank you and good
8 morning. My name is Jim Szostek. I'm vice president
9 and deputy for the retirement security at the American
10 Council of Life Insurers.
11 ACLI is the leading trade association
12 driving public policy and advocacy on behalf of the
13 life insurance industry. Ninety million American
14 families rely on the life insurance industry for
15 financial protection and retirement security.
16 ACLI member companies protect retirement
17 savers' financial well-being through annuities, the
18 only product available that guarantees income
19 throughout retirement. To secure the benefits of
20 guaranteed lifetime income in retirement, it is
21 critical the retirement savers retain both access to
22 fiduciary and non-fiduciary services.
23 ACLI has been actively engaged in working
24 toward a harmonized federal and state best-interest
25 standard of care for financial professionals. ACLI

1 also seeks the appropriate application of fiduciary
2 requirements to those who are paid to provide
3 impartial investment advice.
4 I'm with you today to express ACLI's
5 concerns with the Department's commentary in the
6 preamble to the proposal. The commentary could be
7 understood to broadly impose fiduciary obligations in
8 a manner similar to the Department's 2016 fiduciary
9 regulation.
10 Before it was vacated by the Fifth Circuit
11 Court of Appeals, that regulation's fiduciary order
12 only -- approach restricted access to professional
13 guidance that retirement savers with low to moderate
14 balances wanted and needed.
15 We're concerned that retirement savers will
16 once again be denied the choice of non-fiduciary
17 services, which could negatively impact Americans with
18 low or moderate balances, who typically engage
19 financial professionals on a transactional basis, and
20 may not have the wherewithal to secure fiduciary
21 services.
22 In a memorandum to the Secretary of Labor in
23 2017, the president made clear that one of the
24 priorities of this administration is to empower
25 Americans to make their own financial decisions and

1 facilitate their ability to save for retirement.
2 We're concerned that the Department's
3 actions are inconsistent with this priority, and in
4 fact restrict the ability of Americans to save for
5 retirement.
6 Further, the Fifth Circuit Court of Appeals
7 was evident that regulations regarding retirement
8 savings with low or moderate balances, as it
9 restricted their access to non-fiduciary
10 professionals. Unfortunately, the Department's
11 commentary regarding the five-part test in the
12 preamble to the proposed class exemption acts to
13 revert back to that vacated regulation, casting doubt
14 as to whether financial professionals can ever offer
15 non-fiduciary services to retirement savers.
16 Contrast this with the SEC's best --
17 regulation best-interest efforts. The SEC imposed a
18 best-interest standard of care on non-fiduciary
19 financial professionals. The NAIC, the National
20 Association of Insurance Commissioners, a standard-
21 setting organization led by the nation's state
22 insurance regulators, also revised its annuity
23 transaction model regulation to incorporate a similar
24 best-interest standard of care.
25 States are beginning to adopt this new

1 standard, and ACLI applauds and supports that work.
2 However, of greater import to the Department's work
3 here regarding those with a fiduciary duty, the SEC
4 clarified when a person is subject to the Investment
5 Advisers Act, and thus subject to a fiduciary duty
6 reminder that adviser throughout common law.
7 We think the Department's efforts do not
8 align well with the SEC work. It is reasonable to
9 read the five-part test, the definition of rendering
10 investment advice as an articulation of what it means
11 to be in the business of providing individualized
12 investment advice consistent with ERISA and with the
13 Investment Advisers Act of 1940.
14 However, mere satisfaction of the five-part
15 test cannot and must not be indicative of a fiduciary
16 relationship. The Department's analysis of the five-
17 part test within the framework of ERISA's definition
18 of fiduciary is incomplete, and therefore incorrect.
19 Like the construct under the Advisers Act,
20 to be in the business of providing individualized
21 investment advice, ERISA places fiduciary status on a
22 person who renders investment advice for a fee, as
23 stated by the Fifth Circuit in its ruling vacating --
24 in its ruling that vacated the 2016 regulation the
25 phrase investment advice for a fee, and similar

1 phrases generally referenced a fiduciary relationship
2 of trust and confidence between the adviser and the
3 client.
4 Unfortunately, it is reasonable to conclude
5 the Department's commentary in the preamble that the
6 Department's view that when a person meets the
7 conditions of the five-part tests, and the person
8 receives some form of compensation from somebody for
9 any reason, the person is an investment advice
10 fiduciary.
11 The Department makes its clear in the
12 preamble with the following example. A broker-dealer
13 who satisfies the five-part test with respect to a
14 retirement investor advises that retirement investor
15 to move his or her assets from a plan to an IRA, and
16 receives any fees or compensation incident to
17 distributing those assets will be a fiduciary subject
18 to ERISA with respect to the advice regarding a
19 rollover.
20 This interpretation is not at all consistent
21 with the statutory text of ERISA, and the Fifth
22 Circuit's decision vacated the 2016 fiduciary reg.
23 The relevant statutory text directs that a person is a
24 fiduciary to the extent he renders investment advice
25 for a fee or other compensation, direct or indirect,

1 with respect to any monies or properties in such plan,
2 or has any authority or responsibility to do so.
3 The statute does appropriately tie fiduciary
4 status to circumstances in which a fee is paid for
5 advice, that is, the person is in the business of
6 providing investment advice, the same rule we find in
7 the Advisers Act.
8 Yet the Department's example fails to
9 include any inquiry as to whether the compensation is
10 paid for advice. This interpretation repeats a
11 significant error in the 2016 fiduciary regulation.
12 As the Fifth Circuit put it, DOL's interpretation
13 conjoins advice with a fee or other compensation,
14 direct or indirect, but it ignores the preposition
15 for, which indicates that the purpose of the fees, not
16 sales, but advice.
17 ERISA seeks to ensure that when plans, plan
18 participants, and beneficiaries hire an investment
19 adviser, pay that adviser a fee to provide investment
20 advice, that adviser has a duty of loyalty to the
21 investor commensurate with that of a fiduciary under
22 common law.
23 It is inappropriate and beyond the scope of
24 the law to apply such a duty to an insurance agent who
25 is paid a commission by an insurance company only when

1 an insurance product is sold, not when a
2 recommendation is made.
3 Sales recommendations in which a commission
4 is paid only when there is an investment transaction
5 cannot and must not be viewed the same as investment
6 advice under a relationship in which compensation is
7 paid regardless of whether that advice leads to
8 action.
9 Transactional compensation in and of itself
10 must not trigger fiduciary status under ERISA. Simply
11 put, commission payment was for the sale of a product,
12 not provision of investment advice. Such a clear
13 articulation of ERISA from the Department would remove
14 all doubt for both financial professionals and
15 retirement savers.
16 It would also align the Department's efforts
17 with those of the SEC. The Investment Advisers Act of
18 1940 predates the enaction of ERISA. Plus it is
19 wholly appropriate to examine the SEC's views on when
20 someone is or is not in the business of providing
21 investment advice.
22 The SEC has explained that brokers whose
23 rendering of investment advice is solely incidental to
24 their business, free of any special charges, shall not
25 be viewed as an investment adviser for purposes of the

1 Advisers Act, again, free of any special charges.
2 They're not charging a fee to provide advice. They
3 will not be considered an investment adviser for
4 purposes of the act.
5 This aligns with the plain text of ERISA and
6 the Fifth Circuit's ruling. Absent special
7 compensation for rendering of investment advice, no
8 fiduciary relationship is formed. The Department
9 should be clear. The ultimate fiduciary agreement is
10 based first on whether the person is paid compensation
11 for advice rather than for sales or other services.
12 This will properly sync up the Department's
13 efforts with those of the SEC. Such clarity will
14 ultimately serve retirement savers. There should be
15 no doubt as to the duties owed to them by those they
16 engage. The Department's views of ERISA's fiduciary
17 definition must provide such clarity to retirement
18 savers and the regulated community.
19 Thank you.
20 MS. WILSON: Thank you very much for your
21 testimony, Mr. Szostek.
22 Do any of the government panelists have
23 questions at this time?
24 (No audible response.)
25 MS. WILSON: Okay. Mr. Szostek, please

1 stand by because we may have questions for you at the
2 end of the panel. Thank you again for your important
3 testimony.
4 MR. SZOSTEK: Very good.
5 MS. WILSON: Next we have Mr. Campbell.
6 Welcome, and we are ready for your remarks.
7 MR. CAMPBELL: All right. Well, thank you
8 very much, Secretary Wilson, Director Hall, and the
9 rest of the panel for the opportunity to testify
10 today.
11 My name is Brad Campbell, and I'm a partner
12 with the law firm Faegre Drinker, and I'm here today
13 representing seven organizations. And we collectively
14 represent insurance carriers, insurance
15 intermediaries, and insurance producers, brokers,
16 agents, and agency leaders.
17 And if you'll bear with me, the computer
18 just shut me down. There we go. Okay.
19 So we represent all of these insurance
20 industry participants who are collectively involved in
21 making life insurance and annuity contracts available
22 to millions of Americans. Our business is to provide
23 for the financial security of American families. We
24 help them make informed decisions to protect
25 themselves from a variety of financial risks, from

1 untimely death to outliving their retirement saving.
2 And to put it simply, we provide guarantees
3 in an uncertain world, protecting people from risk
4 that might otherwise devastate their lives.
5 So the ability to insure against these risks
6 is vital, and therefore it's equally vital that
7 Americans have access and choice to a wide array of
8 insurance and annuity products, and to assistance from
9 appropriate insurance and investment professionals to
10 allow them to best protect themselves from these
11 risks.
12 Now, my testimony today is going to focus on
13 how the proposed class exemption and the new fiduciary
14 guidance should be significantly modified to provide
15 strong protection for participants and beneficiaries,
16 while preserving essential access and choice to
17 insurance and annuity product. And in addition to the
18 issues we raised in our comment letters, we wanted to
19 discuss two items here today.
20 First, the proposed class exemption is
21 designed to align with securities regulation, but
22 insurance regulation is materially different in key
23 respects. Its consumer, consumer protection goals are
24 achieved in ways that create very different
25 relationships between carriers, intermediaries, and

1 agent. As a result, the inherent supervision,
2 control, and co-fiduciary status that's baked into the
3 proposal's financial institution and investment
4 professional structure, they simply don't fit into,
5 for example, the independent insurance agent model.
6 We believe the Department needs to provide
7 additional alternative conditions for insurance
8 transactions. They use the NAIC model rule on annuity
9 transactions as a guide, just as the Department has
10 used regulation best interest as a guide for their
11 proposal.
12 Secondly, we believe the guidance that
13 accompanied the proposal interpreting the 1975 five-
14 part test is fundamentally flawed. While at first
15 this guidance acknowledges that the sale of insurance
16 products is not ERISA fiduciary investment advice, a
17 position that's consistent with the Fifth Circuit's
18 ruling, the guidance then goes on to create some
19 significant ambiguity in the application of the five-
20 part test, making it nearly impossible to know with
21 clarity where the Department thinks the line has been
22 drawn.
23 The guidance effectively resurrects many of
24 the problems with the 2016 vacated rule, and even
25 worse it appears to do so being effective immediately

1 upon publication, without review by the public, which
2 we believe is inconsistent with the Secretary's
3 recently promulgated PRO good guidance regulation.
4 So to address these in more detail, I do
5 want to be to be clear, though, we are generally
6 supportive of the proposed class exemption if it's
7 modified as we see best, because conceptually we think
8 the Department is correct that a broad-based class
9 exemption is necessary, permitting various forms of
10 reasonable compensation. And we also agree with the
11 intent behind the coordination with the SEC and reg BI
12 in that the regulatory efficiencies inure to the
13 benefit of participants in the form of reduced
14 expenses and lack of duplicative regulation.
15 But for insurance and annuity transactions
16 that are not themselves secured, the conditions in
17 this proposed class exemption just don't fit with how
18 insurance products are regulated.
19 So in particular, as I mentioned before, the
20 relationships between the various parties and these
21 insurance transactions are different than the
22 relationship that you see between, say, a broker-
23 dealer and a registered representative.
24 Some agents are employees of some insurance
25 carriers. Some agents are affiliated with carriers,

1 multiple carriers, but are not employees. (Clears
2 throat.) Excuse me. Some agents are fully
3 independent insurance agents. Some intermediaries
4 have relationships with a particular carrier. Others
5 manage their own particular networks.
6 All of these different relationships have
7 arisen in the context of state regulated insurance
8 because these different arrangements serve the
9 interests of consumers in those states. But as a
10 result, they have different degrees of control and
11 supervision between the carriers and the agents and
12 the intermediaries.
13 Insurers don't supervise independent agents
14 in the way that representatives are supervised by
15 their financial institutions in the securities
16 industry. Independent agents represent multiple
17 insurers and are not controlled by a single
18 organization or company. Insurance regulation
19 actually is designed to foster this independence for
20 the benefit of consumers. And, of course, independent
21 agents are subject to significant regulation and
22 oversight, but not primarily by the particular
23 insurance carrier whose product they may recommend to
24 a particular individual.
25 So therefore, the policies and procedures

1 that financial institutions are required to adopt and
2 enforce in the context of the proposed exemption just
3 don't have a valid analog under insurance regulation.
4 So to address that, we recommend that the
5 Department look to the National Association of
6 Insurance Commissioners and their recently adopted new
7 model rule for annuity recommendations. This
8 investment interest standard was arrived at after
9 several years of intense study and effort by insurance
10 regulators, academic experts, insurance professionals,
11 and fundamentally take into account the different
12 business models and different nature of regulation in
13 the insurance marketplace.
14 And just as the Department looked to
15 regulation best interest for securities, we believe
16 the Department could look to the NAIC model rule to
17 serve as a framework for an alternative set of
18 conditions for insurance.
19 The other issue is that the exemption
20 requires acknowledgment of fiduciary status. But as
21 I'll discuss next, in light of the guidance from the
22 Department about how to interpret the five-part test
23 in relation to rollovers and distribution
24 recommendations, it's not going to be clear at the
25 outset of many recommendations of insurance products

1 whether the Department thinks fiduciary status
2 applies.
3 So this acknowledgment would prevent the use
4 of the exemption in cases where it should be available
5 because there is ambiguity about the fiduciary
6 standard and whether it applies to a particular
7 transaction. Accordingly, we don't think it's
8 necessary to be included in the exemption in order for
9 the exemption to achieve the Department goal.
10 So lastly, I wanted to address our concerns
11 about the guidance that was issued in the preamble in
12 relation to interpreting the five-part test. It
13 strikes us as concerning that the Department has
14 discovered essentially new meanings to 45-year old
15 words in the text, and has reversed its long-held
16 positions on how to interpret these.
17 We think these new interpretations are
18 inconsistent not just with the law, but also with the
19 Fifth Circuit's ruling. And while we appreciate the
20 Department acknowledging that there are -- that
21 insurance transactions often would not be fiduciary
22 advice, the reality is that most of these transactions
23 related to rollovers and recommendations would not be
24 fiduciary advice because they're sales transactions
25 that Congress never intended to be considered as

1 advice for a fee.
2 And as the Fifth Circuit put it in its
3 ruling, transforming a sales pitch into
4 recommendations of the trusted adviser mixes apples
5 and oranges. So we agree that the guidance says that
6 one-time sales transactions of an insurance product by
7 itself doesn't confer fiduciary status, even if the
8 company buy a recommendation that the product is well
9 suited, and we agree that all five parts of the test
10 should be met.
11 But where we disagree is with the new
12 interpretations of the five parts that undermine these
13 basic principles. For example, there is two ways the
14 Department has shown that a single meeting with an
15 investment professional to discuss a rollover
16 recommendation would constitute regular basis
17 provision of advice.
18 We don't think either one of these would
19 survive court scrutiny as a reasonable interpretation
20 of that rule. The first, which is the anticipated
21 ongoing relationship is predicated not on actions, but
22 on intentions. If I meet once with an investment
23 professional, and she recommends a rollover, the
24 Department would have us believe that we're meeting on
25 a regular basis because we plan on meeting again in

1 the future for additional recommendations.
2 If that's what regular basis means, then it
3 turns out I've been going to the gym on a regular
4 basis for many months now. In seriousness, though,
5 fiduciary status can't hinge on whether an intended
6 future event may happen, and something that has
7 happened only once simply cannot be viewed to be
8 happening on a recurring or regular basis.
9 The second on basis relationship, the
10 ongoing relationship, is predicated on preceding non-
11 ERISA communication, the recommendation counting as
12 ERISA fiduciary advice. So if I met with an
13 investment professional in the past regarding
14 unrelated securities or financial instruments, then
15 her first recommendation regarding a rollover would be
16 viewed by the Department as a regular basis advice.
17 This interpretation is unreasonable because
18 the prior relationship had nothing to do with ERISA.
19 Selling me a term life policy, for example, might be
20 recommending a financial instrument, but it's not
21 related in any way to ERISA fiduciary advice.
22 We're also troubled by the preamble's notion
23 (garbled) --
24 FEMALE VOICE: Excuse me. Your time is
25 expired. Thank you for your testimony.

1 MR. CAMPBELL: I believe -- if you can bear
2 with me just one moment, I'm almost finished.
3 MS. WILSON: Brad, thank you so much for
4 your testimony. We really appreciate your appearing
5 here today.
6 We're going to move on to the next
7 testifier, who is from -- is Ms. O'Brien, from the
8 Federation of Americans for Consumer Choice.
9 MS. O'BRIEN: Thank you very much.
10 Hopefully you can hear me. Yes? Good.
11 We appreciate the opportunity to testify
12 today. I really would like to say at the outset that
13 we're very encouraged to see many other trade
14 associations speak for the very real concerns of
15 independent insurance agents. FACC was formed
16 specifically to represent and address the concerns of
17 independent agents, marketing organizations, and
18 insurance agencies who provide customers with fixed
19 insurance products like fixed annuities.
20 What differentiates independent agents is
21 that they represent multiple carriers offering a wide
22 choice of products that help consumers navigate their
23 options and choose their products that effectively
24 address their financial needs and goals.
25 I spent my career representing independent

1 insurance channels in various capacities, and I'm here
2 today because I'm very deeply concerned that the
3 Department of Labor is designing regulatory
4 requirements that simply will not work for independent
5 insurance agents and will ultimately harm the very
6 consumers you're so very concerned about, as are we.
7 With all due respect, we do believe the
8 Department proposal is flawed. Procedurally, we
9 cannot understand why parties are given only 30 days
10 to comment on a rule proposal, two days to prepare for
11 a hearing like this, and given only 10 minutes to
12 cover very serious issues.
13 The rush to adoption is concerning.
14 Substantively, the Department has raised dozens, has
15 received dozens of comment letters raising a raft of
16 issues. We cannot begin to address them all in the
17 hearing like this. Certainly the definition of
18 fiduciary is now being blurred and rendered impossible
19 even for lawyers to decipher, let alone small business
20 professionals.
21 The rules of the road for rollover IRAs are
22 being changed. Raising the specter of the ERISA will
23 be applied to all retail IRA sales, which cannot be
24 the intent of Congress. The new class exemption may
25 work for the securities industries, but it does not

1 work for insurance representatives. These are real
2 concerns that we respectfully submit go to whether the
3 rule would even pass muster under arbitrary and
4 capricious analysis, and it should not be lost on
5 anyone that these new requirements are being created
6 at the worst possible time in our country.
7 In the middle of a pandemic, small
8 businesses are hurting, customers are reeling, and one
9 must ask why a federal agency right now must introduce
10 such complex requirements into the marketplace. It
11 just doesn't seem right.
12 I want to emphasize two related points.
13 Firstly, now we've heard some of the issues before.
14 Some of these issues go back to our original proposals
15 in 2010 and 2016. But frankly, we think the
16 Department has always paid much more attention to the
17 securities industry than the insurance industry.
18 Second, there are no quick fixes to this
19 proposal unless the Department decides to simply carve
20 out or give a safe harbor to any insurance agent who
21 satisfies state insurance laws. We've always been
22 willing to sit down with the DOL and discuss matters,
23 but the Department has been (garbled) engaged in how
24 DOL's proposals will operate in the (garbled).
25 We are unclear what the role will be to the

1 insurance industry if it suddenly goes into effect.
2 The Department's misconceptions regarding the effect
3 the rule will have on independent distribution is
4 apparent in its discussion in the preamble. In the
5 preamble the Department suggests that insurance
6 companies can simply copy broker-dealer supervisory
7 models, which is simply not true or even feasible.
8 Broker-dealers have broad and exclusive
9 authority over their registered representatives and
10 dictate the select products they may sell, the terms
11 under which they may sell them, and the compensation
12 they're allowed to receive when they make a sale.
13 Typically, insurance agents represent dozens
14 or more insurance companies, so they can offer a wide
15 selection of products to their clients. Individual
16 insurance companies can and do supervise their
17 appointed agents, but insurers can only do so for
18 their own products, their own compensation
19 arrangements, and compliance with regulations as they
20 apply to their products.
21 FACC worked with the National Association of
22 Insurance Commissioners to ensure its best-interest
23 model requirements were compatible with the
24 independent agent distribution system. Keeping in
25 mind that an important goal of these regulations is to

1 preserve consumer choice and different delivery models
2 from which to choose.
3 It's also telling that the Department
4 suggests in its preamble that agents could be
5 fiduciaries merely because they receive a trailer
6 ongoing commission. That belies the misunderstanding
7 of annuity -- how annuity products work and how agents
8 get compensated.
9 How does the fact that insurance companies
10 may pay an insurance agent ongoing commission on a
11 single sale of an annuity policy translate to a
12 fiduciary relationship between the agent and the
13 client? The annuity holdings, product performance,
14 and obligations rest solely with the insurance
15 company.
16 This novel interpretation of the test to
17 determine who is a fiduciary contradicts decades of
18 precedent and guidance. The Department also casually
19 suggests insurance companies can simply transfer
20 supervisory duties to independent marketing
21 organizations. But that is anything but casual or
22 easy. IMOs are not set up like broker-dealers. They
23 do not exercise control over their agents, and of
24 course IMOs are not currently even recognized as
25 financial institutions by your own rule.

1 There are enormous obstacles that these
2 present, all left unaddressed by the Department, and
3 they must be addressed more seriously if this rule is
4 to precede. And nobody should harbor any delusion
5 that PT 84-24 is a quick fix or panacea for insurance
6 agents.
7 First, to invoke PT 84-24, an agent must
8 essentially admit to being a fiduciary, which FACC
9 maintains is unwarranted in most cases.
10 Second, there is uncertainty whether 84-24
11 is available to agents as an exemption for any
12 compensation other than simple commission, leaving in
13 doubt whether it works for agents receiving other
14 common forms of compensation, including non-cash
15 compensation.
16 Third, it's uncertain whether and how PT 84-
17 24 applies to upline agents, including IMOs receiving
18 commissions on the sale of annuity products.
19 And fourth, with the withdrawal of the
20 Deseret Advisory Opinion, we believe there is
21 uncertainty whether PT 84-24 works for rollovers
22 absent clarification that acknowledgment and approval
23 is not needed from the employer plan fiduciary.
24 Finally, and fifth, there is no assurance PT
25 84-24 cannot be limited or withdrawn in the future by

1 the Department, as it did with the Deseret Advisory
2 Opinion. PT 84-24, just like the proposal itself, is
3 a puzzle that creates as many questions as answers.
4 And FACC submits proper rulemaking demands more
5 certainty than is afforded here to the affected
6 parties.
7 Allow me my few remaining minutes to talk
8 about what this rule proposal would mean for real-life
9 insurance agents and agencies. With the help of a
10 statistical analysis company, we have been able to
11 estimate there is approximately 100,000 independent
12 insurance professionals across the country. These are
13 insurance-only agents, most of whom have been in
14 business for years. Plus there are approximately 300
15 independent marketing organizations and agencies that
16 are small- to medium-sized businesses who help
17 individual agents every day.
18 In 2019, over 140 billion annuities were
19 sold, 140 billion in premium. About 60 percent of
20 those products are sold through independent agents.
21 We believe over half of those products are IRAs, and
22 about half of those are rollovers. These numbers are
23 very large, and DOL should not underestimate the
24 impact these rules will have on this industry.
25 We spoke with over a dozen agents and

1 agencies over the short time provided to prepare for
2 this testimony. They are real-life individuals who
3 are really affected by this proposal. They range from
4 literally mom-and-pop shops to agencies with 60 or
5 more employees. They are often located in smaller
6 towns with minimal access to financial services, and
7 customers may have more limited choices there.
8 They're worried about whether this rule will
9 force them to get licenses, work with other security
10 brokers, increase their legal and insurance costs
11 simply to comply with this rule.
12 Let me close by emphasizing that the NAIC
13 just recently adapted its model best-interest
14 requirements. Many ask why would the DOL not allow
15 those to work before creating yet another layer of
16 regulation. When working with the NAIC on the
17 development of the new best-interest model, FACC met
18 with regulator after regulator, who uniformly told us
19 their state doesn't have consumer complaint issues
20 with fixed annuity sales.
21 Their decision rather to create a best-
22 interest standard was motivated by a desire to
23 harmonize with other regulations. And we think now
24 DOL should do the same, seeking to harmonize with the
25 NAIC at least for independent insurance agents.

1 We urge the Department to suspend this hasty
2 adoption process and take the time necessary to study
3 the many critical concerns that have been raised.
4 Getting this right is very important. Thank you for
5 considering our testimony.
6 MS. WILSON: Thank you, Ms. O'Brien, for
7 that important testimony. We appreciate it.
8 At this point, I'm going to ask our
9 government panelists if they have any questions for
10 Ms. O'Brien.
11 (No audible response.)
12 MS. WILSON: Okay. Ms. O'Brien, please
13 stand by for additional questions at the end of this
14 panel.
15 Next we have Mr. Saxon and Breyfogle from
16 Groom Law Group.
17 Who will be speaking first? Mr. Saxon?
18 MR. BREYFOGLE: Yes. Steve is going to
19 start off for us.
20 FEMALE VOICE: This is Leyla. I haven't
21 seen an audio connection from Mr. Saxon. We've been
22 messaging him off to the side.
23 (Pause.)
24 MS. WILSON: Okay. Mr. Breyfogle, would you
25 like to begin?

1 MR. BREYFOGLE: Sure. Well, it was good
2 that I prepared a little bit because I had planned on
3 Steve doing the whole thing, and I was just going to
4 chime in. But Steve's technological capabilities are
5 just slightly less than mine, or mine are just
6 slightly greater than his, so I was able to connect.
7 It's great to see everybody, and Assistant
8 Secretary Wilson and the rest of the DOL panelists. I
9 don't have a joke nearly as good as Brad's gym joke as
10 an analogy for the regular-basis prong, and also not
11 so much kind of as formal of a prepared statement.
12 But really we just wanted to highlight a few things.
13 First of all, our firm is representing many
14 financial services firms. Most of them are
15 recordkeepers. They span the gamut of the financial
16 services industry. We really appreciate -- the main
17 focus of our testimony -- I just want to stand back --
18 is more on the exemption itself rather than the
19 guidance on the preamble on the five-part test.
20 That is important stuff. We had a lot of
21 comments on that in our actual guidance letter that we
22 submitted. But the big point for us is that
23 immediately after the vacature, our clients needed a
24 broad-based exemption. The previous exemptions that
25 exist issued by the Department over many years are

1 really cobbled-together exemptions for different
2 products and services, mutual fund exemptions,
3 insurance exemptions.
4 But immediately after the vacature, all of
5 our clients wanted a clear path on how to give advice
6 under ERISA and to IRAs, also wanted it to cover
7 rollovers should rollovers be covered recommendations.
8 So we actually welcome the Department's work in this
9 area.
10 We do disagree with some of the commentary
11 on the five-part test that is in the preamble. That's
12 all laid out in our written comments. But the
13 exemption is the focus of the group that we
14 represented, and we'd like to start with what is good
15 with it.
16 There are many good things in it. The scope
17 of relief in the exemption is substantial and
18 important and makes it workable. It is many parts of
19 the exemption are harmonized with reg BI in terms of
20 impartial-conduct standards, in addition to the
21 policies and procedure provisions.
22 We think the exemption creates a framework
23 that will be used and could be served -- serve really
24 as a basis for a good advice framework for many years
25 to come.

1 There are some things about the exemption
2 that are problematic, but let's just start with the
3 general idea that it's a welcome development to have
4 this exemption. Our clients would like to use it.
5 We'd like to see it in place for many years. We'd
6 like to see it as an alternative to the sort of
7 patchwork of exemptions that exist currently. So we
8 really do think it's an important development.
9 The second point I wanted to make is more of
10 a conceptual one, which is in harmonizing with reg BI,
11 the Department is sort of doing it in a two-step
12 process. One is through how it interprets the five-
13 part test, and so, you know, while we think in some
14 cases it went too far, you've tried to harmonize it
15 with reg BI in the sense of account recommendations,
16 rollover recommendations. Those things are covered
17 recommendations.
18 But the second part of the harmonization
19 actually comes up in the exemption, so that's where
20 the impartial conduct standards would be created.
21 And, you know, I disagree with some of the previous
22 panelists. I mean, obviously ERISA applies in the
23 ERISA world. There is a prudent standard anyway.
24 But in the IRA world, the impartial conduct
25 standards would very much be parallel to reg BI.

1 Policies and procedures are similar and the like. So
2 you really have to have the two of these working
3 together to have harmonization. And that really kind
4 of highlights one of our main concerns with the
5 exemption, which is the fiduciary acknowledgment.
6 We think it will discourage some people from
7 using the exemption, and we don't think that is a good
8 result. The broader use the exemption has, actually
9 the better for consumers because then the impartial
10 conduct standards, policies, and procedures will be
11 more widely distributed in the marketplace.
12 The fiduciary acknowledgment is, though,
13 going to be a big impediment to the widespread use of
14 the exemption, at least in our opinion. I know you
15 wanted examples as part of testimony here, so I'm just
16 going to give you a simple example in terms of kind of
17 how the decision-making would go for a large
18 institution.
19 So let's say I have a broker, I have a
20 thousand financial advisers, each with 100 clients,
21 and I have to make the choice of whether to
22 acknowledge fiduciary status really across my entire
23 book of business because for basic commission-based
24 brokerage accounts, I'm not going to be able to pick
25 and choose which accounts I acknowledge status for and

1 impose impartial conduct procedures for.
2 I'm going to have to do it on a book of
3 business basis. Some of the FA clients might not ever
4 meet with an FA in an entire year. Some might meet
5 once a year for a simple account check, portfolio
6 check. It might cover their retail products, their
7 IRA, maybe an ERISA plan, and some might actually talk
8 to an FA frequently.
9 So, I'm going to have to make a choice as an
10 institution to basically acknowledge fiduciary status
11 across my entire book of brokerage accounts when I
12 really don't know what the demand from the consumers
13 are going to be. And so, you know, it would be unfair
14 to say that I'm a fiduciary on an account that comes
15 and sees me every two years for a basic account check,
16 and maybe have a duty of monitoring or something like
17 that, and then say -- so I think that's the big choice
18 that you're going to sort of force institutions to
19 make, and I think many institutions will kind of look
20 back and say, wait, the five-part test, that has to
21 mean something. Maybe I want to use disclaimers and
22 things like that.
23 So, I think that that is really the big
24 concern that we have, which is the workability of
25 that. The one other example I want to point out,

1 which is basic pitches. I mean, it's clear from the
2 Fifth Circuit decision that essentially a sales pitch
3 cannot be fiduciary.
4 So let's say I'm an investment manager.
5 Recommending an investment manager is a fiduciary
6 recommendation according to the preamble. Well, I'm
7 -- an investment manager, and I just go do a sales
8 pitch, and I recommend the heck out of myself.
9 Well, that's a covered recommendation. And
10 in a later course of action, like Brad's gym example,
11 then that pitch is now sucked into fiduciary status.
12 I think there just has to be clarity that that first
13 recommendation, that first sales pitch, in respect to
14 the five-part test has to remain exempt from possible
15 fiduciary conduct.
16 So with that, I wanted to thank you for
17 having the hearing. I know you guys are on a short
18 time line to get this done. We actually appreciate
19 the extra process. Our clients appreciate the extra
20 opportunity to submit sort of oral remarks. Our
21 written remarks are much more fulsome, obviously. And
22 I'm happy to take questions.
23 And this is perhaps the first time I've ever
24 spoken without being interrupted by Steve, so I'll
25 just have to enjoy these nine minutes.

1 MS. WILSON: Okay. Thank you so much for
2 that important testimony.
3 At this point, I'd like to open up the floor
4 to the government panelists for questions.
5 Ms. Lloyd, would you like to begin?
6 MS. LLOYD: Thank you. Yes, thank you.
7 I think I'd like to begin with Mr. Campbell.
8 You talked about the issues related to the insurance
9 industry and complying with the exemption. And I
10 guess I wanted to follow up on the suggestion that we
11 need to align better or incorporate better some of the
12 NAIC approaches.
13 I was wondering if you could specify how
14 that would work?
15 MR. CAMPBELL: Well, one of the examples
16 that was a positive that was in the proposed exemption
17 was noting that the insurance carrier, when acting as
18 a financial institution, would not have to take into
19 account the products that other carriers offered that
20 would be offered by that independent agent, for
21 example.
22 I think that was helpful, but that's not the
23 sole issue that comes up in the context of that
24 independent agent and what the carrier would be
25 required to implement as far as policies and

1 procedures to deal with conflicts of interest and
2 other concerns go.
3 If you look at the NAIC's approach, they
4 took into account a variety of other issues that
5 would, would come into play, for example, you know,
6 conflicts of interest, you know, shelf space
7 questions. There is a variety of ways in which the
8 way the exemption is set up -- and again, we're not
9 opposed to the approach the exemption takes. It makes
10 sense in the securities context.
11 But the problem is that the relationship
12 between the carrier and the independent agent is not
13 such that the carrier is actually able to effectively
14 mitigate conflicts of interest. It doesn't have the
15 authority over the actions of the independent agent to
16 do the things that the exemption supposes the
17 financial institution is able to do with respect to
18 the investment.
19 And I think the NAIC model has several
20 different approaches that take that into account, and
21 therefore, in the context of their best-interest
22 standard are more realistically reflecting how -- the
23 nature of that relationship between the two parties.
24 MS. LLOYD: Well, you mentioned that the
25 exemption does say that an insurance company, a

1 financial institution, is not responsible for
2 recommendations of another insurance company by an
3 independent agent. So having said that, what are the
4 more specific things that would need to be done to
5 sort of allow for the insurance company model in your
6 view?
7 MR. CAMPBELL: Well, I think one of the
8 biggest concerns, for example, would be the fiduciary
9 responsibility, that both the investment professional
10 and the insurance carrier as the financial institution
11 would have to adopt under the proposal as it's
12 structured.
13 The nature of that relationship between the
14 two and the degree of control, or more accurately the
15 lack of the degree of control of the insurance carrier
16 relative to the independent insurance agent would make
17 that an inappropriate condition to impose because in
18 reality in many cases, the insurance carrier would not
19 be a fiduciary, I think, in relation to the
20 recommendation the independent agent makes.
21 And even if they were, they don't have the
22 degree of control necessary to oversee every aspect of
23 that relationship with respect to whether that
24 independent agent is in fact conflicted in light of
25 other things it may recommend, other compensation

1 arrangements it may have.

2 Sort of the fundamental structure of what
3 the exemption is intending to do, using regulation
4 best interest as a model for mitigating conflicts of
5 interest just simply doesn't function as the
6 Department really envisions in this insurance
7 relationship.

8 The concern would be that the carrier would
9 be responsible for actions by the independent agent
10 that it does not have the ability, in reality, to
11 address of control.

12 MS. LLOYD: The NAIC does have some policy
13 and procedure, envision oversight by insurance
14 companies. You're just saying that the -- you think
15 that our framework goes a little further?

16 MR. CAMPBELL: Exactly. The framework is
17 based on Regulation Best Interest, which it naturally
18 has a different relationship between the financial
19 institution and the investment professional. And so,
20 the NAIC rules have the same concept, but the way in
21 which they apply it, fits the structure of the
22 insurance industry in a way that the Regulation Best
23 Interest model doesn't. Now obviously, there are
24 insurance products that are securities, variable
25 insurance, you know, variable life, variable

1 annuities, and therefore with respect to those
2 products, the exemption does properly function. But
3 that's because they're being distributed via
4 securities regulation rather than via insurance
5 regulation. So our comments are concerned about
6 insurance products that are not themselves securities.
7 MS. LLOYD: Okay. And I think I'm going to
8 move onto Ms. O'Brien in a minute, but before I did I
9 wanted to see if you have -- what your thoughts are on
10 the availability of the other class exemption 84-24,
11 and how that could, or does that, relieve some
12 pressure in the areas where you this exemption isn't a
13 good fit?
14 MR. CAMPBELL: Well, I actually do disagree
15 with some of the concerns she raised. I do believe
16 84-24 applies broadly to insurance and annuity
17 transactions based on the terms of the exemption as
18 written. I do think it is correct to say, though,
19 that if this exemption, the proposed class exemption,
20 is intended to be broad-based and widely used by a
21 wide range of, of financial professionals, I think
22 that is the Department's intent, and it's one that we
23 support.
24 As it's currently constituted, it's much
25 more likely that insurance interests are going to

1 continue to use 84-24 rather than the broader
2 regulation -- broader exemption rather simply because
3 of these conditions that just don't fit well with
4 insurance regulation.
5 MS. LLOYD: Thank you.
6 So I would like to turn to Ms. O'Brien,
7 maybe just to continue that line of thinking. You
8 listed a number of concerns that you have about 84-24.
9 And I think I understand, except I'm not sure about
10 the part where you said that the insurance agents have
11 to admit to being a fiduciary. And I'm wondering if
12 you could explain your thinking on that a little bit
13 more.
14 MS. O'BRIEN: Well, as we understand it,
15 just by invoking the 84-24 disclosure with the
16 customer, with the client, that is stating to the
17 client I am a fiduciary, and that invokes the
18 fiduciary status when it's maybe unwarranted and not
19 even applicable.
20 So they can't use the exemption without
21 stating they're a fiduciary, and if they don't use the
22 exemption, then they don't have the permissibility to
23 receive commissions for any recommendation and
24 resulting sale.
25 MS. LLOYD: So you read the disclosure

1 requirement as sort of implicit fiduciary
2 acknowledgment because they wouldn't meet the
3 exemption absent fiduciary status? Is that --
4 MS. O'BRIEN: Yes. We think the disclosure
5 is an explicit acknowledgment that they are a
6 fiduciary, whether it's applicable or not, and we
7 maintain that in most cases it is not.
8 MS. LLOYD: Okay.
9 MR. CAMPBELL: So this is Brad, just to
10 follow up on my previous answer. I would respectfully
11 disagree with that. I think we're complying with
12 conditions of 84-24, which include a disclosure of
13 commissions, certain conflicts, and other issues. It
14 does not constitute acknowledgment of fiduciary
15 status.
16 I just think it's important that we make
17 that clear, that 84-24 doesn't have a direct fiduciary
18 acknowledgment.
19 MS. LLOYD: Okay. Thank you for that.
20 I guess I also just wanted spend a minute on
21 your position on IMOs. I think you're saying that you
22 don't think that IMOs should serve as financial
23 institutions under the exemption, which as you know,
24 they were not included in the proposal, but we asked
25 questions on that topic.

1 MS. O'BRIEN: Is that for me?
2 MS. LLOYD: That's right.
3 MS. O'BRIEN: Thank you. Well, IMOs are not
4 functioning -- do not function like a carrier. They
5 don't have, just like a broker-dealer, they don't have
6 exclusive authority over or control over an agent. In
7 our world -- and there is over, as I mentioned,
8 100,000 of them nationwide. They work with two,
9 three, or four IMOs to get the broadest breadth of
10 products that they can offer.
11 So the IMO doesn't have control, and the
12 only way to put them into a financial institution
13 status would be require exclusivity, which totally
14 upends the whole independent distribution concept and
15 the benefit to the consumers.
16 MS. LLOYD: Okay, thank you. I think I
17 might want to talk to the Groom Group representatives.
18 I don't know if we just have Mr. Breyfogle still.
19 MR. BREYFOGLE: Yeah. I think Steve has not
20 been able to resolve his technological concerns, so
21 I'll do my best.
22 MS. LLOYD: Okay. Well, I just wanted to
23 follow up on your comments about the fiduciary
24 acknowledgment. So I wrote down a few notes,
25 essentially that you feel that it will discourage use

1 of the exemption. And is that related to your
2 followup comments that a financial institution would
3 have to sort of wholesale decide if they were going to
4 act as a fiduciary and acknowledge fiduciary status,
5 or there other concerns.
6 MR. BREYFOGLE: Well, I think there is a
7 large -- and I can hear somebody typing in the
8 background. There is a larger concern, which is that
9 the five-part test itself is a facts-and-circumstances
10 test. And so you don't know going into a relationship
11 to satisfy all of its requirements.
12 I think that in 84-24 -- we've talked about
13 it, and some of the other Departments' exemptions, it
14 was specifically there as a backstop for if you cross
15 the line. I believe the preamble to either the
16 predecessor exemption, whether it was 77-9 or whether
17 it was in 84-24, actually states that.
18 So it was specifically designed if you
19 became a fiduciary, and you needed B relief, it would
20 be available to you if you pre-plan to meet its -- you
21 know, to meet its disclosure obligations and the like.
22 That's the way this should work, so that if
23 you are in the background planning and complying,
24 meeting impartial conduct, having policies and
25 procedures, it should be readily available to you.

1 And so because the five-part test is inherently
2 factual, requiring you in an exemption to basically
3 admit that all those facts have been satisfied, it
4 does seem to be just an incongruous situation to us.
5 Also, I think that just in really
6 harmonizing with reg BI, you really want people to do
7 both, right? You actually want them in the exemption.
8 Otherwise, impartial conduct standards aren't even
9 applicable. So you actually want to incent people to
10 use the exemption.
11 Requiring everybody to waive their -- put
12 their hand up and say I'm a fiduciary, regardless of
13 whether they really are or not, is what is going to
14 discourage them. And the example I was just trying to
15 use was just really a practical one, which is for
16 basic commission-based brokerage accounts for a
17 broker-dealer, you can't pick and choose which ones
18 you're going to comply with when you have a thousand
19 brokers, each with 100 clients.
20 You really have to go into it as an
21 organization, you know, from a compliance standpoint,
22 deciding whether for all of those accounts you're
23 going to comply with the exemption, or none of those
24 accounts.
25 That's really just the practical

1 implementation point I was making. And when for many
2 of those accounts people aren't even going to get
3 regular advice at all, why would an institution say
4 I'm going to acknowledge fiduciary status across that
5 whole book of business?
6 I'm just saying that's a practical
7 consideration. And if it wasn't, if that
8 acknowledgment wasn't a requirement, a lot more people
9 would use the exemption, at least in my opinion, just
10 as a lawyer who counsels lots of these institutions
11 because they wouldn't have to sort of concede
12 fiduciary status. But then all of the exemption
13 protections would be in place.
14 MS. LLOYD: Yeah. I mean, I guess I feel
15 like you made the point that there are other
16 exemptions, and they did it through a different
17 approach. And I feel like there is a protection to
18 plan participants to receiving this type of a
19 disclosure that is part of the structure of this
20 exemption.
21 You know if people don't want to step
22 forward and say that they're fiduciaries, there are
23 other exemptions available.
24 MR. BREYFOGLE: But one of the things -- I
25 mean, most of the other -- I don't know that any of

1 the other exemptions require acknowledgment of
2 fiduciary status, even though they also provide self-
3 dealing relief. And so they weren't hinged in the
4 same way.
5 And obviously, you know, we welcome this
6 exemption. We think this is a good development. The
7 problem with the other exemptions is for a
8 multifaceted financial services firm, you have to use,
9 you know, 77-4 for this, 84-24 for that, 75-1
10 conditions. You have to kind of cobble them together.
11 It is not a seamless experience for integrated
12 financial services firms.
13 So it's just a very different financial
14 services world than it was when those exemptions were
15 written. So this to me is a great development to have
16 a modernized exemption, but this condition -- I do
17 think that in our comments we suggested an
18 alternative, which was, you know, to just have a
19 disclosure of the best-interest standard as a concept
20 here. One other think I wanted to mention if none of
21 the other exemptions cover rollovers.
22 So since rollover is such an enormous topic,
23 we can't really have you say the five-part test now
24 includes a rollover because we've rescinded Deseret,
25 and then say go use the old exemptions, where really

1 this is the only place to go on that.
2 So, anyway, again overall, it's a really
3 good development, the impartial conduct standards, the
4 policies and procedures for conflict mitigation. If
5 you have a disclosure around what the best-interest
6 standard means, those are meaningful protections, and
7 people would still have a good sense of the
8 relationship that you have without having to concede
9 the five-part test.
10 And I do think you're kind of funneling
11 people into the exemption in a way that does get a
12 little bit close to the concerns of the court in the
13 Fifth Circuit decision.
14 MS. LLOYD: Okay. Thank you.
15 I think just in case other panelists have
16 questions, I'm going to stop asking questions and let
17 other people have a turn.
18 MS. WILSON: Ms. Hall?
19 (No audible response.)
20 MS. WILSON: Ms. Lim?
21 MS. LIM: No, I don't have anything.
22 MS. WILSON: Okay. I have a couple of
23 questions for Mr. Breyfogle.
24 You did mention the acknowledgment of
25 fiduciary status and that it could be a problem for

1 firms that are implementing the exemption across a
2 broad base of arrangements, some of which might not be
3 fiduciary relationships.
4 And you acknowledged that perhaps an
5 alternative might be disclosing this standard of
6 conduct --
7 MS. BREYFOGLE: Um-hmm.
8 MS. WILSON: -- that would be required. The
9 exemption, as you know, also has another condition,
10 and that is that the advice itself reflect the care,
11 skill, prudence, and diligence under the circumstances
12 then prevailing that a person acting in a like
13 capacity and familiar with such matters would use in
14 the conduct of an enterprise of a like character with
15 like aims, based on investment objectives, risk,
16 tolerance, financial circumstances and the needs of
17 the retirement investor.
18 So prudence requirement is also part of the
19 exemption. Would you also be supportive of
20 acknowledging that the prudence requirement would
21 apply?
22 MR. BREYFOGLE: I think that when you get
23 into a formal acknowledgment condition, you're sort of
24 asking somebody to acknowledge components of the five-
25 part test or concede to components of the five-part

1 test because, you know, when you look at that, the
2 primary basis -- if I've said that everything is going
3 to be prudent in some sort of formal acknowledgment,
4 sort of the reliance part of the five-part test you
5 think would be more easily met.
6 I don't know why just disclosing what that
7 standard is as part of your reliance on the exemption,
8 and wouldn't be sufficient without some sort of
9 acknowledgment that might erode the facts and
10 circumstances and the nature of the five-part test.
11 MS. WILSON: So just to be clear, it's
12 not -- it would not be any acknowledgement of any
13 fiduciary duty, but the exemption itself under section
14 5(a) has a prudence requirement --
15 MR. BREYFOGLE: Yeah.
16 MS. WILSON: -- in the exemption. So if, if
17 a financial institution were implementing the
18 exemption across its entire client base, and it were
19 willing to acknowledge compliance with the best-
20 interest standard, would it also be in compliance with
21 the prudence standard that's inherent in the
22 exemption?
23 MR. BREYFOGLE: So you'd obviously have
24 to -- and I might be getting hung up on the words. In
25 order to meet the conditions of the exemption, you'd

1 actually have to make best-interest advice as defined
2 there. And, you know, for ERISA plans, it would
3 obviously have to be prudent just under 404. For
4 IRAs, it would have to meet the best-interest
5 definition here.
6 So just to have the exemption available,
7 you'd obviously have to meet that standard. I do
8 think that's a facts-and-circumstances standard. If
9 there is a component to compliance with the exemption
10 that requires a formal acknowledgment that if I give
11 advice, I'm going to meet that standard, that's
12 different, as opposed to I am a fiduciary.
13 So if the acknowledge -- if all you're
14 saying in here is that if I rely on this exemption, I
15 will meet all of its requirements, then I think that's
16 sort of definitionally true.
17 There are some -- so that might be
18 different. I do think that the devil's in the details
19 in terms of kind of how it would be written and --
20 MS. WILSON: That's the nature of the
21 question, though. Would they be willing to
22 acknowledge that they are meeting the requirements of
23 the exemption, not -- my question is directed not at
24 would they acknowledge that they meet the fiduciary
25 test, either directly or indirectly, but would they be

1 willing to acknowledge that they are complying with
2 all of the requirements of the exemption?
3 MR. BREYFOGLE: Yeah. I think that that
4 might be a middle ground. I'd like to think about it
5 a little bit more. But I think it would be different
6 to say that a disclosure that if I were to rely on
7 this exemption, I will meet its requirements -- that's
8 different than to say if I'm relying on it, I'm
9 acknowledging fiduciary status.
10 So I do think that's a step back from the
11 requirement that's imposed in the proposed rule. I
12 think it would be --
13 MS. WILSON: Jon, I think you got cut off.
14 Okay.
15 FEMALE VOICE: I think he might be frozen.
16 MS. WILSON: Yes. I think he is frozen.
17 Do we have any other questions from any
18 other panelist?
19 (No audible response.)
20 MS. WILSON: Jon, you were cut off for a
21 minute. Do you want to resume?
22 MR. BREYFOGLE: No. I -- well, yes. I
23 think that might be more of a middle ground in terms
24 of -- but I think the devil is in the details in terms
25 of how it would be written, and I would like to think

1 about it a little bit more. But it'd be -- it would
2 be a different thing to say if I rely on this
3 exemption, I acknowledge that I'm going to meet its
4 conditions, versus if I rely on this exemption, I'm
5 acknowledging that I am a fiduciary no matter what.
6 MS. WILSON: Okay.
7 MR. BREYFOGLE: So I do think that those
8 would be different requirements.
9 MS. WILSON: Yeah. That was the thrust of
10 the question. Thank you --
11 MR. BREYFOGLE: Yeah.
12 MS. WILSON: -- very much.
13 MR. BREYFOGLE: No, no. Thank you.
14 MS. WILSON: Okay. So it looks like we have
15 no more questions from the panel. I do want to thank
16 you again, all of the panelists, for appearing and for
17 your important remarks. We appreciate your time today
18 and your remarks. And at this point, we are going to
19 take a break for lunch.
20 MALE VOICE: Thank you.
21 MR. BREYFOGLE: Yeah. Thank you for having
22 us. Appreciate the opportunity.
23 MALE VOICE: Appreciate the opportunity.
24 //
25 //

1 (Whereupon, at 11:58 a.m., the hearing was
2 recessed for lunch, to reconvene at 1:00 p.m. later
3 that same day.)
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1 A F T E R N O O N   S E S S I O N

2 (1:00 p.m.)

3 MS. WILSON: Welcome to today's hearing.
4 This is the afternoon session of the Employee Benefits
5 Security Administration's public hearing on the
6 proposed exemption for improving investment advice for
7 workers and retirees. I'm Jeanne Klinefelter Wilson,
8 the acting Assistant Secretary at EBSA. Before we
9 resume testimony, I'll cover a few procedural matters
10 for this afternoon's panel.

11 Thank you for participating in this next
12 step in the rulemaking process. We are grateful for
13 all the valuable input we have already received as
14 part of the notice and comment process, and we look
15 forward to your observations this afternoon. We will
16 add this afternoon's testimony to the public record,
17 and we will take this feedback into account as we
18 continue our work on this important project.

19 We heard from three panels this morning, and
20 we have three panels this afternoon. There are three
21 to four witnesses on each panel. We do have a full
22 agenda, so we ask for witnesses to watch your time.
23 Each witness has ten minutes to present their
24 testimony. Multiple individuals will speak on behalf
25 of some organizations testifying today, so I'll

1 clarify that the ten-minute allotment is per
2 organization, not per individual. A timer will show
3 up on the screen to help with time management, and we
4 will be enforcing the ten-minute allotment to ensure
5 that we stay on schedule.
6 The witnesses will present their testimony,
7 and then the government panel members will have an
8 opportunity to ask questions. We are not accepting
9 questions from the audience or the witnesses. Also
10 you should not draw any inferences or conclusions
11 based on the way we happen to frame a particular
12 question or questions. Our goal today is not to
13 suggest or communicate any particular resolution of
14 pending issues, but rather to develop the public
15 record and learn from what you have to say.
16 Today's hearing is being transcribed. The
17 hearing transcript will be available to the public on
18 EBSA's website within about a week. Witnesses will
19 testify in the order in which they appear on the
20 hearing agenda. To assist us today we have a few
21 requests for those who are testifying. First, it
22 would be very helpful if before you testify, you
23 identify yourself, your affiliation, and the
24 organization that you're representing, if any.
25 Second, please limit your remarks to the allotted ten

1 minutes. Pay attention to the timer that will appear
2 on your screen. Third, please remember to speak
3 directly into your phone or microphone on your
4 computer. That's critical to get a complete and
5 accurate transcript. Make sure that speakers are
6 correctly identified, including for the question and
7 answer session. Please identify yourself at each time
8 that you speak.
9 And now I would like to reintroduce the
10 other members of the government panel. Ms. Lyssa
11 Hall, Director of the Office of Exemption
12 Determinations, Ms. Karen Lloyd, Chief of the Division
13 of Class Exemptions, and Ms. Youngok Lim, a Senior
14 Economist in the Office of Regulations and
15 Interpretations. That said, let's get started with
16 the panel number four. Mr. Certner, will be our first
17 speaker. Mr. Certner?
18 MR. CERTNER: Thank you. My name is David
19 Certner. I'm the Legislative Counsel and Policy
20 Director for AARP. We appreciate the opportunity to
21 testify on the Department's proposed prohibited
22 transaction class exemption. In general, AARP
23 believes the proposal provides inadequate restrictions
24 on the provision of conflicted fiduciary investment
25 advice, and, therefore, does not provide the necessary

1 substantive protections participants and beneficiaries
2 have that's required under ERISA.
3 The major priority for AARP has long been to
4 assist all Americans in accumulating and effectively
5 managing the assets that will need to supplement
6 social security. In order to ensure adequate
7 retirement savings, investors often need to know the
8 advice provided by financial advisers that's solely in
9 their interest. Americans face many barriers as they
10 try to save for retirement. Conflicted investment
11 advice should not be one of them. An upcoming AARP
12 survey of retail investors in adviser/client role
13 relationships, confirms the need for fiduciary
14 standard. This national survey of over 1,500 adults
15 with retirement savings or other investment accounts
16 is currently being finalized. We'll be happy to share
17 a copy when it is released.
18 Some of the findings include more than one
19 in three surveyed investors say they are currently or
20 will in the future seek financial guidance from a
21 financial professional. While 68 percent say they are
22 very or somewhat knowledgeable about their
23 investments, many investors have a limited knowledge
24 about whether they pay any fees or how much they are
25 paying. Forty percent of investors mistakenly think

1 they don't pay any fees or expenses to their account.
2 Ten percent aren't sure. Of the 40 percent who report
3 paying fees and expenses, more than 60 percent don't
4 know how much they're paying. Most investors at least
5 somewhat trust the financial advisers and institutions
6 that manage their account. However, 58 percent of
7 investors also think financial advisers are likely to
8 sell them higher priced investments in order to
9 maximize their own earnings, a conduct that they deem
10 unacceptable.
11 A large majority of investors in our survey,
12 84 percent, are not aware of the SEC's recent
13 regulations of best interest. Upon learning the SEC's
14 recent regulations does not require financial advisers
15 to put their client's interest above their own
16 financial interest, a large majority of investors
17 oppose it, with half saying they strongly oppose it.
18 This survey, again, indicates investor confusion, the
19 lack of understanding of the investment industry, and
20 a strong difference in expectations of the
21 participants and beneficiary as to how the system
22 works and the protections they believe are already in
23 place.
24 The potential negative impact of conflicts
25 on the retirement security of older Americans is

1 accomplished under retirement security hold Americans
2 is substantial. The GAO estimated at a 401(k) account
3 that had a one percentage point fee for 20 years a
4 higher fee. For 20 years it would result in over a 17
5 percent reduction in the account balance. Even a
6 difference of only a half a percentage point, would
7 reduce the value of the account by 13 percent over 30
8 years.
9 Two recent National Bureau of Economic
10 Research studies illustrate how a fiduciary standard
11 results in lower fees and better returns and maintains
12 the ability within the industry to still sell their
13 product -- clearly the win-win situation for all
14 concerned that we want. One study found that imposing
15 a fiduciary duty on broker-dealers shifts the set of
16 products they sell to consumers away from variable
17 annuities and towards fixed index annuities. Even
18 within variable annuities, imposition of a fiduciary
19 duty, induces a shift toward lower fee, higher return
20 annuities and with a wider array of investment
21 options.
22 Significantly the paper found that imposing
23 a fiduciary duty upon broker-dealers raises risk-
24 adjusted return by 25 basis points. Similarly, the
25 second NBER paper found that brokers' incentives for

1 selling variable annuities conflict with their
2 client's interest. Brokers earn higher commissions
3 for selling inferior annuities at higher expenses, as
4 well as fewer and worse performing investment options.
5 In short, these two NBER papers found that
6 requiring advisers to be held to a fiduciary standard
7 improves the advice provided to participants and
8 beneficiaries. It's clear that conflicted advice that
9 results in higher fees and lower returns, will have a
10 huge impact for retirement income security levels.
11 Disclosures alone are a poor substitute for
12 substantive protection against bad fiduciary
13 investment advice. In DOL's 2016 proposal, the
14 Department rejected a disclosure, alone standard, as
15 being ineffective to mitigate adviser conflicts.
16 While our written comment letter cited various
17 sections in the regulatory analysis, the Department in
18 its current rulemaking fails to address or repute its
19 previous findings in the studies it relied on. It's
20 especially important that the Department explains,
21 what, if anything, has changed from the 2016
22 regulatory analysis on disclosure. A recent informal
23 survey discussed in Wealth Management, indicated that
24 the SEC's own recently revised CRS disclosures had
25 failed in one of their stated purposes are being

1 conversations starters between the adviser and client.
2 The Kleimann SEC study clearly demonstrates
3 the shortcomings of the recent changes to the SEC CRS
4 disclosure. Even after testing they found that
5 disclosure failed to clearly convey differences in
6 legal obligations between different types of advisers
7 or the importance of conflicts of interest. To make
8 matters worse, a recent review by the Wall Street
9 Journal shows that at least 1,300 brokerage and
10 financial advisery firms incorrectly state on the CRS
11 that neither they nor their financial professionals
12 had legal or disciplinary history. Even when
13 disclosure could be beneficial, the proposals and
14 disclosures are inadequate because they're not
15 effective in alerting retirement investors, that the
16 advice provided is not intended to be subject to
17 ERISA's fiduciary protections. In addition, the
18 disclosures do not provide any explanation of the
19 potential implications of conflicted advice to their
20 investment.
21 In the Kleimann CRS Disclosure study, most
22 participants specifically ask for more information
23 about fees, which the DOL has not required to be
24 disclosed in its proposal. The Department has not
25 attempted to test to disclosures in question to see if

1 they're understandable. If disclosures are not
2 understandable, they cannot effectively protect
3 consumers.
4 Virtually all defined contribution plans
5 permit a lump sum distribution, all but half of
6 defined benefit plans do. For many people, their
7 retirement plan represents the bulk of their personal
8 savings. The often irreversible decisions made with
9 respect to the timing and manner or rollovers or other
10 plan distribution clearly has a major impact on
11 individuals' overall retirement security.
12 Accordingly, it's essential that the adviser providing
13 guidance at this critical juncture be subject to
14 ERISA's fiduciary duties.
15 We appreciate that DOL has stated that
16 recommendation to rollover planned assets to be the
17 start of a regular relationship. However, AARP
18 believes the Department interpretation doesn't go far
19 enough. AARP believes that the recommendations on
20 sales, some or all current recommendations to sell,
21 some or all current plan assets, roll over the
22 proceeds, and any subsequent recommendation as to
23 where to invest those assets, easily meets the on a
24 regular basis prong of the five-part test. These are
25 separate advisery recommendations and separate

1 decisions for the participants to make even under the
2 outdated regular basis threshold.
3 As participants retire or terminate
4 employer, employment and are advised to move their
5 portfolio assets into IRA's, they are moving from a
6 heavily regulated system with fiduciary protections to
7 one without similar protection. Indeed, as has been
8 illustrated, higher assets, most of it from rollovers,
9 now exceeds assets in defined contribution plan. The
10 amounts flowing into IRA's only continue to grow, and
11 as recent reports indicate, this is especially
12 important during this pandemic as almost three million
13 older workers have lost their job with little hope of
14 finding or replacing the job quickly. These
15 tax-subsidized retirement plan assets should enjoy
16 similar protection whether an employer plan or an IRA.
17 This proposed exemption is largely based on,
18 and defers to SEC's recently implemented regulation on
19 best interests. However, Reg BI was drafted based on
20 security laws and uses an undefined best interest
21 standard, not the fiduciary standard explicitly
22 required by ERISA to act in the sole interest of
23 beneficiaries. It is simply contrary to ERISA for the
24 DOL to abandon its statutory and long understood
25 fiduciary standard for a new undefined best interest

1 standard based upon the requirements of another
2 agency. This will only lead to more confusion,
3 regular litigation, and less protection for
4 participants and beneficiaries.
5 In conclusion, I would ask that the document
6 that AARP listed on our Request to Testify be also
7 entered into the record. Holding retirement plan
8 advisers to a lesser standard based in large part on
9 disclosures alone, will not address the problems of
10 knowledge differential, advice need, and the national
11 interest of ensuring adequate retirement income.
12 Given the confusion and lack of understanding in the
13 financial marketplace, disclosure alone is not enough.
14 A fiduciary standard is needed. This proposal is not
15 protective of participants and beneficiary. It should
16 be withdrawn and modified to be consistent for the
17 ERISA. Thank you.
18 MS. LLOYD: Looks like we may have lost our
19 Assistant Secretary.
20 FEMALE VOICE: Yes, I think she's
21 restarting.
22 MS. LLOYD: So Mr. Naylor would you like to
23 go ahead?
24 MR. NAYLOR: Yes. Hi, this is Bart Naylor.
25 In the background is my dog, Heidi. She is -- where

1 is she? She's not registered to testify, but she may
2 bark for which I apologize in advance to express her
3 view of this proposal, which is essentially what I
4 plan to do is bark.
5 On behalf of more than 500,000 members and
6 supporters of public citizens, I offer the following
7 comment on the new retirement advice rule. Currently,
8 I'm the financial policy advocate for public citizen.
9 Formerly I served as director of the Teamsters Office
10 of Corporate Affairs, where we intersected with some
11 of the mammoth teamsters pension funds, such as
12 western and central states. Building upon the
13 precepts of the DOL's Avon letter, which we became
14 among the most prodigious of several resolution
15 activists. We note with loathing that the DOL now
16 proposes to gut the Avon letter, part of an
17 anti-accountability scheme I will address at the
18 conclusion of these remarks.
19 I've also served as the managing partner of
20 the Rolliant Fund, an investment LLC, and I've served
21 as Chief of Investigations to the U.S. Senate Banking
22 Committee. These professional experiences at both the
23 policy and retail level engagement with Wall Street
24 has impressed upon me that the details that the DOL
25 now proposes can have sweeping impacts on the

1 integrity of American investments. We oppose the
2 proposed exemption allowing investment advice
3 fiduciaries to recommend products where the commission
4 received can compromise the fidelity of said advice.
5 At stake is the retirement security of
6 American workers and retirees who will now be suspect
7 gambles. There's a reason some investment products
8 generate the adviser more commission prize money than
9 other products. They're not readily bought. They're
10 not popular proven products. They must be sold
11 precisely because they can be dangerous. Many of the
12 public citizens members are retirees. While they are
13 astute, well-read, and engaged with current events
14 involving corporations, they should still not be
15 exposed to professional scam artists. The Bernie
16 Madoff scandal which involved investment victims, some
17 of whom were leaders in their field, such as Steven
18 Spielberg, attest that smart people can be misled and
19 fleeced.
20 The landscape for retirees has become
21 treacherous in the last half century. Defined
22 contribution retirement accounts, where the retiree
23 must make sound decisions have replaced defined
24 benefit pensions, whether retiree was guaranteed a set
25 retirement income as the primary form of workplace

1 retirement plan. Workers must not only become capable
2 brick layers, they must also be smart brokers of their
3 savings.
4 The self-directed individual retirement
5 account is a major source of retirement protection for
6 some 36 percent of U.S. household, and gone are the
7 days where the basic options were either bonds or
8 stocks. The landscape is crowded with new devices --
9 some useful but others designed to separate the saver
10 from her savings. This makes honest investment advice
11 critical.
12 It is obvious from the very name of major
13 institutions that the investment advisers know that
14 enduring security, honest, and fair dealing rank high
15 on the investor's mind -- Fidelity, U.S. Trust, Black
16 Rock. The history shows that names can deceive.
17 Lincoln Savings and Loan, presumably named for honest
18 Abe and Bankers Trust, both failed after scamming the
19 depositors, and Proctor & Gamble derivatives
20 customers, respectively. This list of deceptively
21 named institutions that scam customers is sadly very
22 long.
23 For the record I ask the following studies
24 be considered. The study on Variable Rate Annuities
25 published by NYU already referenced by Mr. Certner of

1 AARP finds that fiduciary advice standards improve the
2 returns to investors without significantly increasing
3 compliance costs. The study on Broker Misconduct,
4 published by the NBER, only 54 percent respondents
5 trust Wall Street to "do what is right." In a survey
6 on trust and Wall Street sales agents, not a happy
7 story. "Trust is important," as a former head of
8 Merrill Lynch once said. Sincerity is most important
9 in winning the trust of customers. And if you can
10 fake that, we've got it made. For this context, the
11 Department of Labor now proposes to expose retirees to
12 greater risks.
13 The DOL proposes to return to some of the
14 scandalous days and allow sales agent to fly under the
15 banner of fiduciary and sell product that maximize
16 their commissions and not the stable returns to
17 investors. This borrows from and compounds the harmful
18 actions by the Securities and Exchange Commission in
19 their Reg BI. There will also be no mechanism for IRA
20 investors to enforce, bring accountability for
21 infractions, remaining tissue-thin protections offered
22 by the proposed rule. There's no private right of
23 action, nor can the DOL effectively enforce the
24 standard as it applies to IRA's. These flaws are
25 fatal.

1 Of course, the DOL does not confess that
2 these changes are intended to help potential
3 wrongdoings of those Wall Street firms, whose names
4 are meant to convey trust. It's awfully claimed that
5 these changes will help protect investors. This sham
6 reasoning is not dissimilar to the deception that
7 public citizen members will now be forced to confront
8 if this proposal moves forward. This change is part
9 of a much wider, cynical, anti-consumer,
10 anti-investor, and yes, even a racist agenda.
11 Last week the DOL proposed to eviscerate the
12 Avon letter, foundational in promoting institutional
13 investor attention to needed reform as brought by
14 grassroot investors on issues from climate change,
15 political spending, corruption, and human capital
16 management. It adds to the SEC censorship of proxy
17 advisory firms in the forthcoming disqualification of
18 shareholder resolution proponents.
19 Elsewhere the CFEB reversed reforms on loan
20 shark payday lending at a time of induced economic
21 trauma has left millions unemployed. And the OCC
22 unilaterally derailed the Community Reinvestment Act,
23 one of a banking law's key tools to combat racist
24 lending offered by my former boss, William Proxmire.
25 These are all shameful policies.

1 It should be revealing that all consumer
2 advocates today oppose this investment advice rule,
3 and only industry agents support it although they
4 object to the few protections. That's hardly a record
5 of endorsement. If you don't have the AARP, you can't
6 proceed. We ask the DOL to withdraw at least this
7 proposed change. Thank you.
8 MS. WILSON: Thank you very much for that
9 testimony, Mr. Naylor. Next we have Mr. Rhoades. Mr.
10 Rhoades?
11 MR. RHOADES: Thank you for this
12 opportunity. I am Professor Rhoades, Ron Rhoades of
13 Western Kentucky University's Gordon Ford College of
14 Business in its Department of Finance. These remarks
15 are my own, and do not necessarily represent the views
16 of any institution, organization, or firm within whom
17 I am presently associated, nor of any cult or gang I
18 have ever been kicked out of.
19 In my experience as a university professor
20 teaching courses in retirement planning, insurance and
21 investments for nearly a decade, and as a registered
22 investment adviser for 20 years, and as an attorney to
23 both business entities and to private individuals for
24 34 years, I have had the opportunity to review many
25 401(k) plans and their investment offerings.

1 I offer the following factual observations.
2 Plan sponsors are business owners. As such they
3 rightly focus on their business operations. Plan
4 sponsors, whether large or small, don't understand the
5 scope of their fiduciary duties under ERISA. They
6 certainly don't understand the requirements of the
7 prudent investor rule. Efforts to educate plan
8 sponsors on the complexities of the investment
9 marketplace cannot overcome the vast information
10 asymmetry which exists. The world of investment due
11 diligence requires specialized skills, which these
12 plan sponsors significantly lack. As a result,
13 American business are subject to liability should plan
14 sponsors not be aided by fiduciaries, experts upon
15 whom they can rely.
16 Last year the settlements in these class
17 action cases for both for profit and non-profit
18 business, totaled nearly half a billion dollars, and
19 that does not include the tremendous litigation costs
20 incurred. In class action suits, plaintiff's
21 attorneys are now moving on to the very largest ERISA
22 covered plans. From the very largest to those
23 maintained by mid-sized and smaller companies, when
24 such lawsuits are filed, usually the broker-dealer or
25 insurance company and their representatives, who have

1 provided investment recommendations are easily
2 dismissed from the litigation. Brokers essentially
3 hide behind the suitability shield. Reg BI does not
4 substantially change this lack of accountability.
5 I have represented, as well, many
6 individuals who are participants in qualified
7 retirement plans and IRA's. I have seen the harm done
8 through the sale of high cost investment products.
9 The academic evidence on the impact of higher fees is
10 conclusive. Higher cost products have lower returns,
11 especially over the long term, all other things being
12 equal. A mere one percent increase in fees over the
13 course of a works lifetime, results in far less in the
14 retiree's nest egg. Usually 20 percent or greater as
15 far as the lesser amount accumulated.
16 The fact of the matter is defined
17 contribution plans possess economies of scale. This
18 permits investments to be provided at a very low cost
19 to plan participants. Indeed the prudent investor
20 rule mandates that plan sponsors as fiduciaries not
21 waste the assets of the plan participants on expensive
22 products. Moreover, the existence of commissions, as
23 seen in Class A mutual funds, and many annuities,
24 results in a substantial drag on investment returns.
25 This impact is especially severe given the need for

1 portfolio rebalancing in many accounts. There also
2 exists no valid reason for 12b-1 fees, would provide
3 no real benefits to fund shareholders. Commissions
4 and 12b fees often result in unreasonable
5 compensation, a violation of fiduciary requirements.
6 I have served as a consultant to broker-
7 dealer firms. For decades, many such firms have
8 communicated to me their prospects for huge profits
9 resulting from the commissions earned on rollovers
10 from ERISA-covered plans to IRA accounts. There is no
11 question that investors need and deserve fiduciary
12 investment advice at the critical period when they
13 enter retirement and consider whether to undertake a
14 rollover to an IRA or whether to annuitize a part of
15 their nest egg. Reg BI from the SEC does not, by the
16 SEC's own admission, impose a fiduciary standard of
17 loyalty.
18 It is completely inappropriate for the
19 Department of Labor to suggest that ERISA's
20 requirement to act in the interest of plan
21 participants be interpreted under a non-fiduciary
22 standard. In fact the use of the term, best interest,
23 to describe a non-fiduciary standard is the result of
24 a tremendous lobbying effort over the last three to
25 four years by the broker-dealer and insurance

1 industries with the goal of confusing consumers and
2 permitting the sale of high-cost investment products.
3 The use of this phrase in Reg BI and in NAIC proposals
4 is, in my view, tantamount to fraud.
5 The Department suggests that consumers need
6 more choice, but this is a red herring. Greater
7 choice is not what Congress in enacting an ERISA
8 mandated. The strict fiduciary standard applied under
9 an ERISA intentionally limits choice. At its very
10 core, ERISA's prudent invest rule is designed to
11 eliminate bad investment choices.
12 The Department seeks to adapt the fiduciary
13 standard to the sales practices of brokers-dealers,
14 and insurance agents by chipping away at the fiduciary
15 standard. If the fiduciary standard, like this square
16 piece of a brownie sitting atop a round glass, is not
17 suspectable to particular exceptions as the late
18 Justice Benjamin Cardozo put it. Start chipping away
19 at it, and very soon the fiduciary standard just
20 collapses, just as this brownie collapses into this
21 jar. The result is a mess when the fiduciary standard
22 is eroded. I'll save this for later.
23 Disclosure of a conflict of interest is not
24 sufficient to meet the fiduciary standard set forth by
25 ERISA, and the requirements applicable to class

1 exemptions. I can attest that most plan sponsors and
2 plan participants don't read disclosures. Those few
3 that do don't understand them. If disclosures were
4 effective, there would be no need for the fiduciary
5 standard under the law. There's a single truth that
6 is irrefutable. No person can serve two masters. You
7 cannot adhere to the fiduciary standard and also act
8 as a seller of products.
9 The duty of loyalty requires strict
10 adherence to the protection of the interests of plan
11 sponsors and plan participants. The two roles,
12 product salesperson that a purchaser's representative
13 are simply incompatible as the Carter versus Harris
14 decision noted two centuries ago. The express
15 language over ERISA requires a broad application of
16 the fiduciary standard upon those who provide advice
17 to plan sponsors and plan participants.
18 The common-law, which applies a fiduciary
19 standard to those providing investment advice who are
20 in a relationship of trust and confidence with their
21 clients or customers is utilized and should be
22 utilized to inform rulemaking under ERISA. Yet this
23 proposed rule fails to properly consider the
24 common-law application of fiduciary duties. And it
25 doesn't explore many other alternatives for the

1 application of the fiduciary standard to those who
2 provide investment advice and recommendations to
3 ERISA-covered plans.
4 Having commented on advanced force in
5 economics as applied to the capital markets, I now
6 opine on the substantial negative economic effects
7 that will result in this proposed rule. Since the
8 millions of Americans will have less in the retirement
9 due to excessive intermediation. In turn this will
10 result in lesser accumulations of capital. This
11 increases the cost of capital to business. It will
12 also reduce the fuel necessary to drive new
13 innovations forward via entrepreneurship. Over a long
14 period of time just the compounding effect of the high
15 fees and costs that would be permitted under this
16 proposed rule, future U.S. economic growth will be
17 substantially reduced.
18 The betrayals of trust by those who
19 represent themselves as acting in the best interest of
20 the plan sponsor or participant, but who fail to
21 adhere to ERISA's strict fiduciary requirements, will
22 further negatively affect the formation of new defined
23 contribution plans, their maintenance, and the
24 essential trust needed to foster our capital market
25 system. This proposed rule is substantively flawed.

1 The Department should look to Justice Douglas'
2 majority opinion in the 1938 U.S. Supreme Court
3 decision in Pepper versus Litton to better understand
4 the obligations which flow from the fiduciary duty of
5 loyalty.
6 Furthermore, the circumstances prevalent
7 over the last few months have imposed great time
8 constraints on investment advisers, university
9 professors, and others. The short time for written
10 comments, the mere days from the announcement of the
11 hearing to its conduct have not provided the
12 appropriate opportunity time to digest and then
13 comment upon this proposed rule, which is extremely
14 complex. This a monumental rulemaking with
15 significant economic implications, yet it is flawed.
16 This proposed rule promotes the fallacy of
17 choice. It fosters poor investment choices. It
18 expands the lack of accountability by those who
19 recommend investments to plan sponsors, plan
20 participants, and those involved in IRA rollovers. It
21 will lead to increased betrayals of trust. The
22 Department should return to the drawing board. Start
23 over again to fashion the proposal that reflects the
24 plain language of ERISA. They should propose only a
25 narrow class exemption, which protects both the

1 American people and the future of the American
2 economy.
3 Lastly, my testimony today is proof that a
4 very strong dose of caffeine can make even an old
5 slow-talking southern lawyer speak relatively fast.
6 Thank you.
7 MS. WILSON: Thank you very much, Professor
8 Rhoades. And thank you to all of our panelists. At
9 this time I'd like to ask the government panelists if
10 they'd like to ask questions. Ms. Lloyd?
11 MS. LLOYD: Yes, I'm ready if -- ready to
12 get started. I think I would like to go back to Mr.
13 Certner if you're here. So you talked a lot in your
14 presentation about the inadequacy of disclosure
15 generally, and the inadequacy of the disclosure
16 requirements in the exemption. I wanted to talk about
17 something that's been talked about on some of the
18 previous panels. And I don't know if you saw them
19 all, but the disclosure, the fiduciary acknowledgement
20 disclosure, because I think you said that it something
21 about that it doesn't disclose the fact that the -- I
22 guess that the exemption does not require -- it
23 deviates from ERISA's fiduciary standard. Is that a
24 correct? Did I hear you correctly?
25 MR. CERTNER: Yeah, I think your -- it's

1 pretty clear the SEC standard is not a fiduciary
2 standard. And so the exemption you're setting up, at
3 the very least, it's providing serious confusion as to
4 what standard you are referring to. And there was
5 obviously some discussion this morning about whether
6 or not you would have to comply with the exemption or
7 comply with something else or comply with the
8 underlying fiduciary standard. This all just leads to
9 confusion, not just on the part of participants, but I
10 think on anyone who will be trying to interpret this
11 including how a court might interpret this. So I
12 think it would be very important to clarify that the
13 fiduciary standard applies within the exemption
14 itself. And then we'd want to make sure that we,
15 whoever's providing the advice is providing written
16 acknowledgment that there are we won't pursue it if
17 any problem presents.
18 MS. LLOYD: Oh, okay. I thought we lost you
19 for a second. But now you're muted. But okay, great.
20 So I'm sorry that I didn't hear the very end of what
21 you said.
22 MR. CERTNER: I think, so to repeat, so
23 providing to make it clear within the exemption that
24 you're using a fiduciary standard would be point one.
25 And the second part it would be it would very

1 important also for those who are providing the advice
2 to acknowledge that they are fiduciary provider.
3 MS. LLOYD: So I guess maybe can we take
4 that part a little bit in terms of -- so I think what
5 I was trying to distinguish earlier is ERISA Section
6 404, which is the fiduciary duties applicable to ERISA
7 plans and the exemption, which is related to
8 prohibited transactions. But as a technical matter
9 the exemptions don't affect the standard that is still
10 applicable under ERISA Section 404. So I'm trying to
11 just make a technical point when I hear people say
12 that we are eroding the ERISA standard within the
13 exemption. I just want to clarify that the exemption
14 does have a thing that is different, and I am not
15 trying to say that that's not the case, but the 404
16 standard remains to the extent it is applicable,
17 although it, you know, it's not applicable to some
18 transactions, you know, to IRA transactions that are
19 not ERISA plans. So I think that's my point --
20 MR. CERTNER: Right. But I think your
21 explanation itself is just pointing out the confusion
22 here. You're creating the --
23 MS. LLOYD: Right.
24 MR. CERTNER: -- exemption. So by
25 definition it sounds like you're providing an

1 exemption to the fiduciary standard. We've also
2 already talked about the fact that this is based on
3 the SEC, which is clear that they're not using a
4 fiduciary standard. So you're certainly leading
5 people to believe that there is a different and lower
6 standard. Those who are providers will certainly
7 think of it that way. And the courts very well may
8 think of that way even though you're saying there is
9 an underlying 404(c) fiduciary standard. By
10 everything you're going through here, it certainly
11 appears as if you're introducing a different and lower
12 standard.
13 MS. LLOYD: I take your point. I guess, you
14 know, there are other aspects to this though because
15 IRA investors there is no ERISA 404 applicable to
16 them. So I guess one thing I'm wondering is do you
17 feel like the exemptions should have two different
18 standards because of this problem or concern that you
19 have about confusion? Should there be a standard for
20 ERISA plans and standard for IRAs?
21 MR. CERTNER: Well I think, you know, AARP's
22 position has been clear on this for years, these, all
23 of these should be subject to the fiduciary standard.
24 These are all retirement plan monies, most of the
25 money going into IRAs from a IRA rollovers. We

1 certainly agree that rollovers should be covered by
2 the fiduciary standard as well.
3 MS. LLOYD: Okay.
4 MR. CERTNER: Which the -- be greater
5 expansion of the fiduciary standard, not exemptions
6 and cutbacks in the standard.
7 MS. LLOYD: Okay. And so then I guess just
8 to kind of fully make sure I understand your point on
9 disclosure of the standard, would you be more
10 comfortable if the standard was or if the disclosure
11 was a disclosure of the requirements comply with the
12 exemptions best-interest standard? Is that -- would
13 that address concerns about whether the proposed
14 disclosure is misleading?
15 MR. CERTNER: Well, I think the disclosures
16 have multiple problems, right? First of all as I
17 think many of the panel noted, people are generally
18 not reading and/or understanding disclosures. We've
19 certainly saw that with the SEC disclosure where some
20 parts of your disclosure actually provide less
21 information. So to suggest that people will
22 understand the disclosures and know what they mean is
23 just not realistic and not the reality.
24 So disclosures as a first stage are not
25 particularly helpful and useful in this situation.

1 Having said that, it's bound to be better if we have a
2 better disclosure at least for both for sunshine
3 purposes and for the few who understand it. So it's
4 certainly better to be clear within the disclosure
5 itself that there's an underlying fiduciary standard,
6 not that they're simply complying with the exemption,
7 but that there's a compliance with a fiduciary
8 standard.
9 MS. LLOYD: Okay. Jeanne, did you have a
10 question?
11 MS. WILSON: Yes. As written the
12 exemption's impartial conduct standards directly
13 require the fiduciary to adhere to the prudent
14 standard exactly as set out in Section 404 of ERISA.
15 And require the fiduciary to adhere to duty of
16 loyalty, which prevents the fiduciary from placing his
17 or her own interest before the retirement investor's,
18 or from subordinating the investor's interests to his
19 or her own interest of the firm. And it also requires
20 given these, these conduct standards, it requires the
21 investment adviser to disclose that they are
22 fiduciary. We have received comments that this falls
23 short of the fiduciary standard and, therefore, the
24 disclosure would be misleading to say that they were
25 being held to a fiduciary standard. Do you agree with

1 this, Mr. Certner?
2 MR. CERTNER: I think that the disclosure
3 should be clearer that there is an underlying
4 fiduciary standard in the exemption itself, not just
5 simply falling back on a 404(c) standard, if that's
6 what you're asking. And that also that the disclosure
7 itself should acknowledge that whoever the provider is
8 act -- is a fiduciary.
9 MS. WILSON: So let me rephrase my question.
10 That, that is helpful. Your answer is very helpful.
11 But my question is the standards as proposed, do you
12 believe that they fall short of a fiduciary standard
13 and that a disclosure that the investment advice is
14 fiduciary would be misleading?
15 MR. CERTNER: I think at best it's
16 confusing. At worst it's misleading. Since you have
17 an exemption from the ERISA standard here, and you are
18 using an SEC-defined confusing best interest standard,
19 you're calling into question exactly what the standard
20 is in this exemption. And so I think it's certainly
21 leading people to believe that it is not a fiduciary
22 standard and, therefore, it is not protective of
23 participants and beneficiary.
24 You may be interpreting it a different way,
25 but I can assure you that this will, is at best,

1 confusing and can easily be interpreted as a lower and
2 inadequate standard and, therefore, not consistent
3 with ERISA. And that should be made much clearer in
4 this exemption if you're going to put forward an
5 exemption that there is an ongoing fiduciary standard
6 in the exemption itself, not just for having
7 underlying or referring back to an underlying 404(c)
8 fiduciary protection.
9 MS. HALL: So perhaps if we made clearer in
10 the exemption exactly what we were exempting because
11 you've repeatedly said we have an exemption from a
12 fiduciary standard. So I think, perhaps, it's unclear
13 that the exemption is only from the prohibited
14 transaction provisions and not the fiduciary
15 provisions of ERISA. That would provide more clarity.
16 MR. CERTNER: That could potentially provide
17 more clarity. But I think the fundamental issue here
18 is that the exemption itself should not have a lower
19 standard than the fiduciary standard required in
20 ERISA.
21 MS. WILSON: Okay.
22 MR. CERTNER: In order to protect the
23 participants and beneficiary, which is what,
24 obviously, is needed in an exemption.
25 MS. WILSON: Karen, did you have any more

1 questions?

2 MS. LLOYD: Well I thought I just might go
3 back to the two other panelists briefly. Mr. Naylor,
4 I think I kind of took away that you would like to see
5 this withdrawn. And I just want to make sure that if,
6 you know, there's a suggestion for how we change it
7 assuming, you know, if we don't withdraw it. Did you
8 want to make any suggestions about changing it or is
9 that not part of your?

10 MR. NAYLOR: I'm happy to provide more
11 detailed examination of how it can be fixed. It's
12 revealing to me to hear industry talk about the
13 fiduciary standard as some kind of third rail. They
14 want to avoid it. They want to not fall onto it
15 because that's apparently a problem. Whereas when
16 they talk to the public and we view the fiduciary
17 standard as the gold standard. In other words it
18 makes all the sense in the world to put your clients'
19 interest first. So if I had my wish, the fiduciary
20 standard would apply to all tax-advantaged retirement
21 account -- IRA, any kind of pension plan at all that
22 has any government interaction. There are advisers
23 now that adhere to that. It seems like the entire
24 industry should adhere to that. That's one tiny
25 little improvement I propose.

1 MS. LLOYD: Thank you, okay. And then
2 Professor Rhoades, I mean I think I've heard that, you
3 know, you feel like the exemption needs to be based on
4 what you think is a fiduciary standard. Is that kind
5 of the without regard to loyalty phrasing that we had
6 in the last rulemaking? Is that what you would like
7 to see the exemption reflect?
8 MR. RHOADES: Any exemption should reflect a
9 strong fiduciary duty of loyalty, which cannot be
10 disclaimed away by any means. The requirements of a
11 conflict of interest exist including informed consent.
12 No plan participant or plan sponsor, should ever
13 consent to be harmed, which results in from higher
14 costs products, moreover it has been a significant
15 change in the industry since 1975, since 1984.
16 More than half of the revenue derived in the
17 securities industry are present. And I include both
18 brokers and investment advisers in that is derived
19 from fee-based accounts. There is simply no reason to
20 foster commissions, higher expense products in the
21 current environment when we've seen such a substantial
22 shift away from conflicted advice to basically true
23 bonafide fiduciary advice. And the Department should
24 take that into account in any rulemaking that results.
25 You should not ever foster trying to fit ERISA's tough

1 trust law based fiduciary standard to fit the
2 practices of a conflicted industry. That is not what
3 ERISA charges the Department to do.
4 MS. LLOYD: Thank you. I think we're out of
5 time for this panel. Is that correct?
6 FEMALE VOICE: Yes, Karen, I see 1:46.
7 MS. LLOYD: So I don't have any further
8 questions if we want to move to the next panel.
9 MS. WILSON: I just want to make sure that
10 everybody has an opportunity on the government panel
11 to ask questions. Ms. Lim, are there any questions
12 you'd like to ask? Ms. Hall, would you like to ask
13 additional questions?
14 MS. HALL: I have no further questions at
15 this time.
16 MS. WILSON: Okay. Thank you. So I do want
17 to thank the panelists for testifying today. Your
18 remarks are very important to us, and we appreciate
19 your time. So thank you very much for appearing
20 today. At this point we're going to move on to Panel
21 5, and we'll be starting with Mr. Carroll from SIFMA.
22 Thank you.
23 MR. CARROLL: Good afternoon, can you hear
24 me?
25 FEMALE VOICE: We can. Thank you.

1 MR. CARROLL: Okay, good. Good afternoon,
2 I'm Kevin Carroll, Managing Director and Associate
3 General Counsel at the Securities Industry and
4 Financial Markets Association. SIFMA represents the
5 interest of hundreds of broker-dealers, investment
6 banks, and asset managers. We appreciate the
7 opportunity to further comment on the Department's
8 proposed exemption.
9 First, let me express the strong support for
10 the Department one, replacing the vacated 2016
11 investment advice rule and reinstating the original
12 five-part test; two, reinstating interpretative
13 bulletin 96-1; and three, reinstating the class
14 exemptions that were part of the same 2016 initiative
15 as they existed prior to 2016. Directionally, SIFMA
16 also supports the Department's proposed exemption to
17 the extent that it permits financial professionals to
18 provide investment advice in a flexible manner, and
19 also to the extent that it's aligned with the SEC's
20 regulation best interest, also known as Reg BI.
21 Accordingly, SIFMA urges the Department to
22 proceed without delay to finalize its new protections
23 for retirement savers, while at the same time ensuring
24 that those same investors receive the benefit of a
25 consistent best interest standard across both the DOL

1 and SEC regulatory regimes. As you know, SEC's
2 regulation best interest compliance date passed on
3 June 30th of this year. And in the weeks both before
4 and since that date, SIFMA's members have been working
5 diligently to implement the new and meaningful
6 protections and the materially heightened standard of
7 conduct that Reg BI requires when broker-dealers make
8 investment and recommendations to their retail
9 clients. While firms have taken a range of different
10 approaches to comply with the Reg BI, we note that all
11 of the various business and operating model and
12 technological changes that they've made can be fairly
13 characterized as both significant and reasonably
14 expected to inure to the benefit and heightened
15 protection of retail investors.
16 In fairness, and to DOL's credit, many of
17 these formidable changes have been a work in progress
18 for several years trending since the days of DOL's
19 2016 investment advice rule. And Reg BI has only
20 accelerated that trend by properly incentivizing firms
21 to build upon, refine, and formalize these changes.
22 For example, we conducted a survey of nearly 50 of our
23 member firms, and more than half of firms reported
24 that they plan to eliminate certain conflicts of
25 interest.

1 Nearly 70 percent of firms reported they
2 would enhance their existing conflict registry. Our
3 members also report that Reg BI was driving their
4 business models towards eliminating certain products
5 and services from their retail customer product shelf,
6 such as mutual funds with high fees and low analyst
7 ratings. Some firms are also eliminating or changing
8 third-party revenue sources by introducing a single
9 use share class, also known as clean shares, and by
10 capping mutual fund and annuity up front frees (sic)
11 and trailing commissions.
12 Still other firms are adopting a single
13 payout formula and are equalizing compensation for
14 mutual funds in the same category for just instances
15 where a financial adviser may be incentivized to
16 recommend one product over another where it may not be
17 in the customer's best interest to do so. And still
18 other firms are adopting a wide range of third-party
19 vendor solutions, including automated solutions that
20 help an adviser collectively evaluate product costs,
21 fees, performance, risk, and, of course, conflicts of
22 interest to arrive at an optimal best interest
23 recommendation.
24 Of the firms we've surveyed, they've ranked
25 their top three business models changes precipitated

1 by Reg BI as: one modifications to their commission
2 and their fee schedules; two, changes to other
3 advisery compensation and incentive programs; and
4 third, rationalization of continuing to offer certain
5 products and/or product types on their shelf.
6 In sum the collective requirements of Reg BI
7 have compelled our members to implement such
8 fundamental changes to their systems, policies, and
9 procedures such that it is fair to say that Reg BI and
10 the requirements of the Department's proposal,
11 proposed exemption are functionally equivalent. For
12 that reason we believe it's particularly important
13 that the requirements of the proposed exemption hew as
14 closely as possible to the requirements of Reg BI in
15 order to promote clarity, certainty, and consistency
16 in the application of a best interest standard that
17 intersects, at least in part, both the DOL and SEC
18 regulatory regimes.
19 Before I close, I'd like to address the Wall
20 Street Journal article that was earlier referenced in
21 today's testimony. And that report was that a number
22 of financial services firms delivered form CRS
23 disclosures to their retail clients that incorrectly
24 stated that the firm and its professionals did not
25 have a legal or disciplinary history when in fact they

1 did. I think the most important takeaway from that
2 article is that it showed that the Reg BI regime is
3 already working as intended.
4 The legal disciplinary history of an adviser
5 where its firm is exceedingly easy to check, it's
6 highly transparent. Any journalist or investor or
7 regulator, for that matter, can quickly and easily
8 verify whether the firm has accurately answered that
9 question. That type of violation is the proverbial
10 low-hanging fruit of Reg BI. It's not a difficult
11 question of interpretation. SIFMA applauds the
12 transparency and the verifiability of legal and
13 disciplinary disclosures, and, you know, firms that
14 fail to answer that question accurately do so at their
15 peril.
16 So I think it's a positive result that we're
17 seeing journalists, regulators, others kick the tires
18 of Reg BI. It's a strong, protective standard, and
19 for that reason we think it should be closely aligned
20 with the DOL proposal. So we appreciate the
21 opportunity to present this supplemental information,
22 and we thank you for your consideration.
23 MS. WILSON: Thank you. Thank you for your
24 testimony.
25 MR. CARROLL: Thank you.

1 MS. WILSON: At this point we'll go to Mr.
2 Quinn. Mr. Quinn?
3 MR. QUINN: Yes, good afternoon, Ms. Wilson.
4 Can you hear me?
5 MS. WILSON: Yes, I can.
6 MR. QUINN: Thank you. Good afternoon, Ms.
7 Wilson and other members of the panel. My name is
8 Mark Quinn, and I am the director of Regulatory
9 Affairs for Cetera Financial Group. Cetera is the
10 corporate parent of a group of broker-dealers and
11 registered investment advisers. We thank you for
12 giving us the opportunity to appear this afternoon.
13 Through our representatives Cetera serves
14 more than one million retail customers in all 50
15 states. One of their primary objectives is saving for
16 retirement, we are highly focused role that investment
17 advice plays in meeting that goal. We are also very
18 mindful of the fact that every investor is different.
19 They have different backgrounds and experience, goals,
20 and aspirations, levels of risk tolerance and views
21 about the types of engagement they would like to have
22 with a financial professional.
23 The important point is that one size does
24 not fit all. As we think about regulation of
25 investment advice, it is essential to consider all of

1 the available product, services, and business models,
2 and preserve the ability of investors to choose how
3 they wish to engage with their financial
4 professionals. Any approach that imposes undue
5 burdens on customer choice is not ultimately in
6 anyone's best interest.
7 At the outset, I would note that we support
8 the overall approach taken by the Department in the
9 proposed class exemption. It is largely consistent
10 with the regime adopted by the SEC and regulation best
11 interest, which I will refer to as Reg BI. Majority
12 of our clients have both qualified and non-qualified
13 assets for which we provide investment-related
14 services. Reg BI establishes a comprehensive
15 framework of investor protection while maintaining
16 existing business models and customer choice.
17 Adoption of standards that conflict with Reg BI or
18 apply to a portion of the customer relationship, is
19 confusing for clients, and inhibits the ability of
20 financial professionals to provide the holistic
21 financial advice that most clients seek. Consistency
22 and harmonization among regulatory regimes is a
23 crucial objective.
24 Before I address the terms of the class
25 exemption, itself, I'd like to touch for a moment on

1 the standards for determining who is deemed a
2 fiduciary under the provisions of ERISA and the
3 Internal Revenue Code. Traditionally, fiduciary
4 status for providers of investment advice has been
5 determined by reference to a series of factors, known
6 as the five-part test. If a financial institution
7 does not meet all five of the criteria, they are not
8 deemed a fiduciary and do not require an exemption in
9 order to receive compensation in connection with
10 providing advice to covered accounts. One prong of
11 the test provides that the advice given to the
12 customer must be pursuant to a mutual agreement.
13 In the commentary accompanying the proposed
14 class exemption, the Department suggests that the
15 existence of a mutual agreement may be inferred from
16 the surrounding circumstances, perhaps even from the
17 suggestive expectations of the investor. It also
18 states that written statements by the institution
19 describing a mutual understanding or prohibiting
20 reliance on the advice provided by the institution as
21 a primary basis for investment decisions, are not
22 determinative of whether or not a mutual agreement
23 exists.
24 This places institutions in an untenable
25 position because it gives them no effective method to

1 define the terms of their relationship with the
2 customer. Perhaps more importantly, it does not
3 provide the customer with the meaningful understanding
4 of the services that the institution will provide or
5 the obligations that flow from their relationship.
6 This is a recipe for uncertainty, which is not in the
7 interest of either party.
8 The Department should reconsider this
9 interpretation. Agreements are generally required to
10 be in writing so that there is no question about the
11 terms. And institutions should be allowed to disclaim
12 the existence of a fiduciary relationship. Such a
13 disclaimer should be presumed valid if accompanied by
14 appropriate disclosure. The disclaimer, which is
15 inaccurate or procured through misrepresentation,
16 should not be binding on an investor, but absent of
17 showing to that effect, it should be considered
18 effective.
19 The proposed class exemption includes a
20 provision that would require institutions to
21 acknowledge that they're acting as a fiduciary at the
22 exception of the client relationship. This creates at
23 least two problems. The first, as I mentioned before,
24 recent statements from the Department have created
25 considerable uncertainty regarding who might be deemed

1 to be acting as a fiduciary. If an institution cannot
2 reliably determine if they will be determined to be a
3 fiduciary, they will be forced to assume that they
4 must rely on a class exemption in order to receive
5 compensation in connection with provision of
6 investment advice to retirement investors.
7 If this prevents reliance on the proposed
8 class exemption for institutions to become inadvertent
9 fiduciaries by virtue of their conduct. On a more
10 practical level, it may encourage institutions to
11 recommend to all customers that they establish
12 fee-based investment advisery relationships instead of
13 brokerage relationships; or worse, that institutions
14 cease offering transaction-based brokerage services to
15 retirement accounts. This is not merely a theoretical
16 concern. In response to the DOL fiduciary rule that
17 was adopted in 2016, a number of institutions
18 announced that they would no longer offer
19 transaction-based brokerage services to qualified
20 plans and IRAs.
21 The contours of fiduciary status for
22 investment advisers are well known and understood.
23 But the same cannot necessarily be said for broker-
24 dealers. Fee-based investment advisery relationships
25 represent the best options for many customers, and

1 most of Cetera's affiliated financial professionals
2 offer both investment-advisery, and brokerage services
3 to their clients. However, there are many instances
4 in which a transaction-based brokerage relationship
5 will be in the customer's best interest. Any regime
6 which creates incentives for financial professional
7 de-emphasize or eliminate any service model, limits
8 customer choice, and should be undertaken only in the
9 presence of compelling circumstances that do not exist
10 here.
11 I would also note that several states have
12 either adopted or are considering adoption of
13 standards and conduct applicable to provision of
14 investment advice. The common feature in these
15 regulations is the circumstances under which an
16 institution would be required to provide ongoing
17 monitoring of prior investment recommendations. In
18 particular, the state of Massachusetts has adopted a
19 regulation which becomes effective very soon.
20 It provides for that if an institution that
21 has a contractual duty to a customer, a contractual
22 fiduciary duty to a customer, that would be required
23 to provide ongoing monitoring of both recommendations
24 in brokerage and investment advisery accounts. The
25 parameters of this provision are not entirely clear as

1 yet, but it is quite possible that the fiduciary
2 acknowledgment requires that a class exemption would
3 trigger an obligation for institutions doing business
4 with customers in Massachusetts to provide ongoing
5 monitoring in connection with brokerage relationship.
6 I would also note that the SEC has recently
7 provided guidance regarding activities which would
8 render financial advice subject to the provisions of
9 the Investment Advisers Act. In the view of the SEC,
10 one of the hallmarks of an investment adviser
11 relationship is the provision of ongoing monitoring
12 services. The proposed class exemption could,
13 therefore, have the effect of rendering all advice to
14 retiring investors in states with regulations similar
15 to Massachusetts subject to the provision of the
16 Investment Advisers Act. This would encourage
17 institutions to discontinue offering transaction-based
18 brokerage services to retirement investors.
19 Some customers prefer fee-based advisery
20 relationships and the ongoing services that they
21 provide. Others do not feel the need for those
22 services or do not wish to pay for them. In either
23 event, if an institution is required to provide
24 ongoing monitoring services, they must be compensated
25 for doing so. This will have the direct effect of

1 limiting options and reducing customer choice and is,
2 therefore, not in the best interest of investors.
3 To briefly summarize our comments, we
4 believe that the Department should move forward with
5 adoption of the proposed class exemption as quickly as
6 practicable. The requirement to acknowledge fiduciary
7 status as a conditions of the exemption should be
8 deleted from the final version. And finally with
9 regard to reinterpretation of the elements of the
10 five-part tests for fiduciary status, the Department
11 should withdraw those comments and the existing
12 guidance around the five-part test should be reverted
13 to its prior form. If the Department deems it is
14 advisable to make substantive changes to the five-part
15 test, it should be done in accordance with the
16 requirements of the Administrative Procedure Act,
17 including notice and comment. My thanks for your
18 attention and consideration. I'm happy to answer any
19 questions you may have.
20 MALE VOICE: Excuse me, Mr. Quinn, your time
21 is up. Thank you for your testimony.
22 MR. QUINN: Thank you.
23 MS. WILSON: And next we have Mr. Mason.
24 MR. MASON: Hi. Can you hear me still?
25 MS. WILSON: Yes.

1 MR. MASON: Okay, great. Yes, my name is
2 Kent Mason. I'm with the law firm of Davis & Harman.
3 Thank you for holding the hearing. Thanks for the
4 opportunity to testify. Also thank you for making
5 this so easy that even I, you know, a true
6 technological dinosaur, have been able to do this, so
7 thank you.
8 I think we believe that that there are a lot
9 of excellent elements to this proposed exemption. And
10 we really appreciate the efforts to align in a number
11 of ways with Reg BI. But really the focus of my
12 discussion today is going to be on what I see as an
13 attempt in the preamble to rewrite the five-part tasks
14 in such an extensive way that actually what it does is
15 it recreates, resurrects the 2016 fiduciary rule and
16 even goes further in certain respects. And that would
17 cause documented damage to millions of participants as
18 I'm going to talk about.
19 Now I believe that the rewriting of the
20 five-part test preamble is sort of is really
21 completely invalid, and if tested in court would be
22 certainly invalid. But this is a hearing on factual
23 effect, and so I'm going to focus on or what if the
24 preamble were accurate what would it mean.
25 Well the first thing is it effectively

1 eliminates the mutual understanding and primary basis.
2 It does so by saying if there is simply any
3 individualized recommendation, any individualized
4 recommendation, "the parties typically should
5 reasonably understand that the advice will serve as at
6 least a primary basis for the investment decision."
7 So this is saying in the normal recommendation, the
8 mutual understanding and primary basis test will be
9 done.
10 I've been working on this issue for ten
11 years. I'm not aware of any legal or factual basis
12 for that statement, absolutely none. There must be
13 millions and millions of recommendations,
14 individualized recommendations where there is no such
15 mutual understanding of primary basis -- normal for
16 solicitation of a rollover from a new customer,
17 solicitation of anything from a new customer. Sort of
18 a relationship between the customer and a broker
19 that's not that strong.
20 The idea is that they're all involved, or
21 typically involved mutual understanding and primary
22 basis, which is why, just no basis. Now, if it were
23 the case, and it was only the unusual circumstance
24 where those tests weren't met, then we don't even know
25 what that would mean. So there's no way to rely on

1 the mutual understanding and primary basis test
2 because there's unspecified sort of unusual
3 circumstances where they're not met. The elimination
4 of the regular basis test. That's even worse in the
5 sense that what it says is if you give advice, like
6 rollovers, and then you have an ongoing relationship,
7 any type of ongoing relationship. Not regular, just
8 any type of ongoing relationship, you'll retroactively
9 satisfy the fiduciary, the five-part step. That's not
10 the law.
11 But if it were, you could not rely on the
12 regular basis of that. And it also would work in the
13 reverse. If you pay sporadic help to a plan or a
14 participant and then gave rollover advice, but also,
15 we retroactively sort of treat them -- so just think
16 about it. How the fiduciary rule, the regular basis
17 test really doesn't exist. Because at the outset of a
18 relationship what I got to do is I got to decide am I
19 going to have an ongoing relationship with this
20 person? Do I want one? Because if I am, I'm going to
21 be a fiduciary from the beginning. So the only
22 situation where I'm comfortable that I'm not a
23 fiduciary is one where I've decided up front that I'm
24 never going to have an ongoing relationship with the
25 participant. But that's never going to happen, so

1 there really is no regular basis.
2 So if you look at it, no regular basis test,
3 no mutual understanding test, no primary basis test,
4 and it gets worse in three ways. One, that is really
5 that the 2006 fiduciary rule individualized
6 recommendation is all that's needed -- no primary
7 basis, no mutual understanding, no regular basis. But
8 it gets worse. There's no hire me exception. It's
9 worse there than 2016. It's worse in two other
10 respects.
11 This is interpretation of current law back
12 to the '70s. This is saying this is how the five-part
13 test at work since the '70s. So if you had some
14 action taken five years ago, this preamble which say
15 would convert that action, which was clearly
16 nonfiduciary into fiduciary act, the fiduciary act.
17 And the retroactivity doesn't stop there. There's a
18 withdrawal, the withdrawal of the advisery committee
19 2005-23. In 2016 that was withdrawn prospective.
20 Here it's withdrawn retroactive because what the rule
21 says is all of that, that has never been the law.
22 2005-23 was incorrect. It has never been the law;
23 therefore, that's a retroactive effect.
24 On investment, acknowledgements of
25 investments status, I think I would add just two

1 questions, two issues. This is on the exemption,
2 acknowledgement of fiduciary status first. You're
3 going to have a number of people. I agree with the
4 others who say they're going to be some who won't use
5 the exemption because of this. But there are others
6 who will use it even though they're probably not
7 fiduciaries, just to be safe. That will create
8 exposure to tremendous fiduciary liability, because as
9 a fiduciary, you're liable for an imprudence claim,
10 prohibited claim, individual claims, class action
11 claims. So that requirement will increase litigation
12 tremendously.
13 I also want to sort of disagree strongly
14 with an alternative that was discussed earlier. There
15 was an alternative that was discussed earlier then
16 instead of acknowledging fiduciary status, maybe we
17 should say we acknowledge that we will comply with the
18 exemption. I think that is much worse than
19 acknowledgement of fiduciary status, much worse,
20 because that would be a grounds for a contractual
21 compliant. And the reason it's worse is because it
22 would not only affect plans but would also affect
23 IRA's. So it would be a resurrection of the best
24 interest contract. So that, that alternative, to me,
25 would be even worse than the acknowledgment of

1 fiduciary status.

2 As I mentioned the data on sort of the harm

3 of the 2016 rule, there are reams and reams of

4 evidence, of how much harm it did. And what it stems

5 from was exactly what I've talked about. In a lot of

6 ways this rule is coordinated with Reg BI. People say

7 well, gee, Reg BI is working well. What's so

8 problematic about this standard if it's coordinated

9 with Reg BI? Well there's a huge difference. Reg BI

10 doesn't have a private right of action.

11 And that's what created a liability that

12 forced firms to withdraw access to investment

13 assistance to millions and millions of customers. So

14 I will quote you one study. National accounting firm

15 of Deloitte studied 21 financial institutions back in

16 2017 that represented 43 percent of U.S. financial

17 advisers. They found that 53 percent of those study

18 participants reported limiting or eliminating access

19 to brokerage advice. And the effect on this was on

20 10.2 million participants and 900 billion dollars

21 assets under management. And this was less than half

22 the market, and it was also performed without taking

23 into account the best interest contract. The damage

24 of going back to 2016 is just enormous.

25 And I'm going to close with just sort of a

1 summary of sort of what I would ask that first is this
2 critical that the really invalid language spanning the
3 five-part test be repudiated in the final exemption.
4 Second, it should be clear that solicitations to be
5 hired are not fiduciary advice, the hire me exception.
6 Third, the acknowledgement requirement in the
7 exemption should be removed. And fourth, any
8 modification of advisery opinion 2005-23, should be
9 prospective only. I gave you back nine seconds, all
10 of this.
11 MS. WILSON: Okay, thank you to everyone for
12 the testimony today. I'd like to start the government
13 panel questions. Karen, would you like to start
14 first?
15 MS. LLOYD: Yes, thank you. I guess
16 starting with Mr. Carroll, I took away that you wanted
17 to convey that that six-month support alignment with
18 regulations best interest. I think we've heard a lot
19 of other testimony today that alignment with
20 regulation best interest is inconsistent with ERISA's
21 statutory framework and the conduct standards because
22 it's not a fiduciary standard. So I'm wondering if
23 what your response is to those remarks that people
24 have made.
25 MR. CARROLL: Well, as I've pointed out in

1 our testimony, Reg BI is a very, very strong standard.
2 It doesn't use the word fiduciary, but it has all the
3 hallmarks of the fiduciary standard. Has a duty of
4 loyalty. That's the best interest obligation. It has
5 an obligation of care. Fiduciary standards are
6 defined by reference to acting in your client's best
7 interest, and that's precisely what the regulation
8 requires. So I think if you look at the conduct
9 standard itself, the elements, the five elements: best
10 interest, care, conflicts of interest, disclosure, and
11 compliance and what they require, I think the point is
12 fair that it is functionally-equivalent to a fiduciary
13 standard. It is functionally-equivalent to the
14 Department's proposal. And for that reason, alignment
15 is appropriate.
16 MS. LLOYD: Okay, thank you. Mr. Quinn, I
17 feel that you made the point in your testimony that
18 it's important to preserve different options and
19 concerns about the proposal that might cause people to
20 cease providing broker-dealer services and there be a
21 push for people into advisory accounts. But I think
22 we heard on the last panel from Professor Rhoades that
23 he felt that, you know, preserving choice -- I hope it
24 was Professor Rhoades, but I think it was --
25 preserving choice is not really a reason for an

1 exemption. I'm wondering what your reaction to that
2 is. I think the idea would be that we look, you know,
3 we're lowering standards with our choice, and that I
4 think that he opposed that. Do we have Mr. Quinn?
5 MR. QUINN: Can you hear me now?
6 FEMALE VOICE: Mr. Quinn, could you try
7 again, please.
8 MR. QUINN: Okay. Can you hear me now?
9 FEMALE VOICE: We can.
10 MS. LLOYD: Yes.
11 MR. QUINN: Sorry about that. Well, it's an
12 interesting question. I think Professor Lloyd
13 suggests that in some fashion transaction-based
14 compensation is inherently bad, and, you know, it's
15 because the conflicts can never be removed.
16 Certainly, there are conflicts built into
17 transaction-based compensation, but there are
18 conflicts built into any professional relationship in
19 which compensation can be paid to the professional.
20 The key to it is managing and mitigating and
21 disclosing of conflict.
22 So I think if preservation of choice for
23 investors is an important objective for a number of
24 reasons. All investors have different sort of modus
25 operandi and, you know, expectations and wants and

1 desires. There is a purity to a fee-based investment
2 advisery model in that compensation's only coming from
3 the client and some of the other conflicts don't
4 exist. However, that's not the sort of engagement
5 that a lot of clients want. They don't necessarily
6 want to pay for ongoing monitoring services. Perhaps
7 they don't need them. In many cases they don't want
8 to grant discretionary authority to the adviser.
9 So, yes, the important thing is one size
10 does not fit all. Each investor's collection of
11 attributes will determine what's in their best
12 interest, and that's why it's important to maintain
13 choice.
14 Did I answer your question?
15 MS. LLOYD: Yes, thank you. And I was just
16 going to follow-up with a similar question that I
17 posed to Mr. Carroll, which is just, you know, so the
18 kind of context of that is that the exemption proposal
19 is not consistent with the high standards of ERISA's
20 statutory framework, and I'm wondering what your
21 reaction to that.
22 MR. QUINN: Well our view's very similar to
23 Mr. Carroll's. I think at the end of the day,
24 fiduciary status is really just a collection of
25 attributes. And part of the problem that I think

1 we've all had in this entire exercise is there's a
2 common law fiduciary standard, there's an ERISA
3 fiduciary standard, there was a state securities law
4 fiduciary standard. And trying to sort of sort these
5 out and get to a point where you understand them in
6 the way that's consistent and applicable to everyday
7 interactions with clients is difficult. I think that
8 there is no significant amount of daylight between the
9 fiduciary standard and that's being proposed in the
10 exemption and part of the impartial conduct standards
11 and what's in Reg BI and what really ought to be
12 applicable to investor interaction.
13 MS. LLOYD: Thank you. And then Mr. Mason,
14 I just wanted to follow-up on I think sort of the last
15 point that you made that I understood you to say that
16 you don't believe that there should be an
17 acknowledgement of required fiduciary status. But
18 further, do you not think there should be a written
19 acknowledgment of compliance with the exemption. I
20 guess I was hearing it's my understanding that Reg
21 BI's Form CRS performs the disclosure of a conduct
22 standard. Why would this be different? I'm not sure,
23 but I don't think there were issues raised that that
24 would create a private right of action. Why would
25 this be different?

1 MR. MASON: And that's a great question.
2 And I think what's sort of my -- and I actually have
3 personally worried about that exact point on the Reg
4 BI side. In other words could the disclosures be used
5 to sort of imply sort of a contract and agreement to
6 abide by those standards. And I think it's what
7 actually needs to be done as a practical matter, is
8 that firms need to be extremely careful as this is
9 describing the conduct that is required by law. It is
10 not describing anything that in terms of what their
11 engagement is to provide to the customer.
12 So what I was hearing earlier was actually
13 very, very different from the Reg BI description of
14 what the law is. What I was hearing acknowledgement
15 that we will follow the standard. That is a contract.
16 That is an agreement. And that could be enforced
17 under contract law just like the best interest
18 contract exemption. So it is, there's a way we too
19 can frame it to say here are standards that apply, but
20 I am not binding myself in any way under sort of an
21 agreement, a sort of to be able to be sued on a
22 contract basis on this. So that is the critical
23 difference.
24 MS. LLOYD: And do you feel like that type
25 of disclosure is meaningful to anybody who receives it

1 as the standard that I operate under?
2 MR. MASON: I think, I mean, you know, I
3 have to be confused here, you know. And I apologize.
4 I will get back on the point, but it's sort of, you
5 know, we see as sort of endless discussion about
6 nobody reads disclosure, you know. So many, almost
7 every, you know, or witness on behalf of the
8 participants to saying disclosures are worthless.
9 Nobody reads them. Well how can we at the same time
10 then sort of like micromanage and say, okay, if no
11 one's reading them, we're going to put this in, and
12 the only possible use would then be their places for
13 it.
14 In other words, I'm a little confused.
15 Either the disclosures are effective and are going to
16 be read, or, you know, if they're not, then why are we
17 having? So I guess the first question is, you know,
18 how much are we building into these if no one's going
19 to read them? But sort of on the other side of
20 things, the question is can we inform? Let's assume
21 that they're going to be read. Can we inform people
22 about the legal standard, and would that be
23 meaningful? Well, assuming they're going to be read
24 absolutely then. There are the standards that apply
25 by law. And we're claiming from adding that last

1 piece to say we're contractually binding ourselves to
2 be sued if we don't comply with that. I don't see
3 any, any sort of, you know, reason that that hurts the
4 disclosure at all.
5 MS. LLOYD: Thank you. I don't have any
6 other questions if other people on the panel want to
7 join.
8 MS. WILSON: Lyssa?
9 MS. HALL: No, I don't have any further
10 questions.
11 MS. WILSON: Youngok?
12 MS. LIM: I don't have anything either.
13 Thanks.
14 MS. WILSON: Okay. I just, I have one
15 follow-up question for Mr. Mason. Reg BI does require
16 a disclosure. And I think it's just a follow-up from
17 Karen's question. It does require disclosure, the
18 standard of care. And they did say in their preamble
19 we don't intend this to create a private right of
20 action, and we don't think it creates a private right
21 of action. So if we were to take an approach that is
22 similar to what the SEC took in our disclosure, in our
23 exemption that would have a similar disclosure, do you
24 still have concerns?
25 MR. MASON: I think that's a great question.

1 If you were to structure it in a way -- I personally
2 retain some nervousness. That's probably just my
3 nature about sort of, you know, the susceptibility of
4 Reg BI disclosures to serve contract actions. But,
5 you know, I do think that it is possible to structure
6 disclosure to say here are standards. We are not
7 binding ourselves as a matter of contracting. And so
8 I think very good question, and I think, yes, it could
9 be done.
10 MS. WILSON: And do you think that the way
11 that SEC structured it is the appropriate way? Or do
12 you think that the SEC has structured it in a way that
13 creates a private right of action?
14 MR. MASON: My comments to Reg BI to the SEC
15 was to say, very explicitly, in the disclosure that we
16 disclaim any contractual liability based on this
17 disclosure. And in order to if your intent is not to
18 create a private right of action, there was no reason
19 not to include that, that to allow people to make that
20 disclaimer as we've explained that this disclosure,
21 you know, is part of a contract.
22 MS. WILSON: But --
23 MR. MASON: Yes.
24 MS. WILSON: -- the SEC disclaim --
25 MR. MASON: It did not include that.

1 MS. WILSON: That's right.
2 MR. MASON: That's why I'd like to make, you
3 know, I just think you guys should strive higher and
4 do more and to prevent sort of very harmful private
5 rights of action.
6 MS. WILSON: Okay, thank you.
7 MR. CARROLL: Can I just add one point on
8 the private right of action?
9 MS. WILSON: Yes.
10 MR. CARROLL: This is Kevin Carroll again.
11 As a practical matter, you know, investors really do
12 have an effective private right of action, but they're
13 going into FINRA arbitration where all of these claims
14 are being heard, and claiming my advisers violated Reg
15 BI. The hearing panels are hearing evidence of that,
16 and they're just fighting claims on that basis. So,
17 you know, just wanted you to have that background to
18 be aware that Reg BI is being invoked directly by
19 investors in FINRA arbitration. It's happening and
20 cases are being decided on that basis. So that's just
21 a practical matter even though there is, in fact, no
22 private right of action.
23 MS. WILSON: Right. Okay, thanks very much.
24 We really appreciate your testimony today. Thank you
25 for answering our questions. Thank you for

1 participating. We will take your remarks into
2 account. At this point --
3 MALE VOICE: Thank you.
4 MS. WILSON: Thank you. At this point we're
5 going to move to Panel 6, and we'll start with Barbara
6 Roper. Ms. Roper, thank you for appearing today.
7 MS. ROPER: Good afternoon. I am Barbara
8 Roper, director of Investor Protection for the
9 Consumer Federation of America. I appreciate the
10 opportunity to testify today on the Department's
11 advice rule. Since the comment period closed, I've
12 had a chance to review the comments filed by broker-
13 dealer and insurance firms and their lobbyists in
14 response to the proposal. I have to admit it was a
15 dispiriting exercise. And I was particularly taken
16 aback by the cynical claim repeated here today that
17 the preamble discussion of how the reinstated
18 definition of fiduciary investment advice would apply
19 to rollover recommendations would somehow, effectively
20 reinstate the invalidated 2016 fiduciary definition.'
21 The Department was wrong, in our view, to
22 reinstate the five-part test, which it had previously
23 found enabled firms to evade their fiduciary
24 obligations in circumstances where they are clearly
25 functioning in advice fiduciaries and are being

1 reasonably relied on as advice fiduciaries by
2 retirement savers. The amount of comments that the
3 Department has received on this point demonstrates
4 just how inappropriate it was to reinstate the
5 definition to a final rule with no opportunity for
6 input. But it is patently absurd and grossly
7 misleading to suggest that the preamble discussion of
8 these definitions, applications or rollovers, closely
9 resembles the 2016 rule.
10 On the contrary, having made the case for
11 why rollover recommendations should be held to a
12 fiduciary standard. Their importance to retirement
13 savers financial well-being, the incentives firms had
14 to recommend the inappropriate rollovers, the
15 Department's interpretation, would in our view, only
16 modestly expand the portion of rollovers that will be
17 covered by the definition and would lead many of the
18 most problematic rollovers outside the definition.
19 Saying that rollovers in the context of an
20 ongoing relationship constitutes fiduciary investment
21 advice is a step in the right direction, but it is a
22 far cry from unequivocally covering all rollovers in
23 the definition as the 2016 rule would have done.
24 Similarly, saying that firms may need to do more than
25 stick a disclaimer in six point type in a disclosure

1 document to avoid any fiduciary obligations is
2 appropriate as far as it goes, but it would still
3 appear to leave firms plenty of room to come up with a
4 new way to avoid their obligations even in
5 circumstances when the retirement saver will rely on
6 those recommendations as a primary basis for their
7 investment decision.

8 What comes through loud and clear from these
9 industry comments is that broker-dealers and insurers
10 will be satisfied with nothing less than a full return
11 to the bad old days when, as was well-documented at
12 time, firms could not serve to recommend rollovers
13 without any regard to the best interest of the
14 retirement saver, and all too often did just that,
15 costing workers and retirees tens of billions of
16 dollars in lost savings. But even if we are wrong,
17 and the preamble interpretation would have the effect
18 predicted by industry of causing vastly more rollover
19 recommendations to be considered fiduciary investment
20 advice under ERISA, it would still not have the effect
21 these industry groups claim. It would not, for
22 example, cause simple sales recommendations to be held
23 to a fiduciary standard.

24 On the contrary, under the Department's
25 proposed new class exemption, fiduciary investment

1 advice would be held to non-fiduciary sales standards
2 modeled with only minor differences on the SEC's
3 regulation best interest for broker-dealers and the
4 NAIC's model rule for annuity sales. These are
5 standards that these same industry groups strongly
6 support when applied to non-retirement accounts. So
7 their predictions of dire consequences if these same
8 industry-friendly sales standards are applied to
9 advice regarding rollovers are hardly credible.
10 So since the comment period on this proposal
11 closed, when Reg BI had been in effect for just over a
12 month, there hasn't been time for us or the Department
13 to comprehensively study whether or to what extent Reg
14 BI has caused firms to change the way they do
15 business. In particular, there hasn't been time to
16 fully assess where the Reg BI has caused firms to
17 abandon incentive practices the Department has
18 previously determined are likely to induce financial
19 professionals to base their recommendations on their
20 own interests rather than their customers' best
21 interest. We have even less information regarding the
22 effect of the NAIC model rule.
23 To the extent possible within the rushed
24 timeframe for this rulemaking, however, we have begun
25 to review the disclosures firms provide under Reg BI

1 in which they describe their conflicts of interest and
2 compensation practices. The first thing I can report
3 based on that review is that even the best of these
4 disclosures are likely to be of little value to the
5 typical financially unsophisticated retirement saver.
6 Among other problems disclosures mandated by the SEC
7 obscure rather then clarify important differences in
8 legal obligations. The worst of these documents are
9 dense and unreadable, and full of boilerplates, and
10 we've seen far more bad examples than good.
11 Now we have the Wall Street Journal
12 reporting that the new customer relationship summaries
13 brokers and investment advisers are required to
14 provide may also be inaccurate. Specifically, at
15 least 1,300 firms among the roughly 8,000 they
16 reviewed, appeared to falsely claim to have no
17 disciplinary records when, in fact, they or their reps
18 have a history of customer complaints, regulatory
19 actions against them or even criminal conduct. And 80
20 firms failed to answer the question at all.
21 If firms are getting something this basic
22 wrong, or if they are deliberately misleading
23 investors, what does that tell us about the quality of
24 their compliance systems or the value of these
25 disclosures to protecting investors? Because the

1 Department relies on these Reg BI and Advisers Act
2 disclosures to satisfy compliance with its own
3 proposed exemption, it has an obligation to review
4 them carefully, to determine whether they will in fact
5 lead to informed investment decision making. The
6 inescapable conclusion from an honest review of the
7 documents is that they will not.
8 The other thing that begins to emerge, if
9 you dig into the details of these disclosures -- and
10 believe me, you will have to dig -- is that little
11 seems to have changed in brokerage firms conflicts of
12 interest in compensation practices since Reg BI was
13 adopted. For example, the SEC made headlines by
14 banning time-limited product specific sales contest
15 that never really existed at brokerage firms. But it
16 did nothing to address production-based contests and
17 incentives as the type that have been associated with
18 inappropriate rollover recommendations.
19 A review of large retail brokerage firms and
20 BI disclosures makes clear that production-based
21 incentives remain commonplace. Meanwhile, the
22 conflict that has been shown over the years to be most
23 responsible for putrid sales practices, the heightened
24 remuneration brokers can receive selling complex,
25 opaque investments, such as most types of annuities,

1 nontraded REITs, and private securities remain
2 unaddressed. Other problem areas previously
3 identified by the Department, such as certain types of
4 recruitment incentives, ratcheted payout grids and
5 third-party compensation from product sponsors can all
6 still be found to a greater or lesser degree among the
7 large retail firms whose disclosures we've reviewed.
8 It is impossible to ascertain for most of
9 these disclosures what, if anything, the firms are
10 doing to mitigate these conflicts. A few firms make
11 boilerplate statements about addressing conflict
12 through a combination of training, supervision, and
13 disclosure. But there is no evidence in the
14 disclosures we've reviewed of meaningful changes to
15 reduce the intensity or impact of widespread, harmful
16 incentive. Certainly, nothing on the order of
17 magnitude needed to reassure retirement savers that
18 their interests are likely to come first.
19 Now we do not pretend to have conducted a
20 comprehensive review of industry compensation
21 practices of conflicts of interests since Reg BI was
22 implemented. In the rushed process, the Department
23 has adopted for this rulemaking there isn't -- simply
24 hasn't been time for us or the Department to do so.
25 Of course, the firms themselves are in a position to

1 tell us whether and to what extent they have altered
2 their incentives since Reg BI was implemented. Any
3 such evidence is noticeably absent from the comment
4 letters brokers and insurers submitted in response to
5 this rulemaking. If the industry had a positive story
6 to tell in that regard, presumably they would have
7 told it. Their silence is deafening.
8 In conclusion, there is simply no evidence
9 to support a finding that Reg BI or the NAIC model
10 rule will adequately protect retirement savers. And
11 the evidence that does exists leads to the opposite
12 conclusion. The Department, therefore, cannot
13 reasonably move forward with this rulemaking based on
14 the evidence before it. It should withdraw its
15 proposal at least until that evidence can be compiled.
16 Thank you.
17 MS. WILSON: Thanks, Ms. Roper, for your
18 testimony. Next we have Commissioner Seidt.
19 Commissioner Seidt?
20 MS. SEIDT: Thank you. Good afternoon, my
21 name is Andrea Seidt, and I am Ohio's Security
22 Commissioner and chair of the Reg BI Implementation
23 Committee for the North American Securities
24 Administrators Association. NASAA is the oldest
25 international investor protection organization

1 representing 67 states, provincial, and territorial
2 securities regulators in the United States, Canada,
3 and Mexico. I'm honored to represent NASAA before the
4 Department today.
5 NASAA shares the Department's goal of
6 improving investment advice, and we have followed the
7 rulemakings of the Department and the SEC in this area
8 very closely. Following the Fifth Circuit's decision
9 in 2018 and the SEC's adoption of Reg BI in 2019,
10 NASAA convened a committee to develop recommendations
11 on implementation strategies. The committee's first
12 order of business was to conduct a comprehensive exam
13 of broker, dealer, and investment adviser practices as
14 they stood in 2018 to establish a baseline against
15 which we could later measure the effectiveness of Reg
16 BI.
17 In mid-February, the committee launched
18 phase one of the exam with 34 states participating.
19 They collected responses from more than 2,000 BD & IA
20 firms representing more than 360,000 investment
21 professionals and 68 million retail investment
22 accounts. Today I will share highlights from that
23 exam to shed light on what American workers
24 experienced in the marketplace for investment advice
25 as recently as 2018.

1 This data, along with the data that the
2 Department and others collect, respectively, regarding
3 the quality of advice offered under Reg BI will help
4 the Department assess whether reliance on Reg BI is
5 supported by the evidence. Until all of that data is
6 in, however, that assessment cannot be done, and NASAA
7 would ask the Department to defer adoption of the
8 proposed amendment.
9 In 2018, most BD & IA firms focus their
10 attention on conventional security, such as stocks,
11 bonds, and mutual funds. We were curious about how
12 many funds offered costly, complex, and risky products
13 like private securities, variable annuities,
14 non-trader trades and leverage and inverse ETFs
15 because those products are a perineal source of
16 investor complaints. We found that most firms did not
17 recommend them for their customers. In fact,
18 approximately two-thirds of the firms surveyed, did
19 not make any of these products available to their
20 customers. When these products were sold, however,
21 broker-dealers were usually the ones doing it. In
22 fact, BD's were twice as likely as IA's to recommend
23 the purchase of leveraged and inverse ETFs, seven
24 times as likely to recommend private placements, eight
25 times as likely to recommend variable annuities by a

1 measure of 42 percent compared to five percent, and
2 nine times as likely to recommend non-traded REITs.
3 It's too soon to know if Reg BI will narrow
4 these gaps and bring BD's closer to fiduciary
5 practices more aligned with customer interests. If
6 the regulation works as intended, this is exactly what
7 should happen. To that end, NASAA will collect
8 post-Reg BI data as part of its phase two examination
9 next year, and we certainly urge the Department to do
10 the same prior to finalizing any amendments that rely
11 on Reg BI.
12 Due diligence is a critical part of any
13 securities professional's duty of care. One of the
14 most important tools firms have to get to know their
15 customers is the investor profile questionnaire. As
16 such it would be reasonable to expect all firms to use
17 such forms, and to expect those forms to thoroughly
18 catalogue all important investor facts and
19 circumstances. That is not what the exam found. Some
20 BD & IA firms reported that they did not use investor
21 profile forms, while others reported using forms that
22 omit a key information like investment objectives,
23 age, risk tolerance, income, and time horizon.
24 Surprisingly, only 20 percent of the firms documented
25 their customer's education level, and less than half

1 documented investor debt. The Reg BI adoption release
2 says very little about the SEC's expectations in this
3 area, and it's hard to see how American workers are
4 going to be appropriately matched with safe,
5 cost-effective investment options without direct
6 Department guidance in this area.
7 Another component of effective due diligence
8 is understanding the products you sell, especially
9 where those products that are costly, complex and
10 risky. Exam initiative show that few firms have
11 policies and procedures governing specific product
12 sales. And even fewer firms use tools to help agents
13 compare investment opportunities. Only 30 percent of
14 firms had any policies and procedures to guide agents
15 on the proper handling of IRA rollovers. Once again,
16 there is no post-Reg BI data to indicate whether and
17 how much progress will be made in reliance on a best
18 interest standard.
19 When it comes to fee disclosure, the exam
20 shows that all firms relied heavily on delivering
21 prospectuses and account statements. Less than half
22 reported providing individualized fee disclosures at
23 the most important point for the customer, the point
24 of sale. Many investors do not read prospectuses and
25 do not understand the fees reflected on their account

1 statements. They hire professionals to read and
2 explain these documents to them that they have already
3 made the decision to trust the financial professional
4 with their entire life savings. They also trust that
5 they will be treated fairly when it comes to fees.
6 What these investors do not realize is that
7 most firms have a hard time, themselves, figuring out
8 all of the fees they charge their customers even when
9 we regulators ask them. Investors also do not realize
10 that they could save a lot of money by investing at
11 lower costs but equally suitable options because
12 around 60 percent of BD's and IA's keep that
13 information a secret. As a result, as we all know, is
14 that the average American worker, who retires after 30
15 years with maybe $100,000 in her account could have
16 walked away with maybe twice that amount, $200,000 or
17 more. It's just appalling that we would let that
18 happen in our country. American workers would find
19 these facts, these unpleasant truths, unacceptable and
20 the Department should as well.
21 Beyond fees, other compensation practices
22 exist that can also be harmful to investors, including
23 sales contests and a receipt of third-party
24 compensation. Our exam revealed that virtually no
25 firms used product specific sales contests in 2018,

1 the only type expressly prohibited by Reg BI. A small
2 percentage of the BDs utilize product agnostic
3 contests, but such contests were rare at IA's only at
4 one percent. The same was true for third party
5 compensation. Eighteen percent of BD firms accepted
6 third-party compensation from product manufacturers
7 compared to only two percent of IA's. Fifteen percent
8 of BDs accepted third-party compensation from another
9 financial intermediary compared to only three percent
10 of IA's. While these financial incentive conflicts
11 appeared in relatively small percentages, the firms
12 almost exclusively on the BD side, the long-term
13 financial impact to American workers wrongfully
14 steered into more costly products as a result of these
15 conflicts is no small matter.
16 If harmful financial incentives are not
17 prohibited by the Department, it must find ways for
18 firms to effectively mitigate them to avoid harm to
19 American workers. Most American workers cannot wait
20 to retire and would laugh in disbelief or kick you out
21 of the room if asked to sacrifice any of their life
22 savings so their broker could get a trip to an exotic
23 location or a bigger bonus.
24 Firms have a lot of work to do to
25 effectively manage their conflicts. Based on what we

1 see in the 2018 data, only about half of the firms
2 have policies and procedures pertaining to conflicts.
3 Less than half have conflicts registered, and less
4 than a third had conflict committees and officers.
5 Again it is too soon to know if Reg BI will fix these
6 problems. And, consequently, it is premature for the
7 Department to rely upon Reg BI as an effective
8 solution.
9 I will conclude by sharing exam findings on
10 titles and services. As we know the Fifth Circuit's
11 decision would hinge in many respects on distinctions
12 between financial professionals based on the kinds of
13 relationships, they have with retail investors. As I
14 understand it, the Fifth Circuit took issue with the
15 Department's extension of fiduciary status to
16 financial salespeople because they do not typically
17 monitor investments on an ongoing basis or engage in
18 other conduct that places them in a position of trust
19 and confidence vis-à-vis their customers. The
20 Department properly accounted for these distinctions,
21 excuse me, in its current proposal, recognizing a
22 carve out for firms that engage in isolated arm's
23 length transactions but including firms that have a
24 special relationship with their customers based on
25 agreement or mutual understanding. Let's be clear,

1 BDs want their customers to think of them as trusted
2 advisers as evidenced by their marketing campaigns and
3 staunch opposition to efforts that would curtail use
4 of the adviser title.
5 Forty percent of the BDs we surveyed allowed
6 their agents to use that title while acting
7 specifically in a BD capacity, as did 26 percent of
8 the IA's. Firms also allow titles like wealth manager
9 and financial consultant. None of them, as far as I
10 know, hold themselves out a salesperson. These are
11 not terribly surprising facts, but we know that
12 American workers are very confused by these blurred
13 lines and about the services and standards of care
14 they can expect to receive from people who exploit
15 titles of trust.
16 As for the data, the exams show that only
17 about half of the BD's surveyed were even engaged in a
18 sales-centric practice of customer directed brokerage
19 in 2018, the kind of service that the Fifth Circuit
20 focused on in its decision. There were more BDs
21 engaged in recommended brokerage than a significant
22 number of BDs engaged in core, advisery services, such
23 as managed brokerage, financial planning, and account
24 monitoring. BDs who hold themselves out as something
25 more than salespeople to affirmatively create a

1 customer understanding and expectation of loyalty and
2 who receive ongoing compensation from monitoring
3 consultation or other management services, have very
4 squarely placed themselves in a position of trust and
5 should be deemed fiduciaries by the Department.
6 In closing, the Department should defer by
7 the rulemaking until it has a factual record
8 validating the effectiveness of the SEC's approach.
9 There is no such data at this time. Should the
10 Department proceed in the absence of that record,
11 NASAA would ask that it follow the recommendations
12 outlined in its comment letter and stand resolute on
13 the helpful guidance better than adoption preamble so
14 that American workers are given a fighting chance to
15 have a secure retirement future. Thank you.
16 MS. WILSON: Thank you, Commissioner, for
17 your testimony. Next we have Mr. Allen. Mr. Allen?
18 We can't hear you. Mr. Allen, we can't hear you.
19 FEMALE VOICE: Maybe I can try and talk with
20 him offline.
21 MS. WILSON: Yes. So while our technician
22 contacts Mr. Allen offline, we will go to Ms. Conti.
23 Ms. Conti?
24 MS. CONTI: Hi there. Can folks hear me?
25 MS. WILSON: Yes.

1 MS. CONTI: Okay, great. Thank you. My
2 name is Judy Conti. And I am here on behalf of the
3 National Employment Law Project. NELP is a nonprofit
4 research and policy organization that for over 50
5 years has advocated for the employment and labor
6 rights of workers. NELP's constituents include the
7 millions of workers and their families in the U.S. who
8 invest their savings for retirement either through
9 employer-sponsored ERISA plans or through IRAs that
10 have been rolled over from the employer sponsor plans.
11 These workers count on every dollar of their
12 retirement and nonretirement savings to make ends
13 meet. And, indeed, it's never been more important
14 than in these days when so many are not working and
15 are even thinking about withdrawing money from their
16 savings, from retirement. In particular, people of
17 color with retirement savings have on average less
18 than half the savings of white, non-Hispanics. They
19 are among those who can least afford to have their
20 retirement savings drained because of financial
21 advisers' conflicts.
22 My testimony today concerns the broad new
23 exemption to the prohibited transactions provisions
24 under ERISA that DOL is proposing. The exemption
25 would allow investment advice fiduciaries who give

1 advice regarding workplace retirement plans and IRA
2 investments to receive conflicted compensation that
3 would otherwise be prohibited. The DOL admits this
4 proposed exemption as based largely on the SEC's
5 recently implemented Reg BI. Reg BI preserves the
6 ability of broker-dealers to engage in industry
7 practices, which are harmful to retain investors, but
8 profitable to the brokers and their employers.
9 Importing such an approach into the
10 retirement context will only increase the harm that
11 retirement savers suffer when they receive conflicted
12 advice. Brokerage and industry insurance groups,
13 arguments in support of basing the new class exemption
14 on the nonfiduciary regulatory standard of the SEC are
15 without merit.
16 Under Reg BI, firm level conflicts are
17 addressed entirely through disclosure. But a review
18 of the comments submitted by industry groups
19 demonstrates that they have failed to provide any
20 evidence that the Reg BI has resulted in best interest
21 advice or has prevented Congress from changing their
22 recommendations. In fact, evidence demonstrates that
23 even after the Reg BI, firms continue to engage in a
24 variety of harmful conflicts of interest that
25 encourage and reward bad advice.

1 The proposed prohibited transactions
2 provisions places considerable emphasis on disclosure
3 to purportedly protect retirement savers from the
4 conflicts of interest. The Department claims that
5 this disclosure is intended to ensure the fiduciary
6 nature of the relationship is clear to investors.
7 But, in fact, the result of such a disclosure has the
8 exact opposite of the Department's stated intent.
9 Requiring a disclosure of fiduciary status, while
10 exempting firms from the most important requirements
11 stemming from that status, is fundamentally confusing
12 and misleading. Moreover, there is no evidence that
13 disclosure has resulted in firms reigning in the use
14 of harmful incentives that encourage end reward
15 conflicted advice.
16 The SEC's own research has shown disclosure
17 is ineffective in protecting investors from the
18 harmful impact of conflict. While it is too soon to
19 gather extensive evidence on the actual impact of Reg
20 BI, there is only emerging evidence that disclosure is
21 not working as predicted. Just last week a damning
22 Wall Street Journal analysis found that streamline SEC
23 disclosure meant to aid investors often leaves them in
24 the dark, and that firm's disclosures are riddled with
25 inaccuracy. Of all the reports filed, over 16 percent

1 of them failed to disclose past misconduct as required
2 by law, and one percent declined to even answer the
3 question about whether or not there was tax
4 misconduct.
5 This led Nicole Boysen, a professor of
6 business at Northeastern University, to characterize
7 the effort as a 'huge fail' and further opined that
8 'the SEC may have compounded the problem it was trying
9 to fix.' This type of evidence should force DOL to
10 reconsider its failure to create a private right of
11 action in the proposed -- prohibited transaction
12 provisions so investors will have some means of
13 recouping financial losses.
14 Other evidence derived from a review of
15 firms' website and their disclosures shows that the
16 brokerage model hasn't changed at all. They continue
17 to hold themselves out in ways that foster
18 relationships of trust in confidence, yet their
19 disclosures tell another, a tale of extensive
20 conflicts of interest. I will use the example of
21 Janney, not because this firm is an outlier or bad
22 actor in any way, but precisely it is because it is so
23 typical of how these firms do business. Their
24 website, last viewed yesterday, writes about
25 collaborating with a trusted financial adviser.

1 Quote, unquote, "When you partner with a Janney
2 financial adviser, you don't just find an ally to help
3 guide you through the planning process, you gain an
4 advocate -- someone who is dedicated to putting your
5 needs first." Your needs first.
6 It further states we put you first by
7 delivering appropriate and cost-effective advice and
8 solutions based on particular needs, goals,
9 preferences, and risk tolerance. Yet in spite of
10 these assurances, of putting the clients best interest
11 first, Janney's Reg BI disclosure runs 14 pages and is
12 rife with the usual types of conflicts that have been
13 costing investors billions of dollars, including sales
14 contacts, trips, bonuses quotas for advisers and
15 financial professionals meeting certain production
16 requirements. It also includes regulation of firm
17 policies that favors the sale of products and services
18 that are most profitable for the firm rather than
19 those for the best of the customer.
20 I'm now going to read a number of
21 disclosures from Janney's Reg BI form that explicitly
22 contradict the assurances potential clients read on
23 its website. How many potential investors do you
24 think even know that there are even such disclosures,
25 let alone track them down and read them to determine

1 whether or not they should invest with a particular
2 firm? I think we all know the answer to that
3 question. Only the most sophisticated advisers have
4 this kind of knowledge and take this time. The rest
5 fall prey to the kind of practices that are described
6 below. Each and every one of them, meaning that
7 brokers and firms can make more money when they act to
8 the detriment of their clients.
9 One, there are conflicts of interests when
10 investing in mutual funds because omnibus trading
11 offers lower costs for Janney, and with high daily
12 trade value, Janney has sought to establish omnibus
13 trading arrangements with some families that clients
14 trade the most. This creates a conflict of interest
15 in the form of additional financial incentive and
16 benefit to Janney.
17 Two, Janney also receives compensation from
18 certain mutual funds and their sponsors in
19 consideration for the administrative, accounting,
20 recordkeeping, sub-transfer agency or other service
21 Janney provides to those funds. This provides an
22 incentive for Janney to favor funds paying higher
23 service expenses.
24 Three, mutual fund companies also enter into
25 revenue sharing arrangements with Janney in connection

1 with the distribution of their funds through financial
2 advisers. We have a greater financial incentive to
3 promote those mutual funds companies that do. In
4 addition, mutual funds companies typically offer
5 multiple share classes with different levels of
6 seasoned expenses. We do not always select the lowest
7 cost share class for the money market funds we use as
8 cash sweep vehicles. We have a conflict in interest
9 in selecting share classes because we more fees from
10 some share classes than from others. The use of a
11 more extensive share class will lower your overall
12 investment returns.
13 Insurance companies will compensate Janney
14 and its financial advisers for selling their annuities
15 in various forms, including upfront commissions based
16 on the initial sale of the investment and ongoing
17 trail commission or residuals relating to your
18 continued holding of the investment. This provides an
19 incentive for Janney to recommend annuities that pay a
20 higher fee. Commissions on variable annuities are
21 generally higher than commissions on mutual funds,
22 fixed index annuities and fixed rate annuities giving
23 Janney financial advisers an incentive to recommend
24 variable annuities over other investments.
25 Recruitment bonuses. These bonuses give you

1 financial adviser and incentives to recommend you
2 transfer to or deposit assets with Janney and to
3 recommend transactions that generate revenue. Again,
4 to make clear, I'm not reading from Janney's website
5 or disclosure to suggest that it is a bad actor of any
6 sort, but rather have chosen Janney because it's a
7 respected firm and its practices are absolutely
8 typical of the industry as a whole. But if this is
9 how the industry operates, promising the client that
10 their best interests will be taken into account in
11 their promotional materials, yet filing disclosures
12 that honestly lists all the ways in which a client's
13 best interests do not govern how advice is made, then
14 what is an average investor to do?
15 It should be the role of DOL and EBSA to
16 protect the average investor from these all too common
17 practices that diminish the funds they have available
18 for their retirement. Therefore, NELP reiterates it
19 request that as proposed be withdrawn and that EBSA
20 engages in a rulemaking process that prioritizes its
21 core mission, protecting retirement savers and
22 savings. Thank you.
23 MS. WILSON: Thank you very much for that
24 helpful testimony. I'm going to go back to Mr. Allen.
25 Mr. Allen, did you get your technical challenges

1 worked out?

2 FEMALE VOICE: We're hoping?

3 MS. WILSON: Okay, Mr. Allen, if you could

4 unmute yourself.

5 FEMALE VOICE: Yes, Jeanne, he's unmuted.

6 MS. WILSON: Okay.

7 FEMALE VOICE: Looked to have worked.

8 MS. WILSON: Mr. Allen, we cannot hear you.

9 Can you hear me, Mr. Allen? Could you nod if you can

10 hear me? Okay. We can't hear you.

11 FEMALE VOICE: Someone mentioned redo the

12 headset? I'm actually not seeing Mr. Allen, so you

13 guys are seeing him.

14 MS. WILSON: I can see Mr. Allen. If you

15 scroll on the tiles at the top to the right, he'll

16 show up.

17 FEMALE VOICE: Mr. Allen, if you want to try

18 to maybe unplug and reinsert your headset?

19 MALE VOICE: I was speaking with him on the

20 phone. I just tried to call him back and got his

21 voicemail. I thought I had got him to call back on

22 his telephone. He's saying the microphone of the

23 computer, I believe, is not working.

24 MS. WILSON: Mr. Allen, would you like to

25 call in on the phone?

1 MALE VOICE: I'll try to call him on his
2 cell phone again. Just wanted to give you an update.
3 MS. WILSON: Okay. In the meantime would
4 you government panelists like to proceed with
5 questions for this panel? Karen?
6 MS. LLOYD: Yes, I'm ready. Thank you. I'd
7 like to start with Commissioner Seidt. Thank you for
8 that very helpful background and description of what
9 you learned about the practices of these financial
10 services providers. I heard you when you said that
11 you feel that we should wait and see how Reg BI plays
12 out.
13 MS. SEIDT: Yes.
14 MS. LLOYD: So I heard that. I guess I
15 wanted to say is there a way to approach this where we
16 make our conflict mitigation provisions more specific
17 so that they could address -- because I feel like what
18 I've heard from a few people on this panel is Reg BI
19 doesn't have sufficient conflict mitigation. It's too
20 early. So --
21 MS. SEIDT: Yes. It's definitely things
22 that could do in that regard. But again these would
23 be kind of untested, you know, approaches. But one of
24 the big issues and challenges and critiques of Reg BI
25 when it comes to conflict mitigation because the

1 guidance doesn't tell the firms what they must do
2 specifically. And as I mentioned, only one specific
3 kind of conflict is prohibited. Everything else is
4 possible, but there's an expectation of mitigation.
5 And so one of the criticisms that a lot of people
6 have, which NASAA shares is that firms are able to
7 manufacture their own conflicts.
8 I, as my data shows you, not a lot of firms
9 do. You don't see it on the investment adviser side,
10 and you see it only in a minority of broker-dealer
11 firms. But you can have firms, and I think the
12 testimony of using Janney as an example of where firms
13 make deals with third parties in order to sweeten the
14 pot and generate a little more fees and trailing
15 commissions is a great example of that. And it's
16 certainly something that has been scrutinized more
17 closely in other countries than here in the United
18 States.
19 There's no reason for that. That doesn't
20 have to happen. There certainly are unavoidable
21 conflicts of interest in investment advice. Anytime
22 you're taking money from a retail consumer that you
23 don't know, there's some kind of conflict of interest
24 there. But and I think unavoidable conflicts of
25 interests are the ones where disclosure and mitigation

1 makes sense, but I still don't understand why we allow
2 firms to manufacture their own conflicts. Sales
3 contests don't have to happen whether that's product
4 specific, which doesn't happen, or product-agnostic.
5 There's no reason for that and yet we allow that to
6 continue. That's just one example.
7 MALE VOICE: Hello
8 MR: SEIDT: Certainly, if you look at the
9 SEC's comment file on Reg BI see lots of other great
10 suggestions, but conflict mitigation is really a big
11 question mark. And until we get data indicating that
12 a lot of the problem practices that I mentioned are
13 going to ameliorated by a Reg BI, we think it's a
14 mistake for another agency to blindly follow that rule
15 without the data.
16 MS. LLOYD: Thank you. Ms. Roper, can I
17 pose the same question to you in terms of --
18 MR. ALLEN: By the way this is Jim Allen.
19 Can you hear me now?
20 MS. LLOYD: Yes.
21 MR. ALLEN: You can hear me? Okay, when you
22 want me to go, please let me know.
23 FEMALE VOICE: Thank you.
24 MS. ROPER: Do you want him or do you want
25 me to answer the question?

1 MS. LLOYD: I don't know. Maybe since I
2 started, I'll finish my questions and then maybe we'll
3 have him talk.
4 I'm just wondering. I think I understand
5 that one of your primary concerns is the actual best
6 standard and the wording as you can see. The failure
7 to include without regard to or not type of a loyalty
8 standard. But are there ways that we can address that
9 concern through more specific conflict mitigation
10 requirements in the exemption?
11 MS. ROPER: So certainly it would be
12 possible to do so. But there's two basic problems. I
13 mean, there are more, but there are two basic problems
14 with Reg BI. The first is that there's no definition
15 of best interest. Not even a principles-based
16 definition and very little guidance on what the SEC
17 means by that. And so one concern is that that just
18 becomes an empty tray. And we've seen that problem in
19 a very real sense in the SEC's enforcement of the
20 Adviser's Act and fiduciary duty.
21 But the other is we finally included the
22 requirement to mitigate conflicts in Reg BI. And we
23 were certainly open to a compromise there. And so one
24 of the things that you could do is require this
25 mitigation to be sufficient to prevent the conflict

1 from changing the recommendation, something we
2 suggested the SEC do in which they chose not to do.
3 And then you could, as Andrea indicated, identify
4 strategic practices that are just out of balance,
5 right? You know, they -- and I think her focus is the
6 right one, you know.
7 There are incentives that firms artificially
8 create that encourage and reward advice based on the
9 financial incentives of the professionals rather than
10 the best interests of the investor. And there's no
11 reason they have to get. There are conflicts that
12 have to exists, you know. As they say if you're going
13 to get paid whether it's by a fee or a commission,
14 there's a conflict. And there are conflicts that
15 exist that are created by product sponsors not
16 necessarily by the firms themselves that could be
17 reigned in. But there are also conflicts that the
18 firms, themselves, actively create, and they shouldn't
19 be permitted under fiduciary standard.
20 MS. LLOYD: Thank you. So one of I think is
21 what you talk about non-product specific sales
22 context, that type of thing that you think we should
23 outright prohibit?
24 MS. ROPER: So they're so important in the
25 rollover context, right? So, and, you know, they have

1 been found. There was a case. You know the
2 Massachusetts case against Scottrade was a
3 particularly egregious example of where, you know,
4 would we prohibit any benefit to brokers for building,
5 you know, for production? No. But would we prohibit
6 the kind of high pressure or sort of over the top
7 production incentives that absolutely exists today?
8 Yes we would. And so it's not always a black and
9 white line, but we think, you know, the SEC drew a
10 black and white line explicitly permitting
11 production-based sales contests. You know as long as
12 the contest isn't time-limited and product-specific,
13 it's permitted under the SEC rule. And I would add
14 one other thing. Those product-specific contests are
15 common in the insurance industry. So they didn't
16 exist at brokers. So the SEC, essentially, did
17 nothing when they banned them from brokers, but they
18 do exist in the insurance side.
19 So I think there's room for compromise. I
20 agree with Andrea that it would be helpful to have
21 much better data about what's actually occurring under
22 Reg BI before we try to figure out how to fix it. But
23 we have lots of ideas in our comment letter to the
24 SEC.
25 MS. LLOYD: Thank you.

1 MS. WILSON: Okay. So let's go to Mr. Allen
2 now. Mr. Allen?
3 MR. ALLEN: Yes. Can you hear me now?
4 MS. WILSON: Yes, we can. Welcome.
5 MR. ALLEN: Thank you very much. Appreciate
6 it. Good afternoon, I'm Jim Allen. I'm served as
7 head of capital market polices for CFA Institute. On
8 behalf of our members, I want to thank the Department
9 of Labor for scheduling this hearing and for giving us
10 the opportunity to address this forum on behalf of our
11 80,000 plus U.S. members and 185,000 plus members
12 globally.
13 CFA Institute members function variously as
14 chief investment officers, investment advisers,
15 investment analysts and portfolio managers on the
16 market buy side, as brokers, investment bankers and
17 analysts on the sale side, and as consultants, chief
18 financial officers, regulators and a variety of other
19 positions elsewhere in the financial world. What
20 binds them together is a common commitment to the CFA
21 Institute code of ethics and standards professional
22 conduct, which among other things, requires them to
23 adhere to a duty of loyalty, prudence and care when
24 dealing with clients.
25 They also must place their clients' interest

1 before their employer's or their own. In this regard,
2 we support the Department's goal to make
3 beneficiaries' and investor's interest primary.
4 However when we're certain of proposal as written will
5 weaken ERISA's fiduciary regime, which has protected
6 millions of retirement investors over the decades.
7 My comments here today will supplement the
8 positions we suggested in our response on August 6th
9 to the Department's proposal improving investment
10 advice for workers and the retirees, which I will
11 refer to as the proposal elsewhere in my comments.
12 I want to start with talking about the
13 five-part test or as I will call it, the test, going
14 forward. It is in many ways the keystone under which
15 the proposal relies. It determines whether an adviser
16 is subject to fiduciary duty, and provides the
17 exemptions permitting those same advisers to elude
18 those fiduciary obligations if, for example, they
19 function under provisions of the Securities and
20 Exchange Commission's regulations past interest, among
21 other things.
22 Due to a number of concerns, CFA Institute
23 does not support reinstatement of the test without
24 important changes. Because the Department has already
25 issued a final rule reinstating the test to however we

1 encourage it at a minimum to provide the greater
2 clarity in the guidance it offers in the preamble to
3 protect retirement investors. As it stands currently,
4 however, the test is confusing and outdated.
5 For example, we cannot support the test's
6 regular basis provision that permits advisers to give
7 self-interest of a conflicted advice because the
8 advice is provided just once or on an interim basis --
9 I mean intermittent basis. Likewise, we did not
10 believe it is appropriate to permit advisers to avoid
11 fiduciary obligations by disclaiming in the fine print
12 of an otherwise mutual agreement that the advice would
13 not serve as primary basis for an investment.
14 CFA Institute believes that advisers,
15 particularly those providing advice on retirement
16 investments, should be subject to fiduciary standards
17 if the advice is individualized to the specific
18 client. We urge the Department to realign the test
19 provision to close definitional and functional
20 loopholes that would allow investment professionals in
21 financial institutions to avoid their fiduciary duties
22 to retirement investors.
23 Next, let's talk about the SEC's regulations
24 past interests, which is a key provision of the
25 proposed exemption from the test. For example, let's

1 just say advisers including those who would otherwise
2 be bound by a fiduciary duty under the test could gain
3 exemption from the higher fiduciary obligation should
4 they satisfy certain conditions primarily adhering to
5 by adhering to the requirements of Reg BI among other
6 things. We believe that this alignment is premature
7 and potentially ill-considered for retirement
8 investors. In part our concern is that the reliance
9 on Reg BI diminishes the standard of care otherwise
10 required under ERISA.
11 In its financial factors and selecting plan
12 investment guidance, the Department notes approvingly
13 of ERISA's requirement that investment decisions be
14 'made with an eye single to the interests of the
15 participants and beneficiaries' and also account the
16 9th Circuit description of ERISA's fiduciary duty as
17 'the highest known to the law.'
18 While we have a number of concerns about Reg
19 BI, let me just note a few that would have prevent
20 reaching those lofty levels. First, rather than
21 putting investors' interest ahead of their brokers'
22 interests, Reg BI allows brokers to put their
23 interests on an equal footing with those of their
24 clients. And while Reg BI requires brokers to make
25 investment recommendations in their client's best

1 interest, obligations related to that advice are
2 somewhat uncertain about whether they are ongoing
3 after the recommendation is given unlike the known
4 ongoing obligations the fiduciary must provide in
5 regards to such advice. We're also concerned that
6 Form CRS failed to help investors understand broker's
7 conflicts and continues to blur the differences
8 between brokers and fiduciary advisers.
9 Finally, Reg BI is brand new and takes a
10 fundamentally different approach to overseeing brokers
11 advice bend the rules at request. Consequently, it is
12 not just the brokers who are now trying to understand
13 its requirements and provisions, it is also the SEC
14 who must interpret it and FINRA who must apply it
15 through broker examination who are trying to come to
16 grips with the implications of its implementation.
17 Frequently aligning the timing advice rules
18 with Reg BI therefore even while the SEC and industry
19 are understanding and addressing its teething problems
20 could hurt a number of retirees at a critical moment.
21 We, therefore, reiterate our recommendation that the
22 Department address the shortcomings in the proposal to
23 ensure retirement investors receive unconflicted
24 advice from advisers who are legally subject to
25 fiduciary obligations. And with regard to plan

1 rollovers in the proposal's preamble, the Department
2 states that advice relating to a distribution of
3 assets from an ERISA plan constitutes investment
4 advice. CFA Institute supports this decision.
5 While the Department also states it will
6 interpret the five-part test sufficiently broadly to
7 consider rollover advice as fiduciary investment
8 advice, we do not support inclusion in that test,
9 particularly of the rollover advice to satisfy all the
10 prongs of the test to be subject to fiduciary
11 obligations. As the proposal notes, rollovers are a
12 very consequential financial decision for retirement
13 investors and likely to account for the biggest pool
14 of money they will have at retirement. Given their
15 importance, therefore, we cannot see any reason why
16 advice regarding these transactions deserves anything
17 but the greatest of care. We recommend, therefore,
18 that the Department define all rollover advices,
19 fiduciary investment advice subject to limited and
20 narrowly defined exemptions. This would be consistent
21 with congressional intent in our view. The proposals
22 of IRA investors private right of action is another
23 concern that we have and is unacceptable on any basis
24 in our view.
25 Fiduciary duties do not prevent advisers

1 from taking advantage of clients. Rather they lower
2 the thresholds for penalty and raise the consequences
3 for abdication of such duties. The sole agent
4 accountable and agents and advisers accountable and
5 enable retirement advisers to seek redress for
6 wrongdoing warrant a private right of action, which
7 ERISA has allowed in other retirement account areas.
8 We believe that the options should similarly extend to
9 IRA investors.
10 To summarize, therefore, while we support
11 ensuring investors and beneficiaries interests are
12 primary, when it comes to retirement investment
13 advice, we are concerned the proposal, as written,
14 will not achieve that worthy objective. To remedy our
15 concerns we, therefore, urge the Department to do the
16 following: One, close definitional and functional
17 loopholes that would allow advisers to avoid fiduciary
18 duties. Two, clearly articulate the difference
19 between fiduciary and best interest advice. Three,
20 revise the test to ensure advisers are subject to
21 prudent fiduciary obligations when they provide
22 personalized investment advice. Four, provide uniform
23 fiduciary protection for planned rollovers. Five,
24 call on advisers to eliminate conflicts where
25 possible, not just to mitigate them. And, six, to

1 provide private right of action protection for IRA
2 investors. Thank you, and I welcome your questions.
3 MS. WILSON: Thank you very much, Mr. Allen.
4 Karen, I'm going to turn the floor back over to you so
5 that you can resume with your questions.
6 MS. LLOYD: Thank you, Ms. Conti, if you're
7 still here, you raised the disclosure of fiduciary
8 acknowledgement that we've talked about today. And I
9 was wondering if you have a reaction to the earlier
10 testimony. And I guess, in particular, do you feel
11 that the disclosure of the exemption standards is --
12 how do you feel about that idea?
13 MS. CONTI: I'm sorry. I was only here for
14 this panel, so I have not heard earlier testimony and
15 can't comment on it.
16 MS. LLOYD: Okay.
17 MS. CONTI: I would turn to Ms. Roper, who
18 is much more steeped in this than I am and would defer
19 to an answer that she can give. But I will simply
20 note as I didn't have my disclosure alone doesn't cure
21 the problem that EBSA should be solving, which is
22 making sure that investment advice is given in a
23 client's best interest period.
24 MS. LLOYD: Thank you.
25 MS. CONTI: Thank you.

1 MS. LLOYD: Ms. Roper, do you want to talk
2 about that?
3 MS. ROPER: I'd be delighted to. So we in
4 our ideal world the exemption would impose a tough
5 fiduciary standard and firms would be required to --
6 acknowledge their fiduciary status. Our concern has
7 been that the standard is satisfied through
8 compliance. The exemption is satisfied through
9 compliance with Reg BI and that does not, in fact,
10 reflect fiduciary, you know, conduct under a fiduciary
11 standard and, therefore, it would be misleading.
12 I think the problem with trying to come up
13 with the different disclosure that would more
14 accurately reflect the reality is that all of the
15 testing that's been done. There's been a lot of
16 testing done over the years, shows that investors do
17 not distinguish between fiduciary duty and best
18 interest. They don't know what you're talking about
19 when you're talk about a duty of prudence. So you
20 would need to, if you were going to try to go down
21 that route, you would absolutely need to test those
22 disclosures for effectiveness. And I am,
23 unfortunately, quite confident you would find that
24 they don't work, so I think a solution here is to come
25 up with a standard that explicitly is satisfied

1 through fiduciary conduct.
2 And I heard enough of the question about
3 this reference to 404 in the earlier panel to -- I
4 think I know the answer to this one, which is that I
5 think the way I read the exemption, and I suspect most
6 people are reading it is, yes, it refers to 404, but
7 it suggests that you satisfy your fiduciary or
8 obligations under 404 by complying with Reg BI. And
9 that's where I think we go astray because as others
10 have indicated the SEC was quite explicit in saying
11 that Reg BI was not a fiduciary standard. You know I
12 heard SIFMA on the last panel talk about how it's
13 effectively a fiduciary standard. They only supported
14 Reg BI because it wasn't a fiduciary standard. They
15 argued strenuously against being held to a fiduciary
16 standard.
17 So I think the solution here is either to,
18 you know, I actually preferred, much prefer the idea
19 of disclosing, you know, compliance with the standard
20 if it does have the effect that Mr. Mason predicted of
21 creating some kind of enforcement mechanism because,
22 you know, it's one of our other concerns about the
23 standard is it is entirely unenforceable in the IRA
24 context.
25 MS. LLOYD: Thank you. I guess just to

1 follow-up on that, understand that the disclosure of
2 fiduciary status may not impact an IRA investor in the
3 same way as it may impact an investor in an ERISA
4 plan. There is a reason other than just purely
5 conveying information is sort of the acknowledgement
6 that the advice provider understands that they're an
7 ERISA fiduciary, and the elimination of possible
8 dispute over fiduciary status. And I'm just wondering
9 if you think like is that something that is worth
10 giving up?
11 MS. ROPER: I'd like to admit, I like the
12 disclosure a lot more now having heard how much the
13 industry group objects with it than I did before. I
14 mean, it kind of made my head explode when I heard
15 that, whoa, if we have to disclose when providing
16 fiduciary investment advice that we're fiduciaries,
17 people might not use the exemption. I mean that was a
18 little bit of an eye opener.
19 Like I said, our ideal standard, you know,
20 our ideal world says the standard clearly imposes a
21 fiduciary. You know it's meant to adhere to a true
22 fiduciary standard, and then we strongly support
23 having that acknowledgement of fiduciary standards.
24 And I guess I'm open to being persuaded that our
25 concern that this would be misleading to investors are

1 outweighed by the benefits of having firms have to
2 acknowledge this status.
3 MS. LLOYD: Thank you. Thank you. I don't
4 have anything more. I defer to other panelists.
5 MS. WILSON: Lyssa, do you have any
6 questions? Youngok?
7 Hey, I have a question. Youngok, were you
8 going to say something?
9 MS. LIM: No. I just want to confirm that I
10 don't have any question.
11 MS. WILSON: Thank you. I have a question
12 for Ms. Roper. And if you've been listening today,
13 you'll know that I've given this question to several
14 other panelists. But as written the proposed
15 exemptions impartial conduct standards directly
16 require the investment adviser to adhere to the
17 prudence standard exactly as set out in 404 of ERISA.
18 They also require the fiduciary to adhere to the duty
19 of loyalty, which is the same as the SEC's best
20 interest standard. And that duty of loyalty forbids
21 the fiduciary from placing his or her own interest
22 before the retirement investor or from subordinating
23 the investor's interest to his or her own interest or
24 the interest of the firm. And, of course, to the
25 extent that the investment advice fiduciary's giving

1 advice to a plan, it is fully subject to ERISA's
2 statutory provisions. And so I want to know what the
3 basis of your concern would be, and how you think this
4 falls short of a true fiduciary standard if we ask the
5 investment advice provider to disclose that they are
6 fiduciary.
7 MS. ROPER: So as I've said the way I read
8 the exemption, and I'm not an ERISA attorney or an
9 attorney at all. So, take that as given. But the way
10 I read the exemption, yes, it references that 404
11 fiduciary duty of prudence and loyalty. But it
12 suggests that that duty of prudence and loyalty is
13 satisfied, so Reg BI is better on duty of care, I
14 think, than duty of loyalty, but it's satisfied
15 through adhering to the duty of loyalty in Reg BI.
16 And the duty of loyalty in Reg BI is just not a
17 fiduciary standard, it's way too weak. And the
18 concern is we're going to unleash advice driven by
19 conflicts of interest in the hopes that the standard
20 will be protective without a reasonable basis for
21 believing that firms are actually making the changes
22 in the way they do business to conclude that it will
23 be adequately protected.
24 So if you're saying we have the heightened
25 standard which you have to comply with that's 404,

1 that's separate from the way you comply with this
2 exemption, one I think all of the industry people who
3 just say how much they like your reliance on Reg BI
4 would be out the door, and we might like it better.
5 But two, I think it sort of beggars belief to suggest
6 that you're going to -- if a firm complies with this
7 specific conditions in the exemption, like complying
8 with the requirements of Reg BI, you're going to turn
9 around and bring an enforcement action separately
10 based on the 404 ERISA obligation.
11 And then again, of course, if you have to
12 point that, as I understand it, doesn't apply for IRA.
13 So you just have the PTE in the IRA, IRA context. So
14 that is our concern that is in, yes, you reference
15 that standard, but the way the exemption is being
16 read, it's satisfied through compliance with what we
17 view as the lower standard.
18 (Cross talk.)
19 MS. SEIDT: Can I follow-up to that point
20 that Barbara's making? I mean so if compliance with
21 Reg BI is not enough, let's use that conflict issue
22 that I've talked about earlier, product agnostic sales
23 contest. Under Reg BI that's okay. But are we going
24 to revert back to the ERISA fiduciary duty in that
25 the, you know, the prudence standards and say but it

1 wouldn't be okay for DOL's purposes? You know, we
2 need to know. Then it needs to be clear. And I think
3 the firm's understand that compliance with Reg BI is
4 going to be all that's required.
5 MS. WILSON: Okay, are there any other
6 questions? All right, I want to thank each of you
7 for testifying today. We appreciate your comments.
8 We appreciate your participation. And that concludes
9 our testimony for the day. Thank you very much.
10 (Whereupon, at 3:30 p.m., the hearing in the
11 above-entitled matter was adjourned.)
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CERTIFICATE

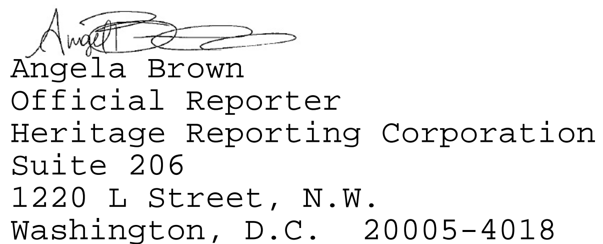
CASE TITLE: Public Hearing on Improving Investment
Advice for Workers and Retirees

HEARING DATE: September 3, 2020

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Department of Labor, Employee Benefits Security Administration.

Date: 9/3/20



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