

UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

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

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WEDNESDAY  
DECEMBER 13, 2023

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

PRESENT

LISA M. GOMEZ, Assistant Secretary for Employee  
Benefits Security

ALI KHAWAR, Principal Deputy Assistant  
Secretary, EBSA

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

MARCUS AZEVEDO, Office of the Solicitor

CHRIS COSBY, Director, Office of Exemption  
Determinations

MEGAN HANSEN, Counsel for Regulations, Office  
of the Solicitor

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

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

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

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

ALSO PRESENT

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

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

2 (9:02 a.m.)

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

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

19 So, Certified Financial Planner  
20 Board.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. DANFORD: I'm sorry.

13 MR. HAUSER: Thank you.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

1 confidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

9 MR. DIVENCENZO: Go ahead, Pam.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (Simultaneous speaking.)

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

10 MR. ROBERTS: Yes.

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

14 MR. ROBERTS: That's correct.

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

17 MR. ROBERTS: That's correct.

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

20 MR. ROBERTS: That's correct.

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

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

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



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

9                   MR. ROBERTS: Yes.

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

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

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

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

1 downside.

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

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

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

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

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

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

7 MS. HEINRICH: Right.

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

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

1 MR. HAUSER: I appreciate that.

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

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

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

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

16 MR. ROBERTS: Sure, of course.

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

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

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

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

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

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

1 extinguish it.

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

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



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

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

11 (Simultaneous speaking.)

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

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

17 MR. ROBERTS: Sure. Sure.

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

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

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

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

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

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

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

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

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

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

1 standards.

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

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

22           MR. HAUSER: Okay, thank you.

1 MS. HANSEN: We are over time now.

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

8 MR. DANFORD: Thank you.

9 MR. HAUSER: Thanks.

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

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

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

22 MR. HAUSER: Yes, perfectly. Thank

1 you.

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

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

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

1 Board's fiduciary standard.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Our CFP professional members stand

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

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

12 MR. CADIN: Cadin, thank you.

13 MR. HAUSER: Cadin, thank you.

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

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



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

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

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

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

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

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

1 better for consumers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

22 For all of those reasons and

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

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

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

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

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

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

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

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

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

22 As a result, a NAPFA registered

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

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

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

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

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

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

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

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

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



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

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

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

22 I would like to also note that NAPFA

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

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

22 We don't have asset minimums, which

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. KHAWAR: Okay, thank you.

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

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

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

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

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

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

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

10 MS. WILKER: Yes, thank you.

11 MS. JORDAN: Okay, great.

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



1           comments.

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

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

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

22                       As mentioned in my testimony, there

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

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

22 For example, one agency can call

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

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

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

22 MR. MAHONEY: You're welcome.

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

3 (Simultaneous speaking.)

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

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

17 MS. LLOYD: Thank you.

18 MR. MAHONEY: You're welcome.

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

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

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

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

8 MR. HAUSER: Yes, thank you.

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

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

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

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

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

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

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

1           dubious arguments.

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

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



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

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

1 know, hasn't been the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 will yield the remainder of my time.

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

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

7 MR. HAUSER: Yes, thank you.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 And so, ultimately, you know, in

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

22                         MS. CHISM: It could.

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

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

5 (Simultaneous speaking.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. PEIFFER: Absolutely.

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



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

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

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

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

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

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

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

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

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

22 Our second point is that the

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

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

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

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

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

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

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

22           It took the Department several years

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

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

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

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

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

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

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

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

1 not recorded or documented.

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

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

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

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

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

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

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

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

22                  And it will unnecessarily interfere



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

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

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

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

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

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

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

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

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

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

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

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

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

1 regulations, including state regulations of  
2 insurance.

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

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

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

13 MR. QUINN: Can you hear me now?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22          We are however concerned any time an

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

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

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

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

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

22 However, despite the similarities,



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

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

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

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

1 prospective customers prior to transactions.

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

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

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

22 In particular, it mandates adoption

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

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

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

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

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

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

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

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

1 threshold.

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

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

1 controversial.

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

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

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

1 have.

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

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

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

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

22 While Congress has a reputation for

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

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

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

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

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



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

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

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

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

22                  Secure 2.0 also eliminated

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

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

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

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

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

22 The proposal we are discussing

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

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

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

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

1 proposal currently states.

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

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

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

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

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

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

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

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

22 Do you have to amend your advice

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

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

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

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

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

1 prohibited from representing that type of  
2 investment?

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

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

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

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

1 exemptions conditions.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 scope extra contractually to the entire  
2 consolidated group.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 After some agonizing days and nights

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

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

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

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

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

1 understand.

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

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

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



1 annuity.

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

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

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

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

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

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

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

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

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

22                  We will further discuss rollovers

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

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

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

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

1 norm rather than a contested ideal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 employees about their plan.

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

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

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

22 And so, courts can agree or disagree

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

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

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

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

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

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

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

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

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

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

22 MR. KREPS: For sure. And I would

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. HAUSER: Yes, see --

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

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

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

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

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

22 But by the end of your testimony

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

5                         (Simultaneous speaking.)

6                         (Laughter.)

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

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

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

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

22                         (Whereupon, the above-entitled

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

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

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

8 MR. HAUSER: Yes, thank you.

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

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

1 I want to go on record as noting  
2 that the comment period is relatively brief and  
3 does come, as others have mentioned, at a  
4 particularly busy time of the year.  
5 To that end, we're still gathering feedback  
6 from our members, but wanted to participate and  
7 are glad to have been given the chance to  
8 participate in these hearings.

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

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

22 The Department, ADISA takes pride in



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 serve IRA holders.

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

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

22 The SEC clearly understood that



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

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

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

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

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

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

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

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

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

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

22 Several years ago, we pointed out in

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

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

22 The Commission-based approach can be

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

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

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

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

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

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

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

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

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

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

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

1 complexities of the markets themselves.

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

8 At Betterment, we believe it is  
9 crucial to ensure that retirement savers  
10 broadly participated in the capital markets.  
11 It's our mission, our reason for existing.

12 Betterment pioneered the use of technology to  
13 provide investment advisory services primarily  
14 over the internet lowering costs and expanding  
15 access to fiduciary advice.

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



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

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

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

1 fee products.

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

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

1 conflicts in interest.

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

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

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

1 for investors to actually receive fiduciary  
2 advice.

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

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

22 Consistent with this approach, several types of

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

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

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

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

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

22 This is particularly true of Betterment as our

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

1 the Supreme Court of the United States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18                   MR. HAUSER: Yes.

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



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

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

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

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

22                      Given these views, we believe that

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

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

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

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

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

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

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

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

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

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

16 These types of assistance encourage  
17 participants to adopt healthy financial habits  
18 and avoid what are generally regarded as common  
19 mistakes. And they are often targeted to  
20 specific individuals based on their  
21 circumstances. And we believe it is this  
22 individualization that actually helps promote

1 the positive outcomes that we're trying to  
2 achieve.

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

8 One example we've heard from our  
9 members is being concerned and I'll offer this  
10 as a hypothetical which is a record-keeper tool  
11 that helps participants make decisions about  
12 their option to receive distributions and loans  
13 from the plan.

14 In offering this type of assistance,  
15 a record-keeper might ask the participant for  
16 specific information about their situation.  
17 How much is your financial need? Are there  
18 specific facts that would support exception to  
19 the early distribution penalties that comply to  
20 in-service withdrawals? What is your  
21 anticipated ability to repay this type of  
22 distribution?

1                   And based on all of this  
2 information, a record-keeper might suggest that  
3 a participant take a loan rather than a  
4 hardship withdrawal in order to avoid those  
5 early distribution penalties if they're able to  
6 repay it.

7 Under the current five-part test, these types  
8 of assistance tools which do not refer to any  
9 specific investments under the plan, generally  
10 are not regarded as fiduciary investment advice  
11 or are not when we say regarded as fiduciary  
12 investment advice.

13                   However, under the proposal, we're  
14 concerned that these types of communications  
15 would be viewed as advice. The second broad  
16 category of communications that we're concerned  
17 about are the types of conversations that we  
18 believe are clearly sales conversations rather  
19 than advice.

20                   And although they occur in a sales  
21 context, many of these conversations we believe  
22 are nevertheless very helpful in promoting

1 things such as plan formation, helping  
2 encourage participation, and bringing new  
3 products and services to plans and participants  
4 thereby increasing their healthy financial  
5 habits.

6 On this issue of sales, for example, the  
7 hypothetical word I guess the real-world context  
8 that I'd like to offer this in is we believe  
9 that the proposal would make it much harder to  
10 sell plans to small employers.

11 It would apply across the board, but  
12 it's particularly concerning I believe in some  
13 of the small plan sales context. Under the  
14 current regulatory five-part test, plans are  
15 often marketed with a pre-selected platform of  
16 investments that are often marketed as being  
17 appropriate or specifically selected to serve a  
18 small employer market.

19 These conversations are not and have  
20 generally not been treated as sales, excuse me,  
21 as advice but rather a sales conversations in  
22 non-fiduciary context. And in our view, this

1 is appropriate as we do not believe that plan  
2 sponsors, even plan sponsors, even smaller plan  
3 sponsors accept back that these sales  
4 representatives marketing their own firm's  
5 products are providing fiduciary level advice  
6 in a relationship of trust and confidence.

7 Under the proposal, however, which  
8 doesn't have platform exceptions or doesn't  
9 have types of exceptions to cover  
10 communications with large plant sponsors or  
11 small plant sponsors or allows them to define  
12 the scope of their relationship, we're very  
13 concerned that these marketing activities would  
14 newly be treated as fiduciary investment  
15 advice, and could only be offered in reliance  
16 on the exemption or potentially limiting plan  
17 sponsors only to generic product descriptions  
18 or general information, which doesn't  
19 necessarily connect them to the types of  
20 products that would be helpful for them.

21 Well the goal of all the  
22 interactions I've discussed is generally to



1 make it more likely that more workers will be  
2 able to adequately quickly prepare for  
3 retirement, whether, again, by encouraging  
4 small employers to adopt a plan or suggesting  
5 that employees avoiding in-service withdrawals  
6 that can't be repaid.

7 We believe that the fiduciary  
8 proposal, that threaten many of these valuable  
9 forms of assistance. The fiduciary liability  
10 and cost have a newly accompanied all of these  
11 interactions in many instances simply cannot be  
12 justified by the benefits that they would  
13 create for a firm.

14 In this regard, we want to emphasize  
15 that the availability of a generally available  
16 advice exemption such as PTE 2020-02 as it  
17 currently exists and especially as it's  
18 realized, should not be used as a justification  
19 for inappropriately lowering the fiduciary bar.

20 Using the most workable exemption is  
21 no cure for the wrong fiduciary definition.  
22 And even for those record-keepers and other

1 service providers, who have already implemented  
2 PTE 2020-02 as we've heard and a few discrete  
3 well-defined, clearly defined relationships.

4 We do not think the Department  
5 should assume they will extend the use of that  
6 exemption to many of these helpful  
7 conversations that have long been treated as  
8 non-fiduciary forms of assistance.

9 Unfortunately, as a result of the  
10 proposal, we expect that many record-keepers  
11 will simply stop providing these forms of  
12 assistance. Whether they actually fall within  
13 the technical definition of fiduciary advice or  
14 even come close to approaching that line, the  
15 risks and costs associated with taking on  
16 fiduciary status especially for situations in  
17 which it was not intended, it just those costs  
18 are too much and the risks are too high.

19 In our written comments which we're  
20 still working on and intend to get in before  
21 the deadline, we will offer some suggestions on  
22 the types of changes that would maybe

1 marginally improve the proposal. However, it  
2 is our view that even if, you know, those types  
3 of changes were made, it would still not  
4 prevent many of these negative consequences  
5 under the framework that's being proposed by  
6 the Department.

7 For these reasons and because we  
8 believe that the current fiduciary proposal  
9 would inappropriately lower the bar for  
10 fiduciary investment advice that would  
11 eliminate many of these beneficial forms of  
12 assistance, we are encouraging the Department  
13 to withdraw its proposal and not re-propose any  
14 similar rules unless they are far more narrowly  
15 tailored to avoid these negative consequences.

16 Again, I'd like to thank the  
17 Department for giving us the opportunity to  
18 speak today. I'm happy to answer any  
19 questions.

20 MR. HAUSER: Thank you. So I'll  
21 start with a few questions and then maybe  
22 others can join in. I think I'd like to start

1 with Mr. Rubin from Betterment.

2 And, I mean, maybe I'll start first  
3 with a statement and then a question that the  
4 statement is just that a lot of the kinds of  
5 communications that you are discussing I don't  
6 think are fiduciary in nature under the new  
7 proposal. You know, it's not just a trust and  
8 confidence test, there has to be a  
9 recommendation. And unless and until you have  
10 a recommendation, you don't have a fiduciary  
11 anything.

12 So when you were talking about kind  
13 of those pre-recommendation conversations, when  
14 you were talking about sort of educational  
15 kinds of communications and the like, those  
16 shouldn't be picked up and I -- I mean, that's  
17 not our intention to pick up those  
18 communications. We don't think the rule as  
19 drafted does. And there was a -- you know, and  
20 the recommendation concept here really is the  
21 one that, you know, should be familiar to folks  
22 from FINRA and the SEC. It's a call to action.

1           It's not, you know, just providing people kind  
2           of disclosure of the attributes of the  
3           particular investment, the basic investment  
4           principles, those sorts of things.

5                        So the question I have is just -- I  
6           mean I won't ask you does that reassure you,  
7           but a question would be, you know, there's a  
8           lot of discussion of these issues in the  
9           preamble.

10           But as I asked a previous Panel, I mean is part  
11           of the issue here that we, in your view, we  
12           really ought to move these things up into the  
13           text of the reg and just be very express about  
14           the sorts of educational communications, the  
15           non-recommendation sorts of communications?  
16           And that they just aren't picked up as  
17           fiduciary advice?

18                        MR. RUBIN:    Yes, well thank you.  
19           And let me say that I am, you know, happy to  
20           hear that it is, you know, your intent is more  
21           consistent with the position that we discussed  
22           and maybe, you know, we had assumed.

1           I do think that is, you know, one of  
2           the things that would be helpful is just to  
3           both have the final rule outside of the  
4           preamble include a definition, a clear  
5           definition of recommendation that, you know,  
6           also includes the sorts of interactions that  
7           are explicitly not intended to be captured in  
8           the context of a recommendation.

9           And I do think that would, you know,  
10          would give us a fair amount of reassurance. I  
11          think our concern is that in the absence of  
12          additional clarity around both the scope of the  
13          definition of a recommendation as well as the  
14          scope of the educational exemption, that I  
15          think that it's likely to chill a number of the  
16          sorts of interactions that we've identified.

17          Just because of the, you know, the  
18          difficulty of complying procedurally and the  
19          additional burden of ensuring that all of the  
20          requirements of the PTE would be complied with.  
21          And so I do think, again, that it would be very  
22          helpful if there were some additional clarity

1 in the final rule.

2 MR. HAUSER: Okay, so that would,  
3 yes, so if just as you're preparing your  
4 comment, if you could think about those areas  
5 you think it's especially important for us to,  
6 you know, underline in that way as non-  
7 fiduciary sorts of communication.

8 And if there are particular  
9 hypothetical sorts of situations or scenarios  
10 that you think maybe are on the line or  
11 especially susceptible to either  
12 misinterpretation or just that you think maybe  
13 we have the wrong interpretation, but if you  
14 could underline those for us and identify them.  
15 I mean generally speaking, when we put out the,  
16 if you look at the preamble to the rule as I  
17 mentioned in the last time we did meet, we  
18 don't think and we don't intend for this rule  
19 to pick up kind of general investment  
20 communication, stuff between the HR Department,  
21 the employees, I don't think this was your  
22 issue in particular, but the kind of mandated

1 disclosures that go with swap transactions, the  
2 hire me kind of conversation right up to the  
3 point that somebody's actually making an  
4 investment recommendation that's intended to be  
5 covered.

6 We don't think wholesaling kinds of  
7 conversations are generally picked up and this  
8 maybe goes to the last testimony, but we also  
9 think that what we said previously about  
10 platform providers, you know, and even actually  
11 in 2016 project, if you fell within the  
12 contours of that platform provider exception,  
13 we don't think you've done anything that would  
14 be picked up as a recommendation subject to  
15 fiduciary status.

16 In this rule, all of those things if  
17 people think they should be in Reg text or  
18 think we should say more about them, I think it  
19 would be extremely helpful to know that.

20 And then, similarly, we didn't  
21 expend a lot of Reg text on the line between  
22 education and advice and information and advice



1 and those sorts of things.

2 But if you're just describing the  
3 attributes of an investment or basic  
4 educational principles, that's not picked up.  
5 And if you look at the guidance we gave in both  
6 in the current interpretable bulletin, but also  
7 even in the 2016 rule where we had a fairly  
8 lengthy discussion of what's advice and  
9 education, I don't think we think those lines  
10 are any different.

11 Because it's the -- you have to have  
12 the recommendation before you get there. So  
13 just I'd urge anybody who's got, has these  
14 worries to take a look at that language. And  
15 tell us how you think we can do a better job  
16 maybe of making sure that people don't have  
17 anxieties about communications we didn't intend  
18 to pick up in the first place as fiduciary.

19 MR. RUBIN: Certainly that's very  
20 helpful and we'll certainly do so in coming.

21 MR. HAUSER: Thank you. And then,  
22 Mr. Grady, I just had a couple of questions for

1           you before maybe I turn it over to others. But  
2           I think you viewed, if I understood your  
3           testimony, you viewed 2020-02 as significantly  
4           more restrictive maybe than Reg BI or more  
5           demanding.

6                       And that you were concerned about  
7           potential impacts on access to advice as a  
8           result of those additional stringencies and I  
9           don't mean to put you on the spot, but if  
10          there's any specifics in that regard that you'd  
11          like to identify about ways in which it's more  
12          stringent than Reg BI that you think we should  
13          be thinking about, I'd appreciate it.

14                      MR. GRADY: I think we're going to  
15          get into that, thank you, in our comment  
16          letter, but I do want to say that in the  
17          context we're talking about, the compliance  
18          with 2020-02 is one that I think your own  
19          Department acknowledged was a higher barrier  
20          than the mere Reg BI standard.

21                      So I think you can go through the  
22          litany, but I think, but it struck me

1 principally as was a relatively broad set of  
2 sort of different additional and higher  
3 standards than somebody who's trying to both be  
4 a broker-dealer complying with Reg BI generally  
5 than somebody who's a broker-dealer trying to  
6 comply with the advice fiduciary definition  
7 would be trying to comport itself with.

8 And for that reason we could see  
9 quite a number of them saying I'm just not  
10 going to serve IRAs even though the brokerage  
11 model might be: a) very welcome to the IRA  
12 holder; and, b) it's really at the heart of a  
13 lot of sales of investment products that are  
14 alternatives which is why we're so concerned  
15 about the backing away of the broker-dealer  
16 community from serving IRAs because of the  
17 differential in compliance.

18 MR. HAUSER: Yes, and so there, too,  
19 I appreciate that you'll, you're looking to  
20 address those things in the written comment.  
21 And I would urge you to do that because I  
22 don't, I don't think at least the standards,

1 the fundamental duties of prudence and loyalty  
2 and then not misleading folks and the like, I  
3 don't know that they are appreciably different  
4 than the two context.

5 And it would just be good to  
6 understand, but there are other features  
7 obviously in 2020-02. And it would just be  
8 good to understand what you think are the kind  
9 of the key drivers here.

10 MR. GRADY: Thank you for that. And  
11 I think part of our answer is going to  
12 ultimately come back to the way the SEC  
13 addressed the issue was it chose not to impose  
14 fiduciary status on broker-dealers making  
15 recommendations in the Reg BI world. And that,  
16 as a result, it might require quite a lengthy  
17 re-write of 2020-02 to make clear where the  
18 fiduciary duty concept might be limited,  
19 truncated or nonexistent in the case of a  
20 broker-dealer made in advice fiduciary who is  
21 also trying to comply with 2020-02 and Reg BI.

22 So I can just tell you that that's

1 probably where the letter will go.

2 MR. HAUSER: So as, I mean as you  
3 understand it, and this isn't like a legal  
4 quiz, I just want to understand where you're  
5 coming from here.

6 I mean, what do you think are the  
7 differences in terms of the standard that apply  
8 to the recommendation under the securities laws  
9 as between a broker and an advisor? There's a  
10 difference in kind of the default monitoring  
11 obligation and not only that, but it is  
12 important, but under ERISA, there is no  
13 on-going monitoring obligation, you know?

14 And I think and we can be clear  
15 about that. The ERISA functional test of  
16 fiduciary status is a  
17 transaction-by-transaction test. It's by its  
18 nature transactional. Are you giving advice  
19 with respect to this transaction that's  
20 fiduciary? So it's in every case going to be  
21 decided on a transactional basis.

22 But after that, I have a hard time,

1           you know, if you put aside the monitoring  
2           issue, it's hard to single out any difference  
3           in the governing standard as between a  
4           recommendation from a broker, an advisor under  
5           the Advisor Act and under the SEC. And they  
6           are both rooted in the same fiduciary  
7           principles as best I can tell. Aren't they?

8                       MR. GRADY: No, that last point I  
9           would start with and say no, I don't think so  
10          or we wouldn't have the 34 Act on the one hand,  
11          the Advisers Act on the other with a clear  
12          exclusion of broker-dealers and investment  
13          advisor status to the extent they give advice  
14          that is solely incidental to the conduct of  
15          their business.

16          And they don't get specially compensated for  
17          it. So with that level of congressional  
18          understanding of the difference, I think we're  
19          very leery of anything that suggests that the  
20          standards are close enough to be legally or  
21          practically the equivalent of each other when  
22          applied to real life work of a broker-dealer.

1 I think that, you know, the SEC  
2 spent quite a bit of time trying to explain why  
3 it wasn't going to adopt a single fiduciary  
4 standard despite in some cases, the  
5 recommendations of staffers from prior eras as  
6 to why it should do so.

7 And I think in some ways, the  
8 formulation often will come down to an  
9 understanding of what the difference is between  
10 putting your client first on the one hand and  
11 not putting yourself ahead of the client on the  
12 other.

13 And I noticed in your own release  
14 that both formulations were used which I'd want  
15 to get into and will and plan to get into in  
16 the comment letter because I think that is a  
17 key differential in especially where as you  
18 label it or the Department labels it in  
19 conflicted advice. Sort of putting the client  
20 first may in some ways be interpreted as never  
21 allowing for compensation. It could vary by  
22 the advice given as opposed to a standard that

1 says you can't put your interests ahead of the  
2 clients or as you put it, subordinate the  
3 clients' interest to your own.

4 So I think that's what and if it's  
5 helpful, we'll get into that in our comment  
6 letter.

7 MR. HAUSER: It would be helpful.  
8 The latter is what's intended. There is not an  
9 assumption in our part that perfectly level  
10 compensation is required by this.

11 MR. GRADY: I appreciate that and I  
12 --

13 MR. HAUSER: It's understand --

14 MR. GRADY: Can I just make one  
15 point?

16 MR. HAUSER: Yes.

17 MR. GRADY: Sort of touched on by  
18 your question and that is we are also happy to  
19 see new ways of providing advice come into the  
20 marketplace including one of my fellow  
21 panelists, the use of technology and internet  
22 to serve smaller balance savers does have



1 appeal to both us and to the market generally.  
2 But I want to point out that a lot of those  
3 models cannot, certainly they do not now.

4 We don't see how they would  
5 necessarily will in the future, incorporate  
6 alternatives in them. They're just not a good  
7 fit for a technology driven advice model even  
8 if that model is otherwise a nice fit and it  
9 alleviates some of the Department's concerns  
10 that the commission model may go away. So that  
11 will be in our letter as well.

12 MR. HAUSER: Okay, thank you. And  
13 can I get a preview of that? What is it you  
14 think is, makes it especially hard?

15 MR. GRADY: I think you'll see that  
16 if you, if there is a program and I'm sure my  
17 fellow panelists would be glad to tell me that  
18 there is one, but if you can find a program  
19 that literally includes a non-listed security  
20 in a program that's delivered essentially via  
21 the internet without the need for a particular  
22 signature on the application or the

1 requirements that are mandated by the state  
2 merit reviews of investors qualifications and  
3 the like, I think including even the basic type  
4 of alternative investments such as a  
5 non-exchanged listed REIT is very difficult in  
6 an advice model that's delivered  
7 electronically.

8 MR. HAUSER: Thank you. And do you  
9 have any sense of -- you referenced at one  
10 point concerns about small balance savers in  
11 particular and I didn't take to your, you as  
12 expressing concern just with respect to the  
13 folks here, members' advice. But I am  
14 wondering about that. Do you have any data or  
15 are you familiar with any data or do you have  
16 any information on the extent to which small  
17 savers are investing in alternative investments  
18 and of the sort that you recommend and have  
19 expertise in?

20 MR. GRADY: I mean, we are still  
21 collecting feedback and data from our members  
22 through a wide-based survey to just try to get

1 at that question specifically because we figure  
2 data is going to help everybody and we want to  
3 be honest brokers on this question.

4 But from what we've seen, you know, the  
5 standards for buying a lot of alternative  
6 investments, they're not, you know, sort of  
7 available to everybody.

8 There is a wealth or income test  
9 that must be satisfied and it's built into the  
10 offering documents and the merit review process  
11 that the states follow. Certainly, for  
12 publicly offered programs such as REITs and  
13 BDCs.

14 So I think, as a result, there is a  
15 need for talking to smaller balance savers  
16 about including ALTs in their portfolio just to  
17 avoid them being totally linked to market-based  
18 products.

19 But at the same time, telling them  
20 that those aren't available because there's a  
21 high minimum fee to be in an account that's  
22 going to make those accessible or that they're

1 not accessible to investors unless they're  
2 willing to meet certain requirements in their  
3 own IRA account is, to our mind, going to make  
4 it less likely that those smaller balance  
5 savers are going to get access to alternatives.  
6 We think they're going to get less access to  
7 advice or expertise generally but in particular  
8 to the ALT space given those extra concerns.

9 MR. HAUSER: But right now as it  
10 stands, they don't have much access to the ALT  
11 space and that's something you think should  
12 change? Is that --

13 MR. GRADY: Oh, I think, I was  
14 actually say -- pardon my interruption. There  
15 are programs that are sold to a significant  
16 extent into the IRA market.

17 The 20, 30, 40, even 50 percent of certain ALTs  
18 programs are sold into IRA accounts for the  
19 reasons that I was angling at before, certainly  
20 their non-correlation and diversification  
21 impact.

22 I think the concern is that taking

1 away or changing the current framework for the  
2 revision of that expertise to the IRA holder is  
3 going to mean IRA holders will get much less  
4 marketed at them by the financial provider  
5 community, and have much less opportunity to  
6 put ALTs in their portfolios than they have  
7 now.

8 MR. HAUSER: My perception though  
9 and tell me if I've got this wrong, is that  
10 there is exposure and access to these  
11 investments and outside the small saver kind of  
12 community and the IRA market, but not so much  
13 for small savers.

14 MR. GRADY: Small savers aren't  
15 excluded because it doesn't require them to  
16 have an asset balance in their IRA to meet the  
17 wealth or income tests that are otherwise  
18 established under the state merit rules.

19 So I think what we're saying is it's  
20 more, it's not likely that firms are going to  
21 go through the hoops to make those products  
22 available to the small balance savers in their

1 IRAs because of all the costs associated with  
2 those hoops.

3 MR. HAUSER: Okay, thank you. Thank  
4 you very much.

5 MR. GRADY: Absolutely.

6 MR. HAUSER: Any data you can  
7 provide us would be terrific. And I'll turn it  
8 over to anybody else on the Panel who has  
9 questions.

10 MR. PALEVEDA: The only question I  
11 have is if you do a study --

12 MS. HANSEN: So, let me ask right  
13 now. Sorry, thank you. I had a question for  
14 Mr. Grady. You mentioned that these, that the  
15 products that are covered here are recommended  
16 to retirement investors.

17 Several times you said that they  
18 were made as recommendations and I'm curious as  
19 to what you think again to serve your opinion  
20 whether when these recommendations are made  
21 whether the retirement investor is under the  
22 impression that the retirement investor

1 appropriately should trust and put their trust  
2 into that recommendation and why or why not?

3 MR. GRADY: You know, I don't think  
4 the context for the recommendation differs by  
5 whether we're talking about the placement of  
6 the investment into a retirement account or a,  
7 you know, taxable just for argument's sake,  
8 taxable brokerage account. Because in many  
9 cases, the same investor who's a client of a  
10 broker-dealer will have both retirement  
11 accounts and taxable accounts.

12 I think the major difference is, is  
13 there a reason to put a high-income producing  
14 investment that maybe long-term in nature in a  
15 tax deferred vehicle or tax-deferred account  
16 like an IRA?

17 Not that it's sold differently, not  
18 that it's, that the relationship is differently  
19 seen, but rather the overlay is, is this the  
20 right place for taxable versus a high-income  
21 producing investments that might cause current  
22 liability if held in the taxable account, but

1           which are shielded from current federal taxes  
2           held in a retirement account? I think that's  
3           --

4                   MS. HANSEN: That doesn't answer my  
5           question. I'm asking whether the retirement  
6           investor believes whether it is your view that  
7           the retirement investor believes they can trust  
8           and put their trust into that recommendation.

9                   MR. GRADY: No, I think the  
10          retirement investor is also the taxable  
11          investor. I think they're all looking at their  
12          broker-dealer as providing expertise on the  
13          security in question.

14          And the extra trust is in the expertise as to  
15          whether or not something would be a good fit  
16          with the retirement account.

17                   MS. HANSEN: So is that, yes, the  
18          retirement investor does believe they can trust  
19          the recommendation?

20                   MR. GRADY: I'm saying it's no  
21          different. If they trust the advisor, then  
22          they would for whether it's a taxable or a tax



1 exempt account.

2 MS. HANSEN: Okay.

3 MR. GRADY: I don't think there's  
4 any different --

5 MS. HANSEN: So just to be clear,  
6 you're not going to answer the question.

7 MR. GRADY: It's not that I don't  
8 want to answer the question. I just think the  
9 context is it's often the same person with  
10 multiple accounts sitting in front of a  
11 broker-dealer asking where they should hold the  
12 investment in question. I do think they trust  
13 the broker-dealer to give them an expert answer  
14 on whether it would be sensible to hold it in  
15 the tax free account or not.

16 MS. HANSEN: So they do trust their  
17 broker-dealer to provide them the  
18 recommendation? Yes, is the answer?

19 MR. GRADY: They do trust the  
20 broker-dealer to give them the right  
21 recommendation as taxable versus nontaxable  
22 accounts in answer to your question.

1 I don't think it's any different as between the  
2 two places in any other respect of their  
3 understanding of the trust relationship.

4 MR. HANSEN: Thank you.

5 MR. GRADY: Absolutely.

6 MR. PALEVEDA: I have a question.

7 Did the Department of Labor EBSA do a study on  
8 the reduction of people setting up retirement  
9 plans?

10 The time you last passed the fiduciary rule our  
11 empirical analysis showed three major insurance  
12 companies withdrew completely from the small  
13 retirement plan market, Transamerica, New York  
14 Life and Ohio National.

15 Our studies showed that new  
16 retirement plans reduced 40 percent the year  
17 you decided to place this fiduciary rule in  
18 effect because the insurance agents didn't  
19 think they could comply with the fiduciary  
20 rule, and would want to show a client anything  
21 else other than a retirement plan. Have you  
22 looked at the damage that was created from this

1 fiduciary rule that was placed several years  
2 ago? I did and it was significant and that's  
3 the reason I oppose it.

4 MS. HANSEN: We are happy to take a  
5 look at anything that is sent in through the  
6 comment period. Unfortunately, this Panel is  
7 scheduled to end a minute ago so we are going  
8 to need to end this panel today right now.

9 (Whereupon, the above-entitled  
10 matter went off the record at 3:16 p.m. and  
11 resumed at 3:30 p.m.)

12 MR. HAUSER: Okay, I think we've  
13 reached the last panel, and that includes  
14 representatives of the American Bankers  
15 Association, Collective Wealth Partners and the  
16 Institute for Portfolio Alternatives. And  
17 we'll start with Mr. Keehan from the American  
18 Bankers Association. At least that's my hope.

19 MR. KEEHAN: There we go. Coming  
20 through okay?

21 MR. HAUSER: Yes.

22 MR. KEEHAN: All right. Terrific.

1 MR. HAUSER: That's good. Thank  
2 you.

3 MR. KEEHAN: Members of the panel,  
4 my name is Tim Keehan. I'm a senior vice  
5 president of asset management for the American  
6 Bankers Association. ABA is the voice of the  
7 nation's \$23.5 trillion banking industry. Its  
8 membership is comprised of small, regional and  
9 large banks that together employ more than two  
10 million people, safeguard over \$18 trillion in  
11 deposits and extend over \$12 trillion in loans.

12 ABA appreciates the opportunity to  
13 be here regarding the Department of Labor's  
14 proposed amendments to its Investment Advice  
15 Regulation and related prohibited transaction  
16 class exemptions, which collectively I'll refer  
17 to as the fiduciary proposal or proposal.

18 My testimony today will cover three  
19 areas of the fiduciary proposal. First, the  
20 Department's interpretation of the term  
21 'recommendation.' Second, the Department's  
22 view that non-fiduciary statements and actions

1 that are made separate and apart from one  
2 another may be combined to become fiduciary  
3 investment advice. And third, the proposal's  
4 impact on the institutional marketplace.

5 At the outset, we are puzzled that  
6 the Department is holding the public hearing on  
7 the proposal during rather than following the  
8 comment period. We are not aware of any other  
9 instance in which the Department or another  
10 federal agency has held a hearing when  
11 interested parties and stakeholders have yet to  
12 provide a formal response. Currently, we are  
13 soliciting views and feedback on the proposal  
14 from our member banks and are still deeply  
15 engaged in formulating a collective member-wide  
16 response.

17 We believe this hearing is premature  
18 and therefore limited in value and function.  
19 The Department and the public would have been  
20 better served if this hearing were held after  
21 the conclusion of the comment period. We  
22 therefore urge the Department to consider

1 holding another, more comprehensive and  
2 informed public hearing once everyone's views  
3 have been crystallized, submitted and  
4 published.

5 A more thorough vetting is  
6 particularly appropriate for this proposal,  
7 which ABA believes is overbroad and  
8 overreaching by capturing many persons who  
9 provide valuable services to individuals, plans  
10 and plan fiduciaries, but who should not be  
11 viewed as a fiduciary under either ERISA or the  
12 Internal Revenue Code. If adopted in its  
13 current form, the proposal will likely harm the  
14 very plan participants, beneficiaries and IRA  
15 account owners that the Department is seeking  
16 to protect by making it extremely difficult,  
17 complex and costly for banks to make available  
18 and deliver the products, services and  
19 information necessary for persons to achieve a  
20 financially sound retirement. The three areas  
21 we've selected to discuss illustrate the  
22 compliance challenges posed.

1 First, the proposal's overbroad  
2 definition of a person who renders investment  
3 advice and who therefore becomes a fiduciary,  
4 hinges on the Department's interpretation of  
5 the term 'recommendation.' The Department  
6 views a recommendation as a communication that,  
7 based on its content, context, and  
8 presentation, would reasonably be viewed as a  
9 suggestion that the retirement investor engage  
10 in or refrain from taking a particular course  
11 of action. Contrary to the Department's view  
12 that this is an objective inquiry, inclusion of  
13 the word 'suggestion' within this  
14 interpretation, is inherently subjective, not  
15 objective, and puts in doubt whether both the  
16 bank and the retirement investor truly  
17 understand whether, and on what basis, a  
18 fiduciary relationship has been established.  
19 Equating recommendation and suggestion in this  
20 way, when coupled with ERISA's strict liability  
21 prohibited transaction regime, could actually  
22 harm retirement investors and is unwarranted.

1                   Moreover, making a suggestion a  
2 basis for fiduciary responsibility is an  
3 unprecedented stretch of the term that  
4 belittles the concept of fiduciary duty while  
5 effectively stifling valued communication to  
6 retirement investors. Together with its  
7 proposed unraveling of the investment advice  
8 regulation's five-part test, the Department's  
9 interpretation of recommendation would capture  
10 a vast swath of written and oral communications  
11 that are not intended as a bona fide  
12 recommendation. Banks thereby are placed in a  
13 precarious position, as there have been and  
14 will continue to be numerous, repeated, and  
15 unanticipated situations in which a bank and  
16 its retirement customer may differ on whether a  
17 recommendation was in fact provided to the  
18 customer. This, in turn, will serve only to  
19 cut short or silence a retirement service  
20 provider's conversations with its retirement  
21 investors and potential customers for fear that  
22 any such conversation could be deemed fiduciary



1 action.

2 ABA believes that the term  
3 recommendation can be sensibly narrowed and  
4 targeted to reach only those instances in which  
5 recommendations are actually intended and  
6 balanced with potential mislabeling as  
7 fiduciary. To achieve this result, we  
8 recommend that the Department interpret a  
9 recommendation as a communication that is a  
10 clear, affirmative statement of intentional  
11 endorsement and support for the retirement  
12 investor to engage in or refrain from taking a  
13 particular course of action that is based on  
14 the individual needs of the retirement  
15 investor. Stated this way, both the retirement  
16 services provider and the retirement investor  
17 would know when a recommendation is genuinely  
18 taking place. It would also realize the  
19 Department's declared goal of establishing an  
20 objective rather than subjective test to  
21 determine whether investment advice is being  
22 rendered.

1                   Second, we're concerned about the  
2 Department's far-reaching attempt to label as  
3 fiduciary a series of unrelated non-fiduciary  
4 statements and actions. As stated in the  
5 proposal's preamble, the Department believes a  
6 series of actions taken directly or through an  
7 affiliate that may not constitute a  
8 recommendation when each action is viewed  
9 individually, may amount to a recommendation  
10 when considered in the aggregate. This view,  
11 which was codified in the 2016 fiduciary rule,  
12 is presumably intended to prevent an unlawful  
13 evasion of the investment advice regulation.

14                   From a compliance and supervisory  
15 standpoint, however, this is simply unworkable.  
16 In essence, multiple, unrelated conversations,  
17 each of which separately, is not a  
18 recommendation with retirement investors across  
19 the bank and its affiliates, could, in  
20 retrospect, be woven together by the Department  
21 to form a recommendation leading to fiduciary  
22 status without the bank or affiliate even being

1           aware of such a situation. This could occur  
2           even in the Department's own illustration in  
3           the proposal of a non-fiduciary action where  
4           the Department assures us that a car dealer  
5           salesperson is not giving a recommendation.

6                       However, it is quite possible that  
7           another non-fiduciary statement, a missing  
8           piece, may be provided by a representative of  
9           the car dealer's finance arm in the showroom,  
10          which, when aggregated with the salesperson's  
11          statement out on the lot, could become,  
12          unintentionally and in random fashion, a  
13          recommendation that would trigger fiduciary  
14          status for both the car dealer and its finance  
15          arm.

16                      In other words, when employing the  
17          Department's policy of aggregation to determine  
18          whether a recommendation has been provided,  
19          there seem to be no limits and no nexus  
20          requirements to individual conversations and  
21          actions.

22                      We recommend that the Department

1 withdraw this policy. If unlawful evasion of  
2 fiduciary status is the concern, then the  
3 Department can include a broad anti-evasion  
4 provision in the final rule which would better  
5 serve efficient and prudent administration.  
6 Such a provision could simply read, "No person  
7 shall knowingly act in a manner that functions  
8 as an unlawful evasion of the purposes of the  
9 investment advice regulation."

10 This language would ensure that a  
11 person cannot deliberately structure a program  
12 to unlawfully evade fiduciary status while  
13 removing the cloud of fiduciary status  
14 resulting from non-fiduciary statements and  
15 actions, and with it, elevated costs and  
16 liability risks.

17 Third, ABA is concerned about the  
18 proposal's needless intrusion into the  
19 corporate retirement marketplace. The  
20 Department has focused much of its attention,  
21 in media statements and in public forums, on  
22 the proposal's benefits in the retail

1 marketplace without having truly analyzed the  
2 need for the proposal in the institutional  
3 marketplace.

4 Institutional investors typically  
5 are well-versed in the functioning of financial  
6 markets, the parameters of investment decision  
7 making and the availability of investment  
8 choices. There's simply no evidence that  
9 institutional plan fiduciaries are being  
10 systematically misled, disadvantaged, or abused  
11 by their service provider as they seek market  
12 information or viewpoints for their  
13 consideration in making their own investment  
14 decisions. The Department's one size fits all  
15 approach to applying strict liability  
16 provisions to all potential advice providers  
17 ignores the fundamental fact that plan  
18 fiduciaries are obligated to understand the  
19 environment in which they operate and the  
20 transactions that they undertake.

21 For these reasons and others, we  
22 believe that the fiduciary proposal should be

1           withdrawn for further vetting with stakeholders  
2           and interested parties, and then should a re-  
3           proposal be necessary, revised to be sensibly  
4           tailored to the retail marketplace. This is a  
5           job for a dart gun, not a blunderbuss. Panel  
6           members, thank you for your time, and I'm happy  
7           to answer any questions you may have.

8                   MR. HAUSER: Thank you. The second  
9           person on the panel is, and I apologize if I  
10          mispronounce your name, Kamila Elliott.

11                   MS. ELLIOT: Yes. Thank you, Tim.  
12          My name is Kamila Elliott.

13                   MR. HAUSER: Kamila.

14                   MS. ELLIOT: Yes.

15                   MR. HAUSER: Thank you.

16                   MS. ELLIOT: So thank you for the  
17          opportunity today to talk about my experience  
18          working with retirement savers and how  
19          important this proposed rule is to all  
20          Americans.

21                   My name is Kamila Elliott. I served  
22          as the 2022 Chair of CFP Board. I was the

1 first African-American chair and one of the  
2 youngest people to ever serve in that role. I  
3 spent the earlier part of my professional  
4 career working at Vanguard with ultra-high  
5 net-worth individuals, endowments and  
6 foundations.

7 But I am now the founder and CEO of  
8 the financial planning firm, Collective Wealth  
9 Partners. We are a majority women and  
10 black-owned registered investment advisor firm  
11 headquartered in Atlanta, Georgia. We provide  
12 holistic financial planning advice primarily to  
13 resilient communities.

14 Now that may be a new term for many  
15 of you this afternoon. You probably have heard  
16 the term underserved communities, but I'm  
17 intentionally calling us resilient.  
18 Underserved means that they're individuals that  
19 are not being served at all, that there are  
20 significant impediments to obtaining financial  
21 advice, particularly holistic advice. But I  
22 don't think the word is empowering. So we use

1 the word resilient that regardless of the  
2 impediments and barriers facing black and brown  
3 communities and receiving competent and ethical  
4 financial planning, they're working to close  
5 that gap and they're looking and seeking  
6 competent and ethical financial advice. So I  
7 think it's really important to share that all  
8 of the financial advisors at Collective Wealth  
9 Partners are certified financial planners who  
10 provide fiduciary advice to our clients. That  
11 is, financial advice that's in our clients'  
12 best interest.

13 Some have argued that financial  
14 advisors cannot serve moderate-income  
15 individuals if they are required to provide  
16 advice that is in those individuals' best  
17 interests. That is not our experience at  
18 Collective Wealth Partners, where  
19 moderate-income people are the bulk of our  
20 client base. We charge fees for individual,  
21 household or business financial planning, which  
22 can be charged as a fixed fee or on an hourly



1 basis, whichever works best for the client. We  
2 establish fees based on the complexity of the  
3 client's financial situation and help with  
4 implementation of our recommendations and a  
5 time frame for ongoing monitoring.

6 We also charge an assets under  
7 management fee if we're managing a client's  
8 financial assets. So to allow us to best serve  
9 our clients, particularly moderate-income  
10 families, we have no minimum asset requirement  
11 for investment management services, and we  
12 consolidate household assets under management  
13 to provide our clients with the best value for  
14 our services. Using this flexible compensation  
15 arrangement, we can work with a client to  
16 provide them with what they need at a price  
17 that they can afford. This is how we meet our  
18 clients' financial needs across the income  
19 spectrum.

20 We educate our clients in an easy to  
21 understand manner so they can understand  
22 personal financial advice and use these

1 concepts to pursue their financial objectives.  
2 We talk to our clients about the importance of  
3 saving early in life, even if it's only a small  
4 amount each month. Our goal is to provide  
5 comprehensive advisory services about  
6 retirement, taxes, estate planning, investment  
7 strategy, and insurance, and provide them with  
8 holistic lifetime assistance so they can build  
9 financial independence for themselves and their  
10 families.

11 We know that in these resilient  
12 communities, every dollar counts. I have  
13 witnessed and researched the impact on these  
14 communities when they are charged too much or  
15 don't receive advice that is in their best  
16 interests. These are the kinds of things that  
17 expand what is already a large racial wealth  
18 gap. When we address our clients' financial  
19 needs holistically and act as fiduciaries, we  
20 are taking steps to close that wealth gap. The  
21 wealthy receive financial advice that is best  
22 for them. Why shouldn't those with

1 moderate-income be treated the same?

2           The stakes have never been higher.  
3 Retirement savers today are responsible for  
4 making their own investment decisions. Like  
5 many, like some of you on the call today, I  
6 don't have a pension. The vast majority of my  
7 retirement is in a 401k plan. But that was not  
8 the case in 1974 when ERISA was adopted.  
9 Because retirement savers are not investment  
10 specialists themselves, they look for help from  
11 financial professionals with whom they trust  
12 and are confident will do what is good for  
13 them.

14           But that trust and confidence is  
15 often misplaced. Financial advisors who are  
16 not required to work in their clients' best  
17 interests may sell products that carry high  
18 commissions or management fees or annuities,  
19 or, we heard earlier, illiquid, privately held  
20 investments that can tie up their assets well  
21 into retirement. The potential for harm is  
22 enormous. These types of products usually

1 introduce unnecessary risk and cost that erode  
2 savings over time. It may not appear like a  
3 lot in one year, but over time it can be the  
4 difference between someone retiring at 65, 75,  
5 or not being able to retire at all.

6 Resilient communities are especially  
7 vulnerable to receiving incompetent and  
8 unethical advice that can erode retirement  
9 savings, regardless of the saver's net worth.  
10 After a lifetime of saving for retirement,  
11 these individuals are left holding the bag.  
12 And Congress could not have intended this  
13 result when they passed ERISA almost 50 years  
14 ago.

15 So I'll share with you a couple of  
16 stories of what I'm seeing every day working as  
17 a financial planner. I had someone come to me,  
18 a teacher, a career changer, bless her for  
19 leaving corporate America, becoming a teacher.  
20 So she had a previous retirement account, and a  
21 financial professional came to her school and  
22 said, I can help you with that. She was, at

1 the time, in her 30s. He put her in an annuity  
2 that has a surrender charge of up to 18% if she  
3 takes her annuity out within the first 14  
4 years. So she's locked into a product for 14  
5 years. She returns before that period, she  
6 loses 18%, 12%, 10%, and not until year 14 as  
7 an end, where it's two percent, and at year 15,  
8 it's zero.

9 Now within that annuity are  
10 non-diversified portfolios, high-cost funds,  
11 and a high administrative fee that she's paying  
12 every single year. This is not what's setting  
13 up her up for success. And also, this  
14 financial professional has not spoken to her  
15 since she purchased this annuity from him, I'm  
16 looking at the contract, eight years ago. Is  
17 this what we intend to help teachers save for  
18 retirement? Someone putting them in a high  
19 cost product, locked in for 14 years in a  
20 non-diversified portfolio? I think not.

21 Now the second is a friend's mom  
22 reached out to me. One of my friends said, her

1 mom needs help. And I looked at her portfolio,  
2 and it's a very large firm, I won't say the  
3 name of the firm, but to initially put her  
4 retirement, they charged her two percent. So  
5 before they even did anything, the initial fee  
6 just to go in the fund was two percent. And  
7 the annual fee for the fund is over one  
8 percent. So they put her in a fund that, in  
9 year one, she's losing three percent. This is  
10 before she has any return on her portfolio  
11 whatsoever. That's a high hurdle to lose three  
12 percent in one year.

13 Now this wasn't a private equity.  
14 This was not a venture capital where it takes  
15 intensive research and a huge team to make sure  
16 she's in the right product. But this is what's  
17 happening to many Americans when they seek  
18 competent and ethical financial advice.  
19 They're going to someone getting one-time  
20 advice that's not in their best interest and is  
21 eroding their retirement savings year over year  
22 over year.

1           So the Department of Labor wants to  
2           require financial professionals to act in their  
3           clients' best interest when providing  
4           retirement investment advice. Now this one  
5           calls firms to abandon moderate-income clients.  
6           My firm is not the only firm that serves these  
7           clients. And there are firms all across  
8           America serving retirement savers of more  
9           modest means with best-interest advice.

10           But also, look at this from the  
11           consumer's perspective. The reason consumers  
12           often have a negative view of financial  
13           professionals is because, in many  
14           circumstances, they aren't required to act in  
15           their client's best interest. We often see  
16           resilient communities, because of their own  
17           experiences or experiences of friends or  
18           family, they do not trust most financial  
19           advisors. So where do they go?

20           MS. WILKER: Ms. Elliot, I just want  
21           to let you know, it has been ten minutes.  
22           Could you wrap up?

1 MS. ELLIOT: Yeah.

2 MS. WILKER: Thank you so much.

3 MS. ELLIOT: They go to TikTok, they  
4 go to other social media platforms and they get  
5 highly questionable and flat out wrong advice.

6 We need to build trust and  
7 confidence with these communities of color to  
8 have in professional financial advisors. And  
9 the proposed deal rule will help with that.  
10 And thank you, and I'm happy to take any  
11 questions you may have.

12 MR. HAUSER: Thank you. Let's see,  
13 next is the Institute for Portfolio  
14 Alternatives. Kevin Walsh.

15 MR. WALSH: Thank you, Tim. And I'm  
16 nervous, guys. Good afternoon. I'm Kevin  
17 Walsh and I'm a principal at Groom Law Group.  
18 I'm here on behalf of the Institute for  
19 Portfolio Alternatives and I really appreciate  
20 the opportunity to provide feedback to the  
21 Department on your latest fiduciary proposal.

22 I appreciate the hard work that



1           you've all put into the proposal. That being  
2           said, IPA's ask is going to be that the  
3           proposal be withdrawn. We've got a handful of  
4           concerns that have been raised by other  
5           commenters. For example, we'd like to see a  
6           general recognition that sales activity and  
7           wholesaling between sophisticated parties does  
8           not give rise to fiduciary status. We've  
9           talked a lot about that the last two days,  
10          though. We'd like additional time to digest  
11          and respond to the proposal. Folks requested a  
12          comment extension. I think you've heard a lot  
13          of that already. We'd like more time to come  
14          into compliance if the proposal is ultimately  
15          adopted. I think the amount of time being  
16          given right now seems pretty short. We'd like  
17          changes to the disqualification provisions of  
18          PTE 2020-02 because they seem to raise some due  
19          process concerns. We look at some of those SEC  
20          cases and we've got concerns about those  
21          provisions. And then we would advise the  
22          Department not to impose Title I of ERISA on

1 plans that are only subject to Title II.

2 So we anticipate raising those and  
3 other concerns in our written comments. We  
4 want to highlight we're still working through  
5 proposal. But in light of other's testimony,  
6 I'm going to focus on just two connected issues  
7 today, and these are kind of the core issues,  
8 honestly.

9 First, the summary here, sales  
10 conversation isn't fiduciary, and there's a  
11 difference between ERISA's fiduciary standard  
12 and a best interest standard. Now that's kind  
13 of the core of what folks have talked about for  
14 the last two days. And so in order to go into  
15 this, I'm going to have to go back to first  
16 principles, get a little more ephemeral than  
17 anyone could possibly want. We're into two  
18 long days of hearings. I get that we're tired  
19 here, but I'm going to take a step back.

20 So first off, salespeople aren't  
21 fiduciaries. So there I'd look at ERISA and  
22 I'd say, what test do we use to figure out when

1 someone's a fiduciary? And I look at Firestone  
2 and it says, "We use common law definitions."  
3 I look at the Fifth Circuit decision that cites  
4 the Firestone, and it again says, "We look to  
5 common law definitions when we figure out if  
6 somebody's a fiduciary."

7 So my instinct there is, I look at  
8 the common law definition of fiduciary. Trust  
9 law goes back to Roman times. We're not going  
10 to go into all that today. But if we look at  
11 the Restatement of Trusts, kind of the quick  
12 and dirty way of figuring out what the test is,  
13 there's kind of three takeaways in the  
14 restatement.

15 First off, "A person in a fiduciary  
16 relation to another is under a duty to act for  
17 the benefit of the other as to matters within  
18 the scope of the relation." Second, "As to  
19 matters within the scope of the relation, he's  
20 under a duty not to profit at the expense of  
21 the other." And then third, they give  
22 examples. "Fiduciary relations include not

1           only the relations of trustee and beneficiary,  
2           but also, among other things, those of guardian  
3           and ward, agent and principal, and attorney and  
4           client."

5                         So with that, I got three takeaways.  
6           First off, fiduciary status is limited to the  
7           scope of the relation. Just at the glance  
8           there, it gives me concerns that hire me  
9           conversations, or those initial sales  
10          conversations really aren't fiduciary  
11          conversations. There's a duty not to profit at  
12          the expense of the other. I think that's  
13          pretty consistent with ERISA but when I think  
14          about sales conversations, in a sales  
15          conversation, someone is trying to profit.

16                        And then, none of the examples look  
17          like sales transactions. I think we could all  
18          agree there's a fundamental difference between  
19          the relationship between a salesperson and a  
20          buyer and that of a guardian and ward.

21                        And so that's common law. Let's  
22          look at the statute of ERISA and say, are there

1 clear problems if we say salespeople are  
2 fiduciaries? Are there hints that the Fifth  
3 Circuit got it right in concluding that  
4 salespeople aren't generally fiduciaries? And  
5 we could look at the purpose of the statute.  
6 We could disagree about that. I think some  
7 would argue that it seems to have been about  
8 defined benefit plans and preventing trustees  
9 from stealing or investment advisors to those  
10 defined benefit plans from misusing plan  
11 assets. I know others view ERISA's purpose as  
12 protecting all American retirement savers. And  
13 honestly, I think folks can disagree on that.

14  
15 But I think we can get grainier from  
16 a text perspective. We can look at  
17 3(21)(a)(ii), and it talks about investment  
18 advice for a fee, direct or indirect. And  
19 ERISA followed on securities law history, the  
20 '34 act, the '40 act, were all around.

21 So first off, under a plain reading  
22 of that 3(21)(a)(ii), "You're a fiduciary if

1           you receive a fee, directly or indirectly, a  
2           fee from a third party for advice. You aren't  
3           a fiduciary if you get a fee only for something  
4           else."       Something else here could mean  
5           something like a completed sale. With that  
6           interpretation, it tracks the '40 Act exactly.  
7           Broker dealers don't get paid for advice. They  
8           only get paid for completed sales. That is, to  
9           be a broker, any recommendation has to be  
10          solely incidental to the conduct of his  
11          business's broker, and you can't receive any  
12          special compensation therefore.

13                       Now you could say, well, no special  
14          compensation therefore, maybe we're saying  
15          that's compensation for advice. But brokerage  
16          commissions aren't even partly a fee for  
17          advice. If the broker's commission were for  
18          advice, you'd expect brokers to seek payments  
19          from non-buyers who don't purchase securities.  
20          And under securities laws, they don't and they  
21          can't.

22                       Now under ERISA, we've taken the

1 position that brokers can be fiduciaries. Part  
2 of that can be, that's Advisory Opinion  
3 1983-60A. The good news, though, is that  
4 advisory opinions aren't binding, and we could  
5 conclude that it was just indirect.

6 Now you may not be sold yet. This  
7 is the big one. Let's look at the consequences  
8 of calling somebody an ERISA fiduciary. ERISA  
9 Section 404(a)(1) requires a fiduciary to  
10 discharge their duties solely in the interest  
11 of participants and beneficiaries. A hired,  
12 registered investment advisor can meet that  
13 standard, but I don't see how a  
14 commission-based salesperson can. A  
15 commission-based salesperson can absolutely  
16 make best interest recommendations for you, but  
17 the only reason they're making a recommendation  
18 at all is in the hope that you buy something so  
19 they can be paid. It's important, then, to  
20 recognize that a best interest sales standard  
21 that everyone seems to be talking about is  
22 fundamentally different from ERISA's solely

1 requirement.

2 And if we look at exemptions, folks  
3 focus on 406(b)(3), where they're saying, well,  
4 that's the problem under ERISA with the  
5 commission. If we grant an exemption with 408,  
6 we still loop back to needing to comply with  
7 404, and 404 is where the problem comes in.  
8 The word 'solely.' If Congress had planned on  
9 banning brokers from providing by selling to  
10 retirement savers, they'd have done it  
11 explicitly and not hid this elephant in a mouse  
12 hole.

13 Okay, that's the bad news. The good  
14 news here, ERISA is not the only standard.  
15 Salespeople can satisfy a best interest  
16 standard. And other regulators have crafted  
17 different best interest standards, and we  
18 should work with them and encourage them to do  
19 so. Industry has supported various best  
20 interest standards and strong loyalty  
21 standards, just not ERISA's fiduciary standard.  
22 The word 'solely' doesn't work. There's a



1           myriad of standards of loyalty, such as the  
2           best interest standards that a salesperson can  
3           satisfy.     We've got the NAIC standard, the  
4           NASAA standards.   We've got the SEC standards.  
5           We've got other best interest care standards.  
6           There's a fulsome debate going on about what  
7           standards appropriate in what circumstances.

8                     But at bottom, it's wrong to put  
9           ERISA's standard on these salespeople because  
10          ERISA's fiduciary standard has been interpreted  
11          as the highest standard under law.     Under  
12          Donovan v. Bierwirth, we say that a fiduciary  
13          has to act with an eye single to the interests  
14          of participants and beneficiaries.   The only  
15          way that we can make the ERISA fiduciary  
16          standard work for salespeople is if we lower  
17          the ERISA standard, and that's not what we  
18          should be doing, because it conflicts with the  
19          statute.

20                     So, to sum up, it isn't that  
21          salespeople want to rip off clients.   It's that  
22          they recognize that their duty of loyalty is

1 different than the duty of loyalty between a  
2 parent and a child or a guardian and ward.  
3 Salespeople are not interacting with potential  
4 buyer out of sense of duty arising from some  
5 existing relationship of trust and confidence.  
6 Instead, salespeople can make best interest  
7 recommendations, but at bottom, they have an  
8 interest in selling a product that makes  
9 ERISA's fiduciary standard of loyalty  
10 unworkable under Section 404.

11 So I thank you for your time today,  
12 and I'd be happy to take any questions you  
13 might have. And sorry for speaking so quickly.  
14 I know I had ten minutes.

15 MR. HAUSER: Thank you. No  
16 objections to your speaking quickly. Let's  
17 see, I think one more panelist, Donald Jones.

18 MR. JONES: Thank you. I'm grateful  
19 to be with you. I want to thank the United  
20 States Department of Labor for the honor of  
21 testifying today on this vital issue.

22 My name is Donald Jones, and I am

1 the founder and partner of the independent  
2 professional ERISA 402(a) named fiduciary firm  
3 called Fiduciary Wise. I speak today as an  
4 individual and not representing any other  
5 person or firm or organization.

6 First, I'd like to say I strongly  
7 support the proposal of the changes recommended  
8 by the Department of Labor. I believe the  
9 Department of Labor is to be commended for its  
10 efforts to compromise in this, the third  
11 attempt to change the definition of a fiduciary  
12 under ERISA. Second, I thank the Department  
13 for its sterling example and tireless effort to  
14 protect the plan participant beneficiaries in  
15 America's retirement plans.

16 Today, I will center my remarks only  
17 on qualified retirement plans. I do not work  
18 in the area of wealth management or IRAs. I  
19 believe that I may be the only one to testify  
20 that is an independent, discretionary ERISA 402  
21 Named Fiduciary with approximately a thousand  
22 plans that we provide fiduciary governance for

1 under ERISA.

2 I've struggled with what to say.  
3 I've decided about all the yeas and nays have  
4 been said, and so I've decided, in being the  
5 last speaker, to give a message of hope.

6 In my 15 years in working as an  
7 ERISA 402 Fiduciary in big and small plans, I  
8 have found, by and large, service providers,  
9 and in this case, particularly investment  
10 professionals, have repeatedly had the desire  
11 to do what's right for their participants,  
12 their beneficiaries, and plan fiduciaries. But  
13 in saying so, I'll give a quote from a case of  
14 Donovan v. Cunningham, and though I think it's  
15 a little bold, but I believe it makes the  
16 point. "A full heart and an empty head is no  
17 defense."

18 I'm not suggesting that everyone  
19 working out there, or even close to everyone  
20 working out there, has an empty head. But  
21 here's what I have seen in working,  
22 particularly in the last 15 years, though I've

1           been in ERISA for over 50 years, or nearly 50,  
2           because ERISA isn't 50 years old yet. But I  
3           notice a noticeable difference in experience,  
4           knowledge and ability between a broker, which I  
5           will call a non-fiduciary, an ERISA 3(21)(a),  
6           I'll call a co-fiduciary and ERISA 3(38),  
7           investment manager, to help the participant and  
8           their beneficiaries.           In essence, this is  
9           what I'm saying. I believe in the goodwill of  
10          the people out there. I believe they want to  
11          do what's right. I believe their desires are  
12          good. Of course there's a bad apple  
13          occasionally, there is in anything. But the  
14          problem is their desire can only go so far.  
15          They're ill-equipped to be able to actually  
16          provide their duties.

17                   Perhaps I'm speaking as the only  
18          boots on the ground, authentic, if you want to  
19          call it, fiduciary with a thousand plans, who  
20          is the responsible fiduciary. Please note that  
21          we are never under contract any other service  
22          provider, such as an advisor, record keeper at

1 TPA. I speak from experience of over 5000  
2 plans or maybe more in the last 50 years. And  
3 again, as I've mentioned, the last 15 as Named  
4 Fiduciary.

5 Today I recognize that I would be  
6 the last speaker. That's not the best place to  
7 speak, but that's my lot. But I'm grateful.  
8 But I'd like to end with an example of hope, of  
9 what I have witnessed and plans I have managed.  
10 Before I do so, let me just take a moment to  
11 say, let's remember that ERISA is based on the  
12 debacle of Studebaker's failure. The desire of  
13 ERISA was solely to protect a participant who  
14 is helpless and innocent, and I believe it's  
15 best compared as a mother to her child. Until  
16 one understands that mother-child relationship  
17 and the sacredness of it, no one is really  
18 ready, no matter what capacity they're in, to  
19 represent an employee or a plan in a retirement  
20 basis.

21 You ask, what is my hope? My hope  
22 is based on the goodness and moral behavior of

1 hundreds and hundreds of service providers I  
2 have worked with. However, approximately 95%  
3 of them are not fiduciaries, and because of  
4 that and maybe that alone, they are  
5 ill-prepared to carry their load that they must  
6 have.

7 Why do I believe that has happened?

8 Well, I don't know for sure, but I've been a  
9 pretty good student of ERISA, and I believe the  
10 single greatest reason is broker dealers have  
11 scared them so much that becoming a fiduciary  
12 will absolutely ruin them. This is sad, and  
13 it's not true, because all that ERISA is asking  
14 is to put someone else first and then do the  
15 best you can to provide the highest standards  
16 under ERISA. There's nothing scary about it.

17 When I decided to be a 402(a) named  
18 fiduciary, I left an excellent company, many  
19 benefits, a good paycheck, and well-meaning  
20 individuals urged me not to be a 402(a)  
21 fiduciary, except for a very supportive wife,  
22 which, by the way, we will have been married 50

1 years here in a few months. Everyone thought  
2 I'd lost my head be this type of fiduciary.

3 And I had no blueprint to follow.  
4 The more I listened to the naysayers, the more  
5 fear I had. They all cared about me. But  
6 here's the bottom line. They had no idea what  
7 it was like to be a 402(a) fiduciary. They  
8 were giving experience though well-meaning.  
9 They were giving advice by having no  
10 experience.

11 I appeal to everyone as we close.  
12 Let's learn to embrace the privilege of  
13 fiduciary care. In the end, you will feel  
14 better about yourself, and you can do a better  
15 job. In my opinion, the DOL has been fair in  
16 this proposal. Let's cast off the boogeyman  
17 tactics and focus entirely on the participant's  
18 welfare. I will just give one example of what  
19 authentic fiduciary care is about. And  
20 remember, the 402 has no safety net.

21 Several years ago, I did and noticed  
22 an unscientific survey. I asked my staff to



1 look at approximately 450 plans we had then and  
2 see what could we conclude had happened, by  
3 embracing fiduciary care. And we found, on an  
4 average, we were able to return back to the  
5 plan participants about 81 basis points per  
6 year. Now doing a little math, over about a  
7 35-year period, that's \$150,000 more in every  
8 employee's retirement account.

9 In doing that, though, I take sole  
10 responsibility as a discretionary fiduciary, I  
11 speak from experience. No service provider was  
12 embarrassed. In fact, when changes were found  
13 by talking offline, we had the service  
14 provider, particularly the investment  
15 professional, introduce the change as if it was  
16 their own. No one's compensation was changed.  
17 No one was terminated.

18 But finally, and most importantly,  
19 they felt much better about themselves, in  
20 them, inside them. And many said that they  
21 knew they weren't doing it like they could have  
22 and should have, what they learned on their

1 mother's knee. And they desired to embrace  
2 fiduciary care. No longer did they need to be  
3 scared and what a relief that was. I have  
4 proof that it works.

5 What you've heard many times today  
6 is, maybe this may happen, maybe this may  
7 happen. But in reality, it doesn't happen. In  
8 conclusion, I would like to give just a few  
9 pieces of advice.

10 MS. WILKER: Mr. Jones, I do just  
11 want to let you know it has been ten minutes,  
12 so if you could make your conclusion remarks  
13 quickly.

14 MR. JONES: Okay. Thank you so  
15 much. I know the Department's proposal isn't  
16 perfect. It'll need to be tweaked. But it's  
17 fair. Let's work together in the spirit of  
18 cooperation. Give it a chance. And I know  
19 that as you learn to embrace fiduciary and the  
20 highest standard known in the law, and note  
21 this well, there is enough elasticity that if a  
22 mistake is made, an honest mistake, it can be

1 corrected. No one gets in trouble. Everyone  
2 can feel good about it.

3 Lastly, learn to use the Common Law  
4 of Trust. That is one of the best gifts that  
5 you have, as stated in the Restatement of Law,  
6 Trust Third.

7 And finally, if you want an example,  
8 I've heard pros and cons about lifetime  
9 guaranteed income. On its surface, it's not  
10 good or bad. But go to the Restatement  
11 Sections 90(b), (f), and (h)(2), and you'll  
12 solve the mystery of how to use it. Thank you  
13 very much. I'm grateful to have been with you  
14 today.

15 MR. HAUSER: Thank you very much. I  
16 think I just have a few questions, and then  
17 maybe we can wrap this up.

18 Starting with you, Mr. Keehan, your  
19 comments were very precise, and I think I  
20 followed them, and I appreciate that you're  
21 going to elaborate upon them in your written  
22 comments. So that's all to the good. And

1 really, the only question I wanted to ask you  
2 about was, I think it might have been your  
3 first of your points, but on our use of the  
4 word 'suggestion' in connection with what  
5 counts as a recommendation.

6 And I guess, we're not trying to  
7 depart when we talk about what counts as a  
8 recommendation, we're not trying to depart from  
9 the way FINRA and the SEC talk about  
10 recommendation. It's really the same  
11 definition. And if you look at FINRA's  
12 guidance on what they mean by recommendation,  
13 you'll see that same word suggestion in their  
14 guidance documents. We're talking about a call  
15 to action. And similarly, the reference to --  
16 it's a contextual test. I mean, whether or not  
17 somebody's actually making a recommendation,  
18 and it fairly can be seen as a call to action,  
19 is dependent on a larger context.

20 But we're not trying to depart in  
21 any way from that. And I just wonder if, one,  
22 if that alleviates any of your concerns, and

1 second, if it doesn't, if you have any concerns  
2 about our potentially writing a definition of  
3 recommendation that departs from the test that  
4 FINRA and the SEC use when they talk about  
5 recommendations.

6 MR. KEEHAN: Thank you, Tim, for  
7 that elaboration. That's very helpful to know.  
8 And yes, we will be responding in our comment  
9 letter with more information on this. I think  
10 where we're coming out and of course, we're  
11 still in the middle of the comment period  
12 rather than at the end so I'm continuing to  
13 huddle with our members.

14 I think the concern here for us is  
15 that the definition of recommendation appears  
16 to be such a lowered baseline that together  
17 with regular basis, which has been so widened  
18 in applicability, that the proposal sets a  
19 hairline trigger on what amounts to investment  
20 advice. And so much so that the proposal  
21 appears to capture not just certain bank  
22 personnel that would not normally be considered

1 a fiduciary, but actually a range of  
2 non-fiduciary, non-financial persons and  
3 professions, all involving relationships of  
4 trust and confidence. Think real estate agents  
5 or life coaches, divorce counselors. I mean,  
6 the list could go on of those who are going to  
7 be inadvertently captured by this rule by  
8 virtue of the fact that you have such a widened  
9 definition of recommendation and regular basis.

10 MR. HAUSER: Okay. Yeah, it'd be  
11 helpful if you'd explain why you think it's  
12 going to be broader in operation and, for  
13 example, the concept as applied by the SEC and  
14 FINRA and whether or not you think we should  
15 depart from that standard.

16 MR. KEEHAN: Yeah, I mean, SEC and  
17 FINRA, were dealing with registered broker  
18 dealers. So that's a regulated, supervised and  
19 examined set of individuals and entities.

20 What I just mentioned here, I'm not  
21 sure that the Department of Labor wants to get  
22 into the business of regulating real estate

1 agents and life coaches and probation officers  
2 and divorce counselors where they technically  
3 can fit under the definition of investment  
4 advice under this proposal.

5 MR. HAUSER: Yeah, well, it'd be  
6 helpful if you could elaborate on those  
7 circumstances where they'd fit. They have to  
8 make those investment recommendations as a  
9 regular part of their business to fall within  
10 the test. I don't have much familiarity with  
11 life coaches, but I'm guessing they don't  
12 engage in much in the way of investment  
13 recommendations, and the same goes for those  
14 other categories of folks you mentioned. But  
15 to the extent you can point to specific things  
16 in our language that you think are problematic  
17 on that score, please point them out, and we'll  
18 make sure we're not reaching folks we have no  
19 intention of reaching.

20 MR. KEEHAN: We'd be happy to do  
21 that.

22 MR. HAUSER: Thank you for that, and

1 we look forward to your comments.

2 Mr. Walsh, mostly, you were making a  
3 legal argument. I found it interesting, but I  
4 don't think I want to join you on a legal  
5 debate on this panel. But I would like to,  
6 just so I better understand how you're drawing  
7 the line between fiduciary advice and  
8 non-fiduciary advice, is it your position that  
9 if somebody is essentially paid on a commission  
10 basis, that that's the end of the analysis, as  
11 far as whether they can be a fiduciary under  
12 ERISA?

13 MR. WALSH: If the only fee they're  
14 receiving is a commission, then they're not  
15 being paid for advice.

16 MR. HAUSER: So it doesn't matter in  
17 your judgment, in that circumstance, whether  
18 they hold themselves out to the customer as  
19 providing individualized advices about their  
20 particular circumstances. It's based entirely  
21 on the customer's interest and not on their  
22 competing interests and any of that. That's



1 all beside the point. The only thing that  
2 matters is that they're paid on a commission  
3 basis.

4 MR. WALSH: So I think you're coming  
5 back to the good news here, which is that  
6 ERISA's fiduciary standard isn't the only  
7 standard, and there are plenty of other care  
8 standards out there. But if we look at the  
9 history of the Advisers Act before ERISA was  
10 enacted and the choice to use the word  
11 'solely,' it doesn't seem like Congress was  
12 trying to get at broker dealers.

13 MR. HAUSER: Well, again, I want to  
14 kind of avoid a protracted legal debate. But  
15 it's not unusual under ERISA for fiduciaries to  
16 have conflicted compensation, no? I mean, so  
17 think of an insurance company. Would you agree  
18 that an insurance company that's making benefit  
19 determinations, that has authority over the  
20 final benefit determination, has a direct  
21 financial interest in whether they grant or  
22 deny the benefits?

1 MR. WALSH: So when we look at that,  
2 we've got the obligations under 404 for a  
3 fiduciary who's involved in plan  
4 administration, and the structure is designed  
5 so that they can't act in a way that conflict  
6 plays a role. Now when you're hired for  
7 benefit administration, you're brought in to  
8 process that. You're getting a fee for that.  
9 When you're a broker, you're only getting a fee  
10 when a transaction is executed.

11 I'm not here to talk to how health  
12 insurance operates but I think the key point  
13 here is that if we look at the rich Common Law  
14 Traditions, brokers aren't advice fiduciaries.

15 MR. HAUSER: The Common Law  
16 Tradition defining who's a fiduciary by virtue  
17 of rendering advice?

18 MR. WALSH: I mean, the Common Law  
19 Tradition of who's a fiduciary. I think if we  
20 look at the case law that's out there, it  
21 suggests that we look to the Common Law in  
22 terms of understanding what these words mean.

1 And then we can even look at the text of  
2 3(21)(a)(ii), and we can see that it tracks  
3 very well with the Advisers Act carve-out for  
4 broker dealers.

5 MR. HAUSER: So you looked through  
6 the Common Law and preparing for this testimony  
7 today?

8 MR. WALSH: I did. I don't want to  
9 sound like such a nerd here, but apparently  
10 fiduciary status goes back to Roman times.

11 MR. HAUSER: Absolutely.

12 MR. WALSH: -- concept of  
13 fideicommissum, which allowed fiduciaries to  
14 hold property on behalf of another. This is  
15 something that courts have been exploring for  
16 more than 2000 years now.

17 MR. HAUSER: Now you're talking to a  
18 nerd, so we're doing just fine. But I mean, I  
19 guess the question I have is, first of all, two  
20 things. One, based on your review of the  
21 Common Law standards, have you found in the  
22 Common Law anything like the five-part test?

1 Can you think of -- since the time of the  
2 Romans, are you familiar with a case under the  
3 Common Law with respect to agency fiduciary  
4 status? Anything?

5 MR. WALSH: Oh, yeah. Yeah.

6 MR. HAUSER: It's listed on the  
7 five-part test.

8 MR. WALSH: Yeah, the 2018 decision.

9 MR. HAUSER: Apart from the 2018  
10 decision, I understand how you interpret that  
11 decision. But apart from that, when we're  
12 looking to these Common Law sources, are you  
13 familiar with any case that adopted the  
14 five-part test?

15 MR. WALSH: I think the key is you  
16 look at the 2018 decision from the Fifth  
17 Circuit, and it really talks about how the  
18 five-part test was a good summary of that rich  
19 Common Law tradition.

20 MR. HAUSER: I think what the court  
21 said was that trust and confidence is relevant  
22 to this analysis, that it matters what the

1 relationship is between the person giving the  
2 advice and the person receiving the advice.  
3 And what I'm hearing you say, and that's fine,  
4 if that's your position, I just want to make  
5 sure I understand it, that it really is  
6 irrelevant whether the customer has put  
7 complete and total faith and confidence in the  
8 advisor, and if they've done it precisely  
9 because the advisor held themselves out in that  
10 position. And it's even irrelevant, under your  
11 approach if they have a long-standing  
12 relationship outside, say, the ERISA context.  
13 As long as the person is just getting a  
14 commission for their advice.

15 MR. WALSH: I think we would both  
16 agree that the relationship between a  
17 salesperson and a potential buyer is very  
18 different than that of a guardian and a ward or  
19 an agent and principal.

20 MR. HAUSER: What I don't agree with  
21 is that it's very different from the  
22 relationship between other categories of

1 investment advisors and the broker or the  
2 insurance agent. I think all of those  
3 categories can hold themselves out in much the  
4 same way, have much the same relationship with  
5 the customer, and from the customer standpoint,  
6 look very similar. And I think we've heard  
7 testimony from folks over the course of this  
8 hearing describing how the relationship works  
9 when they're trying to make these  
10 recommendations that effectively says just  
11 that. But your point of view is that that just  
12 doesn't matter.

13 MR. WALSH: The '40 Act draws these  
14 lines.

15 MR. HAUSER: Is it your  
16 understanding that the '40 Act governs what we  
17 do under ERISA?

18 MR. WALSH: No, but I think that  
19 when the statute's clear, there's less  
20 deference owed to the agencies. And I think  
21 this is a case where the statute is clear.

22 MR. HAUSER: Did ERISA provide that

1 incidental, that advice doesn't count if it's  
2 incidental? Or did it provide that it counts  
3 that somebody's a fiduciary to the extent they  
4 give advice for a fee, direct or indirect.

5 MR. WALSH: Are you saying that  
6 brokers get fees when people don't buy the  
7 product?

8 MR. HAUSER: I'm saying that part of  
9 the compensation, that part of the reason --

10 MR. WALSH: They don't get a fee  
11 unless the product's sold.

12 MR. HAUSER: Well, okay, I don't  
13 think that's quite true. I think part of the  
14 reason people are paid commissions is, what  
15 they're partly being paid for is the service  
16 they're rendering to their customers. I think  
17 that they would be hard pressed, that is part  
18 of what you get compensated for. I tried this  
19 analogy earlier. I think when an attorney is  
20 paid on a contingency basis, would I say  
21 they're not providing a service to the  
22 customer, that their representational

1 obligations don't include a duty of loyalty to  
2 the clients? Of course they do. The fact that  
3 they get paid only if they win the case doesn't  
4 mean they're just getting paid to win. They're  
5 getting paid for representation. They're  
6 getting paid for a service they render. And I  
7 don't know why it's different in this context.  
8 But again, I'm sorry.

9 MR. WALSH: We do ephemeral here,  
10 and I understand we don't want to have a  
11 legalistic debate. We are getting ephemeral  
12 here. I think the attorney/client relationship  
13 is very different than a broker salesperson  
14 relationship, though. I think if we look at  
15 the engagements at the outset, there's clear  
16 differences. But I hear your point that I  
17 think reasonable people could have a lot of  
18 interesting discussions about the solely  
19 language in 404 and if Congress really was  
20 trying to get rid of salespeople in the  
21 retirement space.

22 MR. HAUSER: Yeah. Well, just to be



1 clear, we're not proposing to get rid of  
2 salespeople. We're happy with the commission  
3 model. We're happy with the fee-based model.  
4 We think all of these things can be consistent  
5 with ERISA, and we're trying to give guidance  
6 on how to make that work. But I welcome your  
7 point of view on this and appreciate you and  
8 everyone's testimony.

9 And finally, just to wrap up, and I  
10 think we will close with this. I'd also like  
11 to thank, in addition to thanking Mr. Keehan  
12 and Mr. Walsh, I'm very grateful for Ms. Kamila  
13 Elliot's participation in this hearing, as well  
14 as Mr. Jones and obviously anybody who's  
15 putting themselves out there and representing  
16 people in a fiduciary capacity.

17 Speaking as an agency responsible  
18 for -- on behalf of the agency that's  
19 responsible for regulating fiduciaries, we  
20 thank you for your service. We're very  
21 grateful. Whenever people are willing to step  
22 up and act in accordance with those basic

1 fiduciary duties of prudence and loyalty with  
2 respect to something as important as retirement  
3 benefits. And I understand from your testimony  
4 that you both are committed to that as well.  
5 And thank you for that.

6 MS. ELLIOT: Thank you.

7 MR. HAUSER: And with that, I think  
8 we're closing the hearing. I'd like to also  
9 thank everybody who's testified over the past  
10 couple of days, whether I agreed with you or  
11 not, whether you agreed with me or not, whether  
12 we're still working through the issues. It was  
13 all enormously helpful and gave us a lot to  
14 think about. And I'm confident that when we  
15 move to a final rule, it will reflect what  
16 we've learned from this hearing as well as from  
17 your written comments to come. So thank you  
18 all very much. Take care, everybody.

19 (Whereupon, the above-entitled  
20 matter went off the record at 4:28 p.m.)  
21  
22

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Retirement Security Rulemaking

Before: US DOL

Date: 12-13-23

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



-----  
Court Reporter

**NEAL R. GROSS**

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UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

PUBLIC HEARING  
RETIREMENT SECURITY RULE: DEFINITION OF AN  
INVESTMENT ADVICE FIDUCIARY  
DECEMBER 12 – 13, 2023

ERRATA SHEET

The Department of Labor wishes to note the following with respect to the transcript:

1. Day 1, page 13: The opening remarks of Assistant Secretary for Employee Benefits Security Lisa M. Gomez included a statement that the Department will publish a Federal Register Notice notifying the public when the hearing transcript has been posted on EBSA's webpage. However, the Department determined that the most efficient way of providing notice of the posting was through a press release and email blasts, rather than through a Federal Register Notice.
2. Day 1, pages 273-274: An earlier, unofficial draft of the transcript misattributed the following to Mr. Hauser, Deputy Assistant Secretary for Program Operations of the Employee Benefits Security Administration, although it was said by Mr. Hadley, witness on behalf of The Committee of Annuity Insurers. The official transcript accurately reflects that Mr. Hadley said:

The Five-Part Test did a pretty good job. If you look at that test, it really establishes somebody who has an agreement where they will provide ongoing advice, where there's an agreement that both sides understand what's being provided and what doesn't. I am sure there are people that are -- that sell insurance products and act as fiduciaries and meet the Five-Part Test.

And that test makes a lot of sense because it is a -- exactly the type of fiduciary relationship that Congress intended when it borrowed from -- from trust law. And we think that makes sense, and we think you should keep it.

3. The earlier, unofficial draft of the transcript contained other minor errors which have been corrected in the official transcript.