

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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TUESDAY
DECEMBER 12, 2023

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

PRESENT

LISA M. GOMEZ, Assistant Secretary

ALI KHAWAR, Principal Deputy Assistant
Secretary

TIMOTHY D. HAUSER, Deputy Assistant Secretary
for Program Operations

MARCUS AZEVEDO, Office of the Solicitor

CHRIS COSBY, Office of Exemption Determinations
Office Director

MEGAN HANSEN, Counsel for Regulations, Office
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LYNN JOHNSON, Office of Research and Analysis
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Interpretations, Division of Fiduciary
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SUSAN WILKER, Office of Exemption
Determinations Division of Class
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ELAINE ZIMMERMAN, Office of Research and
Analysis
Office Director

ALSO PRESENT

LYNN DUDLEY, American Benefits Council
BRIAN GRAFF, American Retirement Association
DANA M. MUIR
LISA BLEIER, Securities Industry and Financial
Markets Association
CANDACE ARCHER, AFL-CIO
SUSAN K. NEELY, American Council of Life
Insurers
MICAH HAUPTMAN, Consumer Federation of America
MARK SMITH, Financial Services Institute
STEPHEN W. HALL, Better Markets Inc.
BRYON HOLZ, National Association of Insurance
and Financial Advisors
CHARLES ROSS, SR., National Association of
Insurance and Financial Advisors
CHANTEL SHEAKS, U.S. Chamber of Commerce
KENT MASON, Davis & Harman LLP
KIM O'BRIEN, Federation of Americans for
Consumer
Choice
DON COLLELUORI, Federation of Americans for
Consumer Choice
BARTLETT NAYLOR, Public Citizen
RON A. RHOADES
DAVID CERTNER, AARP
MICHAEL L. HADLEY, The Committee of Annuity
Insurers
WAYNE CHOPUS, Insured Retirement Institute
JASON BERKOWITZ, Insured Retirement Institute
KATHLEEN M. MCBRIDE
IVAN CAZARIN, Americans for Financial Reform
JENNIFER ELLER, Groom Law Group, Chartered
KNUT ROSTAD, Institute for the Fiduciary
Standard

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

2 (9:03 a.m.)

3 MS. GOMEZ: Good morning, everyone.

4 Welcome to the public hearing on the proposed
5 retirement security rule: Definition of an
6 investment advice fiduciary, and proposed
7 amendments to Prohibited Transaction Exemption
8 2020-02, proposed amendments to Prohibited
9 Transaction Exemption 84-24, and proposed
10 amendments to several other existing
11 administrative PTEs that are available to
12 investment advice fiduciaries.

13 I am Lisa Gomez and I am the
14 Assistant Secretary of the Employee Benefits
15 Security Administration.

16 On behalf of everyone at EBSA, I
17 want to thank everyone that we will hear from
18 today. We take your comments very seriously
19 and we have every expectation that the final
20 rule will benefit from your thoughtful
21 participation. Thank you very much.

22 I'd also like to thank everyone at

1 EBSA and at the Department who have worked
2 together to develop the proposals and to
3 prepare for this week's hearings.

4 Before we get started with the
5 testimony, I'd like to provide you with some
6 background on the proposed rulemaking and
7 exemption amendments and then cover a few
8 procedural matters.

9 The Proposed Rule reflects a few
10 basic premises. First, if you hold yourself
11 out as an investment professional providing
12 individualized investment recommendations to
13 retirement investors that they can rely upon
14 with trust and confidence as in their best
15 interests, you should be held to a "best
16 interest" standard.

17 In the words of ERISA and the Code,
18 in such circumstances, you should be treated as
19 a fiduciary.

20 Second, advice fiduciaries should
21 uniformly adhere to a few basic principles.
22 Their advice should be prudent, meaning that

1 they should adhere to an expert standard of
2 care.

3 Their advice should be loyal,
4 meaning that their customers' interests must
5 come first. In other words, recommendations
6 should be based on what's in the financial
7 interest of the investor, not the competing
8 financial interests of the professional making
9 the recommendations.

10 Recommendations should be free from
11 misleading statements or misinformation about
12 the investments, their services, fees and other
13 relevant information, and investors should not
14 be overcharged for the advice provider
15 services.

16 At bottom, this proposed regulatory
17 package simply requires that people who hold
18 themselves out as fiduciaries adhere to these
19 basic fiduciary principles.

20 And in keeping with this, it
21 requires the financial institutions that
22 oversee those who provide investment

1 recommendations to have policies and procedures
2 in place to ensure that these basic principles
3 are met, in other words, policies and
4 procedures that take conflicts of interest
5 seriously and ensure that recommendations are
6 prudent, loyal, candid and free from
7 overcharges.

8 Third, the Proposed Rule is based on
9 recognition that it is very hard for ordinary
10 investors to manage retirement savings.

11 Investment products, strategies,
12 fees and services are complex and often subject
13 to very significant conflicts of interest which
14 can bias the advice investors receive.

15 In over the 50 years since ERISA was
16 enacted, the challenges for ordinary investors
17 have only grown as the complexity and range of
18 investment products and practices have
19 expanded, the conflicts of interest that can be
20 presented to advisors have become more
21 commonplace, and individual retirement
22 investors have increasingly been called upon to

1 make important investment decisions in 401(k)
2 plans and IRAs that used to be made by
3 professional money managers.

4 The Proposed Rule's chief aim is to
5 make sure that when individual retirement
6 investors turn to investment professionals for
7 sound advice rooted in their best interest,
8 they get just that, advice that is prudent,
9 loyal, candid and free from overcharges.

10 The Proposed Rule also aims to
11 ensure that a common regulatory framework apply
12 to all advice by trusted advisors regardless of
13 the type of investment product, the type of
14 investment professional making the
15 recommendation or who is receiving the advice.

16 Surely, whether one is recommending
17 an annuity or a stock, working on a commission
18 basis or for a fee, the recommendation can, and
19 should, reflect the best interest of the
20 customers, that is, it can be prudent, loyal,
21 candid and free from overcharges.

22 And while there are many advice

1 providers out there who are delivering on these
2 promises and expectations, we need to address
3 any gaps so that retirement investors know what
4 to expect from all trusted advisors.

5 Finally, it's important to note that
6 this proposal is not just a repeat of the 2016
7 advice package that was ultimately struck down
8 by the Fifth Circuit. It departs from that
9 package in numerous ways. Without belaboring
10 all of the departures from the 2016 rule, a few
11 deserve special mention.

12 This Proposed Rule is much narrower
13 than the 2016 rule, which broadly addressed
14 virtually all investment recommendations
15 regardless of whether there was a relationship
16 of trust and confidence with the advice
17 provider.

18 Unlike the 2016 rule, the proposal
19 does not impose enforceable contract or
20 warranty requirements on advice providers.

21 The sole remedies to investors for
22 any violations of the proposed regulation's

1 requirements would be those expressly set forth
2 in ERISA and the Internal Revenue Code. No
3 more and no less.

4 Unlike the 2016 rule, the proposal
5 does not require insurance companies to act as
6 fiduciaries with respect to independent agents
7 who are not their employees as a condition of
8 paying them commissions in connection with
9 investment recommendations.

10 The proposal offers a pathway to
11 compliance for robo-advice that was not
12 included in the 2016 regulatory package.

13 The rule also is being proposed
14 against a very different regulatory backdrop
15 than 2016 as both the SEC and many states have
16 since made changes to the regulation of
17 financial advice. We, too, believe it is past
18 time to modernize the regulation of advice.

19 The focus of the proposed regulatory
20 package is simply on honoring legitimate
21 investor expectations about the nature of their
22 relationship and ensuring that, in appropriate

1 cases, the advice adheres to stringent
2 fiduciary standards.

3 We, of course, welcome your
4 thoughts, comments and testimonies on any of
5 these observations as well as anything else
6 related to the rulemaking.

7 Now, I'll turn to a few procedural
8 matters and then we will turn to our witnesses.
9 With respect to timing, the Proposed Rule and
10 exemption amendments were published on November
11 3rd, 2023, with a 60-day comment period that is
12 scheduled to end on January 2nd, 2024.

13 The Department later published a
14 Federal Register Notice on November 20th of
15 2023 announcing the date of the virtual public
16 hearing that we are beginning today and the
17 deadline for submitting requests to testify.

18 We've posted on the Department's
19 webpage the request to testify, the agenda for
20 this week's hearing, information for
21 registering for the hearings, and an initial
22 batch of public comments that have been

1 submitted on the Proposed Rule and exemption
2 amendments.

3 Today's hearing is being
4 transcribed. The hearing transcript will be
5 added to the public record for the Proposed
6 Rule and exemption amendments.

7 The Department will publish a
8 Federal Register Notice notifying the public
9 when the transcript has been posted on EBSA's
10 webpage.

11 So, each day we will have six panels
12 of witnesses. Some panels will have three
13 witnesses while others will have four
14 witnesses.

15 Each organization or individual
16 witness that's listed on the agenda has ten
17 minutes to present testimony.

18 If multiple individuals are
19 presenting on behalf of a single organization,
20 it is up to those individuals to determine how
21 to allocate their ten minutes, and the total
22 allotted time for each panel includes times for

1 questions and answers.

2 We are going to try to stick as
3 closely to the schedule as possible. We will
4 not be taking questions from the audience
5 during the hearing.

6 Please do not draw any inferences or
7 conclusions based on how the Government
8 panelists frame a particular question or series
9 of questions.

10 Our goal during the course of this
11 hearing is just to develop the public record
12 for the proposed rulemaking and to learn, from
13 all of you, the information that is conveyed in
14 the testimony.

15 We have several requests for those
16 of you who are testifying. Please first
17 identify yourself and, if applicable, identify
18 the organization that you're representing
19 before you begin your testimony.

20 Second, please remember to speak
21 directly into your phone or computer microphone
22 so that we can clearly hear you and the court

1 reporter can transcribe accurately.

2 Finally, if we run into technical
3 difficulties with any witness, we will move on
4 to other witnesses while the technical issues
5 are resolved. Please make sure that you're not
6 on mute when you are going to testify.

7 I would now like to introduce the
8 members of the Government panel that will
9 moderate this week's hearing.

10 We have Ali Khawar, EBSA's Principal
11 Deputy Assistant Secretary. Tim Hauser, EBSA's
12 Deputy Assistant Secretary for Program
13 Operations.

14 Chris Cosby, the Director of the
15 Office of Exemption Determinations. Susan
16 Wilker, the Chief of the Division of Class
17 Exemptions in the Exemptions Office.

18 Elaine Zimmerman, EBSA's Chief
19 Economist. Lynn Johnson, Senior Economic
20 Advisor in the Office of Research and Analysis.

21 Karen Lloyd, Chief of the Division
22 of Fiduciary Interpretations in the Office of

1 Regulations and Interpretations.

2 Megan Hansen, Counsel for
3 Regulations in the Plan Benefits Security
4 Division of the Office of the Solicitor.

5 And Robin Parry and Marcus Azevedo,
6 attorneys who also work in the Solicitor's
7 Office.

8 If you wish to submit written
9 testimony, you may email it to Scott Ness any
10 time before the end of the comment period.
11 Scott's email address is ness, N-E-S-S, dot,
12 Scott at dol.gov.

13 Now, before we start the first
14 panel, I'm going to offer a few tips regarding
15 the Webex that we are using.

16 Witnesses will have control over
17 their microphones during the panel. So, we ask
18 that witnesses remain on mute unless speaking
19 or being asked questions.

20 Closed captioning is available for
21 all attendees by clicking the button in the
22 lower left corner. Thank you, everyone.

1 (Pause.)

2 MR. HAUSER: So, to break the ice, I
3 think the first panel is Lynn Dudley, Brian
4 Graff, Dana Muir and Lisa Bleier.

5 I think Lisa is first -- or Lynn
6 Dudley is first on the list.

7 MS. DUDLEY: Okay. Hi, everyone.
8 I'm Lynn Dudley and I am Senior Vice President,
9 Global Retirement and Compensation Policy for
10 the American Benefits Council.

11 Thank you very much for holding this
12 hearing today and for allowing me to testify.
13 I'm here today to speak for our plan sponsor
14 members.

15 I haven't finished collecting input
16 from our members yet and I haven't finalized
17 our comments yet. So, I may not be able to
18 provide specific, definitive answers to all the
19 questions, but I certainly can articulate what
20 I've heard so far and want to share that with
21 you now.

22 We appreciate the importance of

1 ensuring that the fiduciary rules keep pace
2 with innovations in plan design and the
3 evolution of the marketplace and that the
4 Department is trying to address its concerns
5 about potential conflicts of interest. So,
6 that's an important backdrop to my comments
7 today.

8 In gathering comments from our plan
9 sponsors, I have heard multiple times that plan
10 sponsors are concerned that the new proposed
11 rules are somewhat at odds with the direction
12 that they are moving and with the pressing
13 needs of participants in terms of facilitating
14 employee engagement with their plans.

15 Employers report that the breadth of
16 the redefinition of "fiduciary advice" will
17 force them to pull back tools that provide
18 important benefits to plan participants.

19 The new rules will make some of
20 their plan operations more difficult, more
21 expensive, because they will add uncertainty,
22 cost and potential liability, which they're

1 real concerned about at a time when plan
2 sponsors are trying to efficiently utilize both
3 internal and outside resources to encourage
4 more effective consumerism.

5 What I'd like to do now is just to
6 simply highlight a few of the issues that have
7 come up. Hopefully, that will be helpful to
8 you. These all relate to retirement savings.

9 I do think our comment letter will
10 include some health policy issues as well, but
11 these all relate to retirement savings.

12 First up is plan sponsor employees.
13 We strongly support a clear exclusion from
14 investment advice fiduciary status for human
15 resource employees and all other employees,
16 because sometimes you're not in HR, of the plan
17 sponsor with respect to providing assistance to
18 plan participants.

19 The preamble addresses this issue
20 and we appreciated that, but we don't think
21 it's clear enough and it only is with respect
22 to human resource employees and we've learned

1 that other employees often do get assigned to
2 benefits.

3 The definition itself should be
4 clear that it does not cover human resource
5 employees or any other plan sponsor employee
6 with respect to assistance provided to plan
7 participants.

8 Another issue that came up in our
9 discussions was financial well-being programs.
10 Many of our plan sponsor members outsource
11 financial well-being programs that help their
12 employees manage all elements of their
13 financial situation, including, for example,
14 retirement, health, consumer debt, college debt
15 and home purchases.

16 And we urge the Department to
17 include outsourced financial well-being
18 programs in the same exclusion applicable to
19 plan sponsor employees when the programs are
20 simply providing information based on
21 well-established principles, for example, the
22 effect of a hardship distribution or a loan on

1 retirement savings, and are paid exclusively
2 for the assistance on a basis that is not
3 affected by --

4 (Audio interference.)

5 Financial education. We strongly,
6 strongly support the full preservation of the
7 Department's position on investment education
8 as reflected in Interpretive Bulletin 96-1.

9 We also commend the Department for
10 indicating that it may also apply to
11 distribution education and we urge you all to
12 make that latter point clear.

13 Call center assistance. This is
14 always a difficult area in our discussions with
15 you all in the past and it comes up in every
16 discussion about this rule.

17 Call centers today are operated by
18 plan record-keepers and are generally available
19 to provide basic information regarding the
20 investments offered under participant-directed
21 individual accounts.

22 The proposal as written would in our

1 view, unnecessarily constrain call center
2 personnel from providing any discussion of
3 investment issues specific to the plan
4 especially where, as is commonly the case, the
5 record-keeper is a financial institution.

6 This is true because the discussion
7 of plan-specific investment issues would
8 trigger fiduciary status under the proposal and
9 likely be a prohibited transaction.

10 This makes that interaction, that
11 meaningful call center assistance, risky and
12 expensive both to the plan sponsor and the
13 provider.

14 We think the overall negative
15 consequences for participants resulting from
16 this limitation would lead to less effective
17 investment decisions in the long-term and that
18 these negative outcomes would far outweigh any
19 potential benefits of applying the proposal to
20 call center employees.

21 Quite honestly, we think isolated
22 calls for assistance to an unknown person at a

1 call center is simply not the trust and
2 confidence relationship that you all are
3 thinking about.

4 Co-fiduciary liability. There was
5 quite a lot of discussion about this in the
6 conversations I've had so far.

7 Under a safe harbor that we would
8 urge you all to include in the rule, a plan
9 sponsor would not have co-fiduciary liability
10 to the acts of the service provider if the plan
11 sponsor establishes and communicates a clear,
12 written policy that the plan service providers
13 are prohibited from providing fiduciary advice
14 regarding plan investments unless the advice is
15 provided in connection with the fiduciary
16 program or service offered by the service
17 provider where the plan sponsor has contracted
18 for, or agreed to, the provision of such
19 fiduciary services and, if applicable, the
20 plan's participant has elected to remain in the
21 program and takes appropriate steps to ensure
22 future compliance with the policy upon

1 discovering instances where it was not being
2 followed, and we think you ought to include a
3 de minimis rule because sometimes mistakes do
4 happen.

5 Responses to RFPs. This has come up
6 in every conversation. The Council is
7 concerned that the Department's proposal will
8 often result in fiduciary status for persons
9 responding to a plan sponsor's RFP because such
10 responses generally include discussions of
11 investment ideas such as in the case of an
12 investment manager.

13 Because of the references to
14 investments, the "hire me" exception would not
15 be available. At least that's our
16 interpretation.

17 We think this will hurt plan
18 sponsors and result in limited RFP responses,
19 making them less informative and may increase
20 the ultimate cost of services.

21 We don't see a reason why responses
22 to RFPs would be fiduciary advice and request a

1 blanket exception for such responses from the
2 definition of a fiduciary.

3 Mergers and acquisitions. The
4 proposal raises -- I was actually surprised how
5 many people raised this with me. The proposal
6 raises numerous plan issues in connection with
7 a business merger acquisition.

8 For example, it is common in a
9 merger or acquisition agreement for the parties
10 to agree on how the integration of the
11 different plans will work.

12 For example, the buyer could notify
13 the seller's employees of the opportunity to
14 roll over their benefits from the seller's plan
15 to the buyer's plan and could explain the
16 benefits of doing so in terms of creating a
17 seamless transition.

18 To assign fiduciary status based on
19 these types of normal transition assistance
20 would raise cost and discourage that assistance
21 and make it more difficult to make that smooth
22 transition.

1 We would ask that the proposal
2 provide an exemption from fiduciary status for
3 actions taken by or at the direction of the
4 plan sponsor in helping employees transition
5 from one plan to another in the context of a
6 business transaction such as a merger or
7 acquisition.

8 Thank you again for the opportunity
9 to testify. I look forward to collecting
10 additional comments and sharing those with you.
11 Thanks very much.

12 MR. HAUSER: Thank you, Ms. Dudley.

13 Mr. Graff?

14 MR. GRAFF: Brian Graff, CEO on
15 behalf of the American Retirement Association.
16 Thank you, Assistant Secretary Gomez, Deputy
17 Assistant Secretaries Khawar and Hauser, and
18 the rest of the EBSA staff, for this
19 opportunity to testify on behalf of the ARA on
20 the proposed retirement security regulation.

21 The mission of the ARA has always
22 been to expand and strengthen the

1 employer-based retirement system.

2 Consistent with this mission, ARA
3 embraced the enactment of ERISA almost 50 years
4 ago in 1974 because it included a
5 principles-based fiduciary standard designed to
6 protect the interest of both plan sponsors and
7 participants.

8 From the outset, we would like to
9 voice our support for the Department's
10 longstanding efforts to modernize the '75
11 regulatory definition of investment advice
12 leading to fiduciary responsibility under ERISA
13 particularly as it applies to advice to
14 retirement plan sponsors with respect to plan
15 investments.

16 It is well-recognized that the
17 gateway for working Americans to achieve a
18 comfortable retirement is having access to a
19 workplace retirement plan.

20 Modern income workers are 15 times
21 more likely to save for retirement when covered
22 by an employer-based retirement plan than on

1 their own in an IRA.

2 The advent of automatic enrollment
3 has made the connection between retirement plan
4 coverage and positive retirement outcomes even
5 stronger.

6 The retirement plan coverage gap
7 tends to be greater among small business
8 employers and this has contributed to savings
9 inequity among communities of color where
10 employment disproportionately skews to smaller
11 businesses.

12 Access to a workplace retirement
13 plan is, by far, the best way to address
14 savings inequity and the American Retirement
15 Association remains committed to the goal of
16 expanding retirement plan coverage particularly
17 by smaller businesses.

18 The good news is that progress is
19 being made. The overwhelmingly bipartisan
20 legislation SECURE 2.0 contained numerous
21 provisions to expand small business retirement
22 plan coverage.

1 Legislative efforts with similar
2 policy objectives have also been spearheaded in
3 now 15 states. As an example, data from one
4 state has shown an over 50 percent increase in
5 401(k) plan coverage with the smallest
6 businesses showing the biggest increase.

7 Over the next five to seven years it
8 is estimated that hundreds of thousands of new
9 small business retirement plans will be
10 created. This is indeed good news, but it also
11 highlights a significant regulatory gap
12 respecting advice to plan sponsors regarding
13 plan investments.

14 It is often said that small business
15 retirement plans are, quote, sold, not bought,
16 because small business owners are too busy
17 running their businesses.

18 Selling a small business retirement
19 plan, including the specific investment options
20 offered to participants, is not investment
21 advice under the current 1975 regulation
22 because, as is often the case with smaller

1 plans, there is no ongoing advice relationship
2 and the "regular basis" prong of the 1975
3 five-part test is not satisfied.

4 Practically, this means that when
5 most small business retirement plans are sold,
6 the advice given is not subject to ERISA's
7 fiduciary standard of care.

8 Investment advice given to small
9 business plan sponsors is also not protected by
10 SEC's Regulation Best Interest because the
11 plan-level advice is considered, quote,
12 institutional advice even if we are talking
13 about, for example, an unsophisticated small
14 business owner with, let's say, just two
15 employees.

16 In fact, when Reg BI was being
17 developed, the ARA asked the SEC commissioners
18 to consider applying it to advice to small
19 business retirement plans, and we were told
20 that they believe such advice probably belonged
21 within DOL's jurisdiction.

22 Similarly, although the NAIC model

1 rule has increased protections for individual
2 purchasers of annuities in over half the states
3 so far, it again does not apply to the purchase
4 of annuity-based retirement plans by small
5 business owners.

6 Thus, under the current federal and
7 state regulatory framework, most small business
8 owners doing the right thing for their
9 employees are often provided zero, let me
10 repeat, zero regulatory protection with respect
11 to the advice given to them regarding plan
12 investment options.

13 As we look to increase small
14 business retirement plan coverage, it is
15 critical we address this regulatory gap.

16 The 1975 regulatory definition of
17 "investment advice" is ill-suited for advice to
18 plan sponsors with respect to
19 participant-directed 401(k) plans that didn't
20 even exist in 1975.

21 Under ERISA, a small business owner
22 is subject themselves to ERISA's fiduciary

1 standard when selecting a provider of plan
2 investment options.

3 Since a plan sponsor is making
4 decisions on behalf of participants, ARA
5 believes it is absolutely essential, as
6 provided in the Department's Proposed Rule,
7 that such a fiduciary plan sponsor be able to
8 rely on the fact that their investment advisor
9 will be subject to the same fiduciary standard
10 of care regardless of whether such advice is
11 just once or on a regular basis.

12 Both SEC Reg BI and the NAIC model
13 rule provide investor protections to
14 individuals on a transactional basis whether or
15 not there is an ongoing advice relationship on
16 a so-called regular basis.

17 It is simply nonsensical to give an
18 unsophisticated small business owner, who is
19 arguably making a more consequential set of
20 investment decisions on behalf of his or her
21 employees, less investment protection than that
22 same small business owner would likely get with

1 respect to investment advice received on his or
2 her own personal investments.

3 ARA feels strongly that small
4 business owners looking to provide a retirement
5 plan for their employees should never be left
6 without any regulatory protections when getting
7 advice with respect to plan investment options.

8 The ARA, as a matter of policy,
9 believes that all retirement plan regulations
10 should be business model and product neutral.

11 The proposed regulation will ensure
12 that advice given to plan sponsors will be
13 subject to the same fiduciary standard of care
14 regardless of whether the advice is given once
15 or is part of an ongoing relationship.

16 It would also provide for the same
17 fiduciary standard of care regardless of the
18 retirement plan investments being considered be
19 they mutual funds, insurance products, CITs,
20 CDs, commodities or even cryptocurrency.

21 We also support the stated intent of
22 the proposal to be distribution and

1 compensation model neutral. ARA feels strongly
2 that commission-based compensation must
3 continue to be permitted.

4 We appreciate the recognition in the
5 proposal that commission-based compensation for
6 advice may, in many cases, be in the best
7 interest of plan sponsors and participants.

8 In fact, the allowance of
9 commission-based compensation is critically
10 necessary with respect to small business
11 retirement plans as it can reduce out-of-pocket
12 costs to the small business owner who might not
13 otherwise be able to afford the plan.

14 The same can be said regarding
15 proprietary investment products and we
16 appreciate the Department's recognition that
17 their use in retirement plans can also be
18 consistent with ERISA's fiduciary standard.

19 Of course we recognize that with a
20 broad rule like this the details matter. We
21 supported PTE 2020-02 when it was originally
22 proposed, and we generally think it has been

1 working well in protecting plan sponsors and
2 participants.

3 We frankly have some concerns about
4 some of the proposed changes, such as the
5 substantial changes to the disclosures
6 required, and question whether the benefits of
7 some of these changes outweigh the likely
8 costs. We will be outlining these concerns in
9 more detail in our written comments.

10 We would, however, like to highlight
11 one significant proposed change to PTE 2020-02
12 that appears to be inconsistent with the
13 Department's stated position of being business
14 model and product neutral.

15 Proposed changes to the policies and
16 procedures required under PTE 2020-02, Section
17 II(c), would now include a prescriptive list of
18 business and compensation models that are
19 presumed to be in violation of a retirement
20 investor's best interest.

21 These include appraisals,
22 performance and personnel actions, bonuses and,

1 importantly, differential compensation. Given
2 the season, we are referring to this as the
3 "naughty list."

4 The inclusion of this prescriptive
5 naughty list would seem to be wholly
6 inconsistent with the Department's general
7 embracing of a principle-based fiduciary
8 standard.

9 If this list is included in the
10 final exemption, it would absolutely interfere
11 with existing business and compensation models
12 by creating a clear, negative presumption
13 against all these forms of compensation.

14 For example, there are numerous
15 examples of when differential compensation may
16 be entirely appropriate and in the best
17 interest of plan sponsors and participants
18 because such differential compensation relates
19 to specialized investment options offering
20 different levels of services or features.

21 Such common options to plan sponsors
22 and participants would now be chilled as a

1 consequence of this negative presumption.

2 We strenuously recommend that the
3 final exemption return to the previous language
4 in the current exemption, which relies on a
5 principles-based approach to policies and
6 procedures.

7 That said, we do want to reiterate
8 our general support for the Department's
9 longstanding effort to modernize the 1975
10 regulatory definition of "investment advice."

11 In this regard, we strongly support
12 the Department's suggestion that, when
13 finalized, the regulation be structured so as
14 to be severable in case a court determines that
15 portions of the final regulatory package and,
16 in particular, the changes to the existing
17 prohibited transaction exemptions should be
18 vacated.

19 We believe it is critical --

20 MS. WILKER: Please wrap up, Mr.
21 Graff.

22 MR. GRAFF: We believe it is critical

1 to the interest of plan sponsors and
2 participants that the fundamental changes in
3 the 1975 regulatory definition of "investment
4 advice" be allowed after almost 50 years to
5 finally move forward.

6 Thank you for the opportunity to
7 testify today. We look forward to continuing
8 the dialog on this incredibly important topic.
9 I am happy to take any questions.

10 MR. HAUSER: Thank you very much,
11 Mr. Graff. Let's see. I think next up was
12 Professor Muir.

13 MS. MUIR: Thank you. My name is
14 Dana Muir and I am the Robert L. Dixon
15 Collegiate Professor of Business -- I'm sorry,
16 have I started too soon? I'm good? Okay.

17 I'm the Robert L. Dixon Collegiate
18 Professor at the University of Michigan Stephen
19 M. Ross School of Business.

20 After working in compensation and
21 benefits, and then as an employee benefits
22 attorney for more than 30 years, I have studied

1 employee benefits, particularly fiduciary
2 issues, as an academic. The views I state here
3 are my own and based on that experience.

4 I commend the Department of Labor
5 for its extensive and thorough work on the
6 proposed retirement security rule and the
7 related amendments to Prohibited Transactions
8 Exemptions. As I continue, I include PTEs, as
9 appropriate, when I refer to the Proposed Rule.

10 I strongly support the Proposed
11 Rule. It is needed to fill existing gaps in
12 protection for retirement savers and to ensure
13 all of their financial advisors live up to the
14 trust those savers put in them.

15 Over the almost 50 years since the
16 Department issued its first rule on investment
17 advice, the landscape of financial products and
18 employee responsibility for investment
19 decisions in retirement plans has undergone
20 monumental shifts.

21 What has not changed, is the primary
22 responsibility that Congress assigned to the

1 Department of Labor to protect Americans'
2 retirement savings.

3 Congress established retirement
4 savings as a category of one. To repeat and
5 perhaps clarify, retirement savings are unique
6 and distinctive. Truly a category of one.
7 They are tax advantaged.

8 As employee benefits, they must be
9 available on a fair basis to all of the
10 company's workforce, not just top executives.
11 They are protected from creditors.

12 Currently, though, retirement savers
13 are not sufficiently and uniformly protected
14 from the dangers of conflicted investment
15 advice.

16 The U.S. financial regulatory system
17 is a patchwork for retirement savers. That
18 patchwork means that, depending on the
19 circumstances and the product being
20 recommended, their trusted providers of
21 investment advice may be subject to ERISA's
22 high fiduciary standards or the standards

1 promulgated by the SEC or by the states.

2 That patchwork allows some
3 investment advisors, in whom retirement savers
4 place their trust, to provide those savers with
5 advice. They provide the savers with
6 conflicted advice that eats away at the saver's
7 assets.

8 Estimates of the cost of conflicted
9 advice vary, but there are costs. And over the
10 working life of a retirement saver, even small
11 costs add up.

12 Using a reasonable estimate of 100
13 basis points, a rollover made at age 45 and
14 reduced returns by 100 basis points will
15 decrease a worker's savings by 17 percent when
16 they retire at age 65.

17 Those costs are particularly
18 pernicious for women who accumulate fewer
19 retirement assets because of the wage gap and
20 need to rely on those assets for a much longer
21 life span, and for households of color whose
22 median retirement account balances are half

1 those of white households.

2 The proposed rule also would provide
3 important protections to plans and plan
4 fiduciaries. I agree with much of what Mr.
5 Graff said. He spoke eloquently on behalf of
6 small business, but this is important for all
7 businesses and their plan fiduciaries.

8 Those plan fiduciaries are tasked
9 with retirement-related decision-making. They
10 know they have to make those decisions in the
11 best interest of the plan, the participants,
12 and the beneficiaries.

13 They should be able to rely on all
14 of their trusted investment advisors to provide
15 them with advice that meets that same standard
16 and thereby helps the fiduciaries meet their
17 own obligations.

18 The cost of conflicted advice across
19 \$11 trillion in plan assets is enormous because
20 even slightly lower returns on investments in
21 DB plans or on a menu option in 401(k) plans
22 that many participants choose. Those costs

1 will proliferate across the plans.

2 The proposed rule while modernized
3 to address the monumental shifts in financial
4 products, and investment responsibility that
5 have occurred since the promulgation of the
6 1975 rule is not itself a monumental shift in
7 regulation and it is well within the
8 Department's authority. It hues more closely
9 to the statutory language than did the 1975
10 rule.

11 The Department's definition of
12 "investment advisory actions" that give rise to
13 fiduciary status easily fits within the
14 parameters of the statutory definition and that
15 should be the end of the inquiry, but also,
16 though, is consistent with the philosophical
17 view that providing advice is, in itself, an
18 invitation to trust the giver of advice.

19 Professor Arthur Laby cites that
20 view in explaining that, and here I quote, an
21 advisor's fiduciary duty arises from the nature
22 of the trust relationship and this regulation

1 concentrates on the nature of the trust
2 relationship.

3 Furthermore, the Proposed Rule
4 aligns with 2019 regulatory changes adopted by
5 the SEC for products within that agency's
6 jurisdiction.

7 The proposed amendments to PTE's
8 2020-02 and 84-24 also provide critical
9 protections. It will increase the uniformity
10 in obligations and disclosures to retirement
11 savers.

12 The PTEs mitigate the
13 effects of conflicts of interest through widely
14 used and generally accepted regulatory tools.

15 The consolidated and amended
16 requirement to document investment advice that
17 a rollover is in a plan participant's or
18 beneficiary's best interest is particularly
19 important in light of the use of rollovers.

20 In 2019, I published an article
21 pointing out that rollovers pose a last-mile
22 problem that undermines many of the gains

1 retirement plans have achieved by applying
2 insights from behavioral economics.

3 The data are clear. Generally,
4 default settings work and they are sticky;
5 automatic enrollment, escalation and
6 allocation, increase retirement savings and
7 investment diversification.

8 The one default setting that is
9 slippery is automatic retention. Above a set
10 threshold, plans must retain the account assets
11 of participants who leave employment unless the
12 participant requests a distribution or
13 rollover.

14 That default to keep assets in the
15 plan often is to the advantage of participants,
16 a plan fiduciary has screened and continues to
17 monitor the plan's investment menu, and
18 institutional fund classes have lower fees than
19 equivalent retail funds. And participants
20 retain all of the other benefits of ERISA
21 regulation. Yet, in this, and only this
22 default setting, the default fails.

1 That failure has been consistent
2 over time and adds up to trillions of dollars
3 of retirement savings.

4 Between 1998 and 2007, more than 80
5 percent of the money that flowed into IRAs came
6 from qualified plan rollovers.

7 In 2020, nearly 5.7 million
8 Americans rolled over more than \$618 billion
9 and IRA assets currently total approximately
10 \$13 trillion.

11 I found in my research that both
12 general behavioral observations and economic
13 analysis indicated direct and indirect
14 conflicted advice plays a role in overcoming
15 automatic retention and encouraging rollovers.

16 The Proposed Rule would require
17 investment advisors who provide rollover
18 recommendations, do so in participant's best
19 interest.

20 That's incredibly important and
21 powerful and the PTEs would require appropriate
22 documentation of the basis for the

1 recommendation.

2 That is essential to countering the
3 costly effects of conflicted advice in this
4 context.

5 In closing, I reiterate my strong
6 support for the proposed retirement security
7 rule and the associated PTEs. Thank you for
8 this opportunity to state my support.

9 MR. HAUSER: Thank you and -- let's
10 see. I think next up is Lisa Bleier.

11 MS. BLEIER: Thank you very much.
12 My name is Lisa Bleier and I am here on behalf
13 of SIFMA representing securities firms, banks
14 and asset managers and the clients and
15 individuals or members served.

16 While we appreciate the opportunity
17 to testify, we are bothered by the decision to
18 hold a hearing in the middle of the comment
19 period.

20 The purpose of a hearing is to allow
21 interested persons to review other comments and
22 provide testimony on the position as informed

1 by those other comments.

2 The Department of Labor's
3 unprecedented approach here precludes all
4 stakeholders the opportunity to do that
5 resulting in a rulemaking that will be less
6 robust and likely flawed.

7 Further, as we have previously
8 stated, the Department's decision to provide
9 only a 60-day comment period, which includes
10 three of the largest federal holidays of the
11 year, is not designed to obtain the most
12 helpful and well-considered public comments.

13 It also makes it challenging to
14 provide the robust analysis and internal
15 discussions with our members necessary to help
16 the Department reach a result that ensures
17 continued protection for investors that can
18 also be operationalized while, at the same
19 time, providing retirement investors access to
20 advice and education and the ability to choose
21 how they receive that advice and education. We
22 question why the Department is undertaking a

1 rulemaking of such breadth at all.

2 We have not heard of any situations
3 of abuse where courts have held that investment
4 professionals were protected from liability due
5 to a lack of oversight by the Department.

6 If the Department's enforcement
7 program is overrun with such instances, there
8 is no mention of those facts in either the
9 preamble or the cost analysis.

10 We believe amendments to the
11 regulation defining "investment advice
12 fiduciary" are unnecessary due to the SEC's
13 Regulation Best Interest, the NAIC's best
14 interest model, and the Department's own PTE
15 2020-02.

16 Our member firms made substantial
17 changes in 2019 and 2020 to implement
18 Regulation Best Interest. And for some firms,
19 they instituted further changes to their
20 practices to comply with PTE 2020-02.

21 Flexibility in practices in firm
22 arrangements provide the individual investors

1 with substantial choice in the marketplace
2 while still getting the benefit of financial
3 professionals looking out for their best
4 interest.

5 In fact, senior department officials
6 have acknowledged the validity of Reg BI as a
7 strong standard.

8 Nonetheless, the Department has
9 chosen to draft a regulation so broad as to
10 make all conversations between a financial
11 professional and an investor into a risk of
12 fiduciary conversation.

13 We see these changes as
14 even broader and less tethered to the common
15 law of trust than the 2016 changes that were
16 vacated by the Fifth Circuit decision Chamber
17 of Commerce v. Acosta.

18 This Department's new proposal is
19 based on the arrangements a retirement investor
20 makes with investable assets that are not even
21 in an ERISA-covered plan nor IRA.

22 It is based on the financial

1 professional's business rather than on the
2 relationship of trust and confidence with
3 respect to the plan or IRA at hand.

4 It does not acknowledge that dealers
5 in securities and commodities selling to
6 sophisticated large plans where there are very
7 experienced investment managers are not acting
8 as fiduciaries. It also covers market color as
9 well as publicly available research and quotes
10 despite those obviously not being fiduciary
11 actions.

12 It covers an individual moving from
13 one IRA to another IRA as well as moving from
14 advisory services to brokerage.

15 SEC and FINRA rules have covered the
16 field here. There is no reason for the
17 Department to get in between these
18 relationships as well especially if the
19 Department's new rules and exemptions are
20 getting in the way of how these financial
21 institutions are organized and supervised
22 resulting only in conflicts and

1 inconsistencies.

2 We fail to see how these new rules
3 meet the tasks set out by the Fifth Circuit or
4 help individuals trying to save for retirement.

5 Prior to issuing the rule, the
6 Department spoke about regulatory arbitrage and
7 insurance professionals being subject to
8 different rules from broker-dealers.

9 But if that is the Department's
10 focus, the first step should have been
11 determining whether there is a problem. And if
12 there is, then the second step should have been
13 a tailored, narrower approach to that problem.

14 The Department took neither of those
15 steps. Instead, the Department chose to
16 drastically increase the scope of the fiduciary
17 definition while shoehorning everyone into a
18 single exemption making substantial changes to
19 that Prohibited Transaction Exemption for all
20 financial institutions and putting the
21 Department's thumb on the scale of what
22 products can be sold to retirement investors.

1 PTE 2020-02 has only been in place
2 for two years. Firms that have chosen to use
3 PTE 2020-02 made changes in their business
4 practices to make this exemption work only to
5 face the prospect of yet additional burdens and
6 changes.

7 In our view, much of the
8 Department's proposal is beyond the
9 Department's jurisdiction and likely to be
10 vacated by the courts.

11 This cycle of overbroad regulation
12 and judicial disapproval of agency action is
13 very disruptive and costly for firms and their
14 clients.

15 I would also note the Department has
16 not made its case for why any of these changes
17 are necessary. The Department's cost benefit
18 analysis does not take into account the fact
19 that the regulatory landscape has changed since
20 their final rule of 2016, which was found
21 unlawful and vacated by the Fifth Circuit Court
22 of Appeals.

1 As I mentioned earlier, there is a
2 new SEC rule, new state laws and the new PTE.
3 All of those have provided new protections and
4 a new standard of care for individual
5 investors.

6 The Department should be taking all
7 of these changes into account before changing
8 the definition of an ERISA fiduciary and
9 increasing the burdens of accessing PTE 2020-02
10 with no benefit to investors merely imposing
11 substantial costs and limited investment access
12 to retirement investors, which will reduce
13 retirement savings.

14 While we are still working on our
15 comment letter, I will highlight a few areas
16 that we have already found to be particularly
17 problematic.

18 They include sweeping in
19 conversations that are merely educational, as
20 well as those that are responsive to RFPs and
21 other inquiries from large plans, as well as
22 the equivalent of a "hire me" conversation.

1 None of those should be considered ERISA
2 fiduciary advice.

3 The proposal also seems to preclude
4 any education in the rollover area. The
5 Department will simply deem any conversation
6 about a rollover as a fiduciary conversation.
7 There is no basis for this approach.

8 The proposal also includes an
9 ineligibility provision that unlawfully gives
10 the Department the power of prosecutor, judge
11 and jury. It allows a foreign government to
12 dictate whether a large bank holding company
13 should be allowed to service U.S. retail
14 investors, including based on a decision by a
15 foreign government regarding a foreign
16 affiliate of the bank that has no
17 responsibility for or interaction with U.S.
18 retail investors.

19 The only way around is to get an
20 exception for the Department causing enormous
21 disruption in client accounts and broker
22 affiliation.

1 The Department does not appear to
2 have worked with the SEC, FINRA or the states,
3 and will cause major disruption in the
4 marketplace and those costs have not been
5 assessed accurately by the Department.

6 The Department's ability to issue
7 exemptions is intended to help the markets work
8 efficiently, yet this proposal will have the
9 opposite result.

10 For all of these reasons, the
11 Department should withdraw this proposal which
12 is overbroad, unnecessary and inconsistent with
13 existing federal regulations such as SEC's
14 Regulation Best Interest.

15 There are so many more areas of
16 retirement law that deserve our attention,
17 including helping more individuals save for
18 retirement and save for emergencies, increasing
19 exposure to financial literacy program and
20 helping individuals make their savings last
21 through retirement. Let's find better uses for
22 our collective time. Thank you.

1 MR. HAUSER: Okay. Thank you all.

2 MR. KHAWAR: A few minutes for
3 questions here.

4 MR. HAUSER: Ali?

5 MR. KHAWAR: Yeah, I just wanted to
6 get started with a couple of quick questions
7 starting with Ms. Dudley.

8 You brought up the experience of
9 plan sponsor employees that are non-HR
10 employees. Can you just expand on that a
11 little bit and, in particular, I think I'm
12 interested in understanding where you think
13 that they're making recommendations and
14 triggering that portion of it as well as
15 whether or not, you know, which part of the
16 test itself that you think they would be
17 meeting.

18 Is it that they are -- they have
19 discretionary authority? They are
20 acknowledging fiduciary status? Or is it that
21 central prong which is more contextual?

22 MS. DUDLEY: So, this is what I know

1 so far, Ali. I'll try and -- I'm still asking
2 people for input on this, but what I've learned
3 is that it's the same problem that we described
4 to you before with HR employees, but they're
5 not in HR. They're not human resource.
6 They're outside of HR. They may get assigned
7 to help participants or answer questions, but
8 they're not HR.

9 And so, I think we just need to --
10 they may be working with the, you know, the
11 Plan Administration Committee or they just --
12 they just may be in a different part of the
13 company and they answer questions for
14 participants.

15 I think there are a couple of things
16 that concern us. One, they may be regularly
17 doing that as part of their job or they may
18 actually be paid from the plan. There's that
19 scenario that has been raised with me as well.

20 And it may -- it's a fine line
21 between education and advice in the sense that
22 they may be answering a question like, hey, I

1 saw that we had target date funds, so I
2 invested in all of them so I'll have money in
3 my 30s and my 40s and my 50s and my 60s, and
4 they don't know that they're supposed to pick
5 the age-appropriate target date fund.

6 And we have a lot of companies that
7 have expressed that problem where they go in
8 and they actually tell people when they're
9 doing something like that, that that's not how
10 it works. So, is that investment advice?

11 That's the kind of thing -- and they
12 may just not be in HR. I don't know if that's
13 answering your question or not, but -- and I
14 can certainly go back and get more input. I
15 have asked for more input on that.

16 MR. KHAWAR: Okay. I appreciate
17 that. Thank you, Lynn.

18 Mr. Graff, one of the other things
19 we heard from Ms. Dudley and I know as a
20 significant part of commentary in general right
21 now, is lack of an explicit carve-out for
22 sophisticated investors.

1 You brought up a number of points
2 about a class of what you might consider
3 sophisticated or institutional investors, small
4 business employer.

5 Do you have any thoughts on, you
6 know, if we were to pursue something like a
7 sophisticated investor carve-out, how much
8 should we be concerned about including in such
9 a test that the kind of entities that you are
10 talking about who are running a small business,
11 but maybe don't have the capacity or time to
12 focus on these questions the same way.

13 (Pause.)

14 MR. KHAWAR: I think you're muted or
15 my audio is screwed up.

16 MR. GRAFF: Nope, it was me. Thank
17 you, Ali, for the question. And we certainly
18 would agree that a small business owner would
19 not -- should not be considered a sophisticated
20 investor for purposes of this proposal.

21 That being said, I think it is
22 fairly common in the chain that the retirement

1 plan marketplace utilizes for intermediaries to
2 be used particularly when you have an unbundled
3 retirement plan situation where there is a
4 separate record-keeper from an advisor, which
5 is, you know, fairly common and particularly in
6 the smaller plan marketplace.

7 And in those instances where the
8 advisor may be working with the record-keeper,
9 both are doing it on a regular basis, both are
10 very practiced in the retirement plan universe,
11 that relationship, it would be appropriate to
12 have a sophisticated investor exception because
13 it doesn't make sense to require the basket
14 load of disclosures and other requirements
15 associated with the exemption.

16 So, I think that, in our view, is
17 where those types of exceptions make the most
18 sense rather than to the ultimate consumers who
19 are more typically unsophisticated.

20 MR. KHAWAR: Okay. Appreciate that.
21 And maybe just following up, I have a parallel
22 question to the question you asked Ms. Dudley.

1 So, one of the things that the
2 preamble to the NPRN states is that part of why
3 there's not an explicit sophisticated investor
4 carve-out is that -- I would have to go back
5 and look, but I think the example we used is
6 where there's a financial intermediary that's
7 sophisticated that's dealing with a product
8 producer.

9 And in that context, we believe that
10 the relation can be structured in a way that
11 doesn't give rise to a trust and confidence
12 relationship, that context where individuals
13 are entering into a fiduciary relationship and
14 that's part of why the carve-out isn't needed.

15 Do you think there are circumstances
16 that notwithstanding the Department's language
17 in the preamble will continue to meet the
18 fiduciary definition and where there's a
19 recommendation?

20 MR. GRAFF: Yes. Well, I think the
21 concern is that despite that language, it's
22 just not clear enough to allow for an exemption

1 of the kind that we're discussing right now.

2 And so, I think this is
3 more of a clarification issue. I don't think
4 it's really the Department's intent to require
5 when there's a recommendation going on between
6 two parties that are essentially acting in a
7 financial institution capacity, of one kind or
8 another, to require those kinds of disclosures
9 as were mentioned before.

10 So, you know, we're planning on
11 commenting on this in quite a bit of detail and
12 certainly we'll provide you with some concrete
13 examples of what people are concerned about in
14 this regard.

15 MR. KHAWAR: I'll stop there just in
16 the interest of time and thank you all.

17 MR. HAUSER: Maybe just a couple
18 questions from me. Going back to you, Ms.
19 Dudley, and this is really, I think, just
20 verifying, but when you -- the kinds of
21 communications you're worried about where they
22 come from call center people in connection with

1 mergers and acquisitions or the other examples
2 you gave, I mean, are these communications, in
3 your view, that really involve making
4 investment recommendations, suggesting
5 particular investment strategies or investments
6 people make or is the concern more that people
7 are going to be explaining, you know, the
8 attributes of investments, how things work,
9 doing a lot of the sorts of things that we've
10 normally seen as educational in the past, but
11 that they'll be fear about those things swept
12 into the advisory definition?

13 MS. DUDLEY: A little bit of both,
14 Tim, but I've asked -- again, I've asked --
15 I've sent out a request to hundreds and
16 hundreds -- thousands of people, actually, to
17 get more input, but I think it's a little bit
18 of both.

19 Some people are very alarmed that
20 they won't know where the line is. And some
21 people do actually want to be able to describe
22 the investments in the plan and what they do

1 and how they work.

2 And it's always a very tricky thing
3 when you and, you know, and we've all had this
4 conversation before because people don't feel
5 like they -- they feel like if they're talking
6 about the investments in the plan, then that
7 could be interpreted as advice and there's some
8 uncertainty and potential liability there that
9 they just forbid anybody from saying anything.

10 And that's what -- our plan sponsors
11 don't want to do that because they're getting
12 -- they're finally getting some good results
13 from being able to talk about these things with
14 people.

15 So, it's a little bit of both, but
16 -- and I'll go back and reinforce both your
17 question and Ali's and see if I can get more
18 for you.

19 MR. HAUSER: One thing that would be
20 helpful to know, I mean, so we indicated in the
21 preamble at various points, you know, we're not
22 really drawing -- we're trying to draw a line

1 that sweeps in those kinds of communications
2 that we normally view as educational or
3 informational or describing the attributes of
4 the investment or the fund lineup.

5 Those really aren't picked up by the
6 rule's text, but there is not express
7 provisions in the rule that outline where that
8 line is.

9 And I guess one question I have for
10 you would be, do you think that is something
11 that ought to be included in --

12 MS. DUDLEY: Yes.

13 MR. HAUSER: -- the text? Is that
14 something we should say more about?

15 MS. DUDLEY: Well, I definitely think
16 we ought to move the exception to the
17 regulation for a variety of reasons, but I do
18 think it's a little bit confusing.

19 What's in the preamble is confusing
20 because it's -- the salary is tied to whether
21 you're giving education, but what if -- but if
22 you're giving the education, you're not a

1 fiduciary in the first place. You know what
2 I'm saying?

3 And so, they won't know where that
4 is. They will just forbid saying anything.
5 They won't know where that line is.

6 And some people have been assigned
7 the job of answering questions. That's --
8 they're regularly doing that as part of their
9 job and they may actually even be paid out of
10 the plan.

11 So, I feel like they may actually be
12 answering a question about an investment, what
13 it's -- not only what it's supposed to do, but
14 whether it, you know, you're young, you get
15 somebody that's in their 20s and they want to
16 ask you questions about investing in, you know,
17 S&P 500 or in something that is less risky.

18 Well, you know, is that advice or
19 are you describing the investment? You know
20 what I'm saying?

21 So, I think -- I would tell you
22 right now I don't know the answer to your

1 question because I need to ask if they want a
2 line drawn, but I will tell you they don't know
3 where the line is.

4 MR. GRAFF: And, Tim, if you don't
5 mind, let me just add to what Lynn is saying
6 because I think it's extremely important
7 because we've heard similar concerns from our
8 plan sponsor members and something that we've
9 shared with you before.

10 They are extremely nervous about
11 liability issues. It's just all-consuming in
12 terms of what their focus is.

13 And so, anything that has the
14 potential for possibility of being liable they
15 are going to run away from.

16 So, I think we all agree that we
17 want employees of plan sponsors to be able to
18 talk to each other about these important
19 issues.

20 And so, we just want to be -- make
21 sure that whatever the final rule addresses
22 here, it's very clear that HR and other

1 employees of companies can continue to do what
2 they do best, which is help their fellow
3 employees save for retirement.

4 MR. HAUSER: I appreciate that and I
5 guess what I'd urge both of you, and any other
6 commenters, would be to the extent you think
7 there are text changes or preamble changes or
8 illustrations that would be helpful in this
9 context, that would be great.

10 I mean, we truly are just trying to
11 pick up recommendations, you know, I mean,
12 genuine investment recommendations. Invest in
13 this. Pursue this investment strategy, that
14 sort of thing. We're not trying to pick up,
15 you know, the kind of educational,
16 informational assistance that people provide
17 and merely answering the question about how a
18 target date fund looks, for example, that
19 wouldn't be a recommendation in our view. But
20 anything we can do to -- that you think will
21 help ease people's minds in those circumstances
22 where we're looking at trying to pick up a

1 communication as fiduciary would be great.

2 Similarly, Ms. Dudley, I think your
3 suggestion of additional guidance, perhaps, in
4 co-fiduciary liability is a helpful one. And
5 to the extent you have language that you'd like
6 to suggest, inclusion of that sort of thing in
7 a comment might be very helpful.

8 MS. DUDLEY: Glad to go back.
9 Uh-oh, we've lost you, Tim.

10 MR. HAUSER: I'll just turn to other
11 panelists before I consume all the time.

12 MR. COSBY: Tim, I'm just going to
13 add that I think it will be helpful to get from
14 Ms. Bleier the same information you're
15 requesting about the line, because she had
16 talked about chilling effect on rollover
17 conversation and education and also the "hire
18 me" issues.

19 So, I'm just going to add that to --
20 I think that dovetails with what she was saying
21 to the other testifiers.

22 MS. BLEIER: Certainly, Chris, and

1 we'd be happy to try to address that in our
2 comment letter.

3 As I think Lynn referenced, it is
4 very hard at this time of year, this month,
5 this shortened time period, to get feedback
6 from our members, but we'll certainly work to
7 try.

8 MR. COSBY: Thank you. I was going
9 to ask, Ms. Muir, you had mentioned about the
10 rollover disclosure and how you thought that
11 was an important component of what's in 2020-02
12 now and which will continue to be there.

13 I was just wondering if you could
14 elaborate a little bit about why you thought
15 that was effective communication for
16 participants.

17 MS. MUIR: Well, I think that the
18 documentation, in particular, is very useful in
19 a rollover context.

20 I am one of those people who writes
21 a great deal for my job. And what I find is I
22 am more careful and more thoughtful and I learn

1 a lot by writing -- by writing down my thoughts
2 in an organized way.

3 And I think the requirement to
4 document that investment advice to rollover
5 someone's account assets, a retirement saver's
6 account assets, is incredibly important.

7 That is, for many people, one of the
8 largest, if not the largest, financial decision
9 that they will make.

10 And so, the retirement savers have a
11 great deal of risk in that context, but that's
12 also -- there's a flip side to that coin and
13 that means that the investment advisor has the
14 potential of making a great deal of money as a
15 result of that transaction and I think that the
16 documentation and disclosures associated with
17 that are really important.

18 In my research, what I found was one
19 of the -- one of the important things in
20 overcoming these automated defaults is access
21 to individuals by third parties with conflicts
22 of interest, and that's what we're talking

1 about, that's what we're talking about
2 mitigating, and I think that the Department's
3 approach is right on target and well within its
4 authority.

5 MR. COSBY: Thank you. I apologize
6 that I was difficult to hear. I just had my
7 mic pulled down, so -- but I'm glad you could
8 hear my question and I'll have my mic down for
9 future questions, but thank you. That was a
10 very helpful response. I appreciate it.

11 That's all. That's the only
12 questions I have for now. Thank you. Thanks
13 to the panelists. I appreciate your testimony.

14 MR. HAUSER: All right. Mr. Graff,
15 let me maybe ask you one more question or maybe
16 make an observation and just have you comment
17 on it, but you singled out, in particular,
18 concern about a provision in the rule that
19 references quotas, appraisals, performance
20 action, bonuses, et cetera.

21 And I just wanted, you know, our
22 intention in that provision is not to say that

1 you're prohibited in some way from having those
2 practices it's that you can't use them if their
3 intention is to cause a violation of the "best
4 interest" standard or that when one looks at
5 your policies and procedures, these particular
6 actions seem designed in such a way that
7 they're going to incentivize people to violate
8 the "best interest" standard.

9 My question is, does that alleviate
10 your concerns at all? Is there something we
11 should do to make that clearer? Are we better
12 just striking that, just if you have, or do you
13 not have thoughts and time to reflect?

14 MR. GRAFF: No, no, I -- rarely do I
15 not have thoughts. So, I think whenever you
16 have a prescriptive list -- and again we, just
17 for the fun of it, call it the "naughty list"
18 -- you are creating a negative presumption.

19 And I think that's really our
20 concern that when you create this negative
21 presumption, it is -- it requires the
22 institution, the advisor to overcome that

1 presumption in a way that we believe would have
2 a chilling effect in the marketplace which we
3 don't believe is the intent, in general, of the
4 rule.

5 And as I indicated in my testimony,
6 there are a fairly significant number of
7 examples where a particular differential
8 compensation is perfectly appropriate, may make
9 a lot of sense because it involves a service or
10 a product that involves differing levels of
11 services or features.

12 And so, we think you can -- we think
13 the way it was working before was working in
14 the context of a more principle-based approach
15 to policies and procedures and we would
16 strongly encourage you to go back in that
17 direction.

18 If there's something that you're
19 observing in the marketplace that's concerning,
20 we would argue that's better addressed from an
21 enforcement standpoint as opposed to having
22 such a prescriptive list that we do believe

1 would have the kind of chilling effect that I'm
2 describing.

3 MR. HAUSER: And I'd like to thank
4 and dismiss this panel. We appreciate your
5 participation and let me just say generally
6 both to this panel and to everybody who
7 testifies today, we have immense gratitude to
8 anybody that steps up to the plate and shares
9 their views on the rule.

10 Whether we agree or disagree, we
11 think the conversation is very helpful and the
12 final rule will, I have no doubt, be better
13 from the conversation we're having. So, thank
14 you all.

15 MR. GRAFF: Thank you.

16 MR. HAUSER: With that, we'll turn
17 to the next panel which should include Candace
18 Archer of the AFL-CIO; Susan Neely, American
19 Council of Life Insurers; Micah Hauptman,
20 Consumer Federation of America; and Mark Smith
21 on behalf of the Financial Services Institute.

22 We'll begin with Ms. Archer if she's

1 ready.

2 (Simultaneous speaking.)

3 MS. GOMEZ: We get a 15-minute break.

4 MR. HAUSER: I'm sorry. Excellent.

5 MS. GOMEZ: I know we can't wait
6 until the next panel, but we --

7 MR. HAUSER: We are very excited.

8 MR. KHAWAR: We're also excited for
9 the opportunity to grab a cup of coffee, which
10 I encourage everyone to do. We'll resume at
11 10:30 and begin Panel 2.

12 MR. HAUSER: Perfect. Thank you.

13 (Whereupon, the above-entitled
14 matter went off the record at 10:17 a.m. and
15 resumed at 10:30 a.m.)

16 MR. HAUSER: We're ready to get
17 started again. The panels are ready. Ali, my
18 colleague, pointed out before the break that I
19 had just one job, which I messed up by stepping
20 on people's break, but I'll try to do better as
21 a moderator moving forward.

22 But anyway, the next panel up is

1 Candace Archer, Susan Neely, Micah Hauptman and
2 Mark Smith.

3 So, if you all are ready, we'll
4 start with Ms. Archer.

5 (Pause.)

6 MR. HAUSER: I think you're muted,
7 Ms. Archer.

8 MS. ARCHER: My apologies. Good
9 morning. I'm Candace Archer, the Policy
10 Director for the AFL-CIO.

11 The AFL-CIO has one overarching
12 goal, a better life for working people that
13 includes a financially secure retirement.

14 I'm pleased to be here on behalf of
15 the more than 12.5 million working women and
16 men who are members of the AFL-CIO 60 affiliate
17 unions.

18 The AFL-CIO fully supports the
19 Department of Labor moving forward with this
20 rulemaking.

21 We have been concerned about
22 conflicted retirement investment advice for

1 decades and we consistently have weighed in on
2 legislative and regulatory proposals in this
3 space.

4 Retirement income security is top of
5 mind for all working families and union members
6 are particularly focused on it.

7 Pensions and retirement savings
8 plans are a big part of the economic package
9 negotiated through collective bargaining.

10 More than 94 percent of union
11 members who are employed in private industry
12 have access to workplace retirement plans.

13 Although it is correct to associate
14 being a union member with having a defined
15 benefit pension, you should know that a greater
16 share of union than nonunion workers
17 participate in defined contribution plans as
18 well.

19 Many union members also have
20 individual retirement accounts, IRAs, because
21 that's where the money in their workplace plans
22 end up when they leave their job or retire.

1 If their traditional defined benefit
2 pension plans offer a lump sum option, about 36
3 percent of private sector workers have this
4 option at normal retirement age, according to
5 the Department. That money may end up in an
6 IRA as well.

7 All IRA holders need assurances that
8 any professional advice they receive about how
9 to invest their IRA is conflict-free. The
10 Proposed Rule provides them with that
11 assurance.

12 Retirement savings are the primary
13 way which union members invest in the capital
14 markets and their retirement money, by and
15 large, is their biggest financial asset. They
16 are counting on making the most of it.

17 And when I say, "their money," I
18 mean both what they decide to contribute
19 personally and what they bargain for their
20 employer to put in.

21 To get the most out of these
22 contributions, they need conflict-free

1 investment advice. Advice that is solely in
2 their best interest. They literally cannot
3 afford investment advice that is compromised by
4 the investment professional's own financial
5 interests.

6 As has been well-documented,
7 conflicted advice can cost retirement savers
8 thousands of dollars over their lifetime.

9 Having made a huge bet on the
10 private retirement system bigger than any other
11 group of workers, unions have a big stake in
12 the system's integrity.

13 As we at the AFL-CIO evaluate the
14 need for the Proposed Rule, we ask; one, are
15 the current rules designed to serve the
16 interest of those for whom the system was
17 created? The answer to that question is an
18 unequivocal no.

19 Two, do we continue to allow the
20 financial conflicts of some investment
21 professionals to supersede the interests of
22 workers and retirees? That answer depends on

1 whether the proposal before us gets over the
2 finish line and we certainly hope it does.

3 The retirement investor
4 protections contained in the Proposed Rule are
5 long overdue. We agree with the Department's
6 concise assessment set out in its January 2023
7 regulatory agenda that the current rule, quote,
8 is not founded in the statutory test of ERISA,
9 does not take into account the current nature
10 and structure of many individual retirement
11 plans and IRAs, is inconsistent with the
12 reasonable expectations of plan officials,
13 participants and IRA owners who receive
14 investment advice, and allows many investment
15 advice providers to avoid status as a fiduciary
16 under federal pension law.

17 The current loophole-ridden rule was
18 promulgated in 1975 and clearly a lot has
19 happened and changed since then.

20 As the Department notes in its
21 proposal, in 1975 IRAs had only recently been
22 created and 401(k) plans did not even exist.

1 Private retirement savings were mainly held in
2 large employer-sponsored, defined benefit
3 pension plans. And so, there was no need for
4 participants to concern themselves with how
5 their retirement money should be invested.

6 Today's data, as the Department
7 further highlights, shows a dramatic contrast.
8 The share of retirement plan participants
9 covered by defined contribution plans is 78
10 percent and, by 2020, 94 percent of these
11 plans' active participants had responsibility
12 for directing the investments of some or all of
13 their account balances.

14 Assets and IRAs exceed \$13.2
15 trillion with most of the money coming from
16 rollovers from employer-sponsored plans with
17 projected 4.5 trillion more in additional
18 rollovers by 2027.

19 The participants in these plans, by
20 and large, have limited investment experience
21 and so they responsibly seek out professional
22 advisors to guide them.

1 The big problem, however, is the
2 current rule's limited definition of who is an
3 investment advice fiduciary subject to the
4 "best interest" standard.

5 Only a person or firm providing
6 advice to a particular client on a, quote,
7 regular basis meets the regulatory definition
8 of an investment advice fiduciary.

9 As a result, advice provided on a
10 onetime basis such as many of the
11 recommendations involving rollovers may not be
12 treated a fiduciary advice. The Proposed Rule
13 closes this consequential loophole.

14 Another loophole is that an advice
15 provider must be a "best interest" fiduciary
16 only if there is a mutual agreement,
17 arrangement, or understanding that the advice
18 will serve as a primary basis for investment
19 decisions.

20 Contrary to the retirement saver's
21 expectations which are reasonably based on the
22 nature of communication with their advice

1 provider, that provider's materials may include
2 boilerplate disclaimers that disavow such a
3 conclusion. The Proposed Rule closes this
4 loophole as well.

5 Those opposed to modernizing the
6 current regulation argue that it is unnecessary
7 because other regulators have already stepped
8 in to remedy the, any problem. This, however,
9 is not the case.

10 As the Department correctly explains
11 in its proposal, other regulators have not
12 fully addressed the problem of conflicted
13 retirement advice.

14 SEC Regulation BI does not apply to
15 all investment professionals, all products or
16 all accounts. It is limited to recommendations
17 to retail customers about securities, that is,
18 the rule does not cover recommendations of
19 certain insurance products, real estate future
20 or options.

21 Further, retirement plans do not
22 meet Reg BI's definition of a "retail

1 customer." So, it does not cover investment
2 recommendations to plan sponsors.

3 The National Association of
4 Insurance Commissioners regulation is also
5 inadequate. Unlike Reg BI which imposes an
6 explicit "best interest" standard on
7 broker-dealers, the NAIC model rule provides
8 that an insurance producer has met their "best
9 interest" obligation if they merely, quote,
10 have a reasonable basis to believe the
11 recommendation option effectively addresses the
12 consumer's financial situation, insurance need
13 and financial objectives. We consider the
14 standard to be meaningless.

15 Further, the model rule excludes
16 both cash and noncash compensation from its
17 definition of "material conflict of interest."

18 In other words, it does not require
19 investment professionals to mitigate their
20 compensation related conflicts when
21 recommending annuities.

22 In conclusion, our nation has a

1 well-documented retirement income crisis. We,
2 at the AFL-CIO, are under no illusions that a
3 comprehensive solution is near. The proposal
4 before us, while not comprehensive, is still
5 very important.

6 Whether we move forward to protect
7 retirement investors' hard-earned dollars
8 should not be a close question and we commend
9 the Department for initiating this rulemaking.
10 Thank you for the opportunity to come before
11 you today and I'm happy to answer any
12 questions.

13 MR. HAUSER: Thank you.

14 Ms. Neely?

15 MS. NEELY: Well, thank you and good
16 morning. Appreciate the opportunity to provide
17 this testimony.

18 I'm Susan Neely, CEO of the American
19 Council of Life Insurers, and we'll start with
20 a point of commonality.

21 Couldn't agree with Candace or, I
22 think, all the speakers and witnesses that you

1 will hear throughout this hearing that we
2 recognize there is a retirement savings gap in
3 this country and we want to make sure consumers
4 are supported with options and protections to
5 help our policy leaders close this gap and to
6 help consumers live with certainty in
7 retirement.

8 So, it's in the spirit of that
9 shared mission where we will then offer our
10 disagreement and express our grave concerns
11 about the imprudent nature of this proposal,
12 which is more expansive and harmful than
13 attempts in 2010 or 2016 to promulgate a
14 similar regulation. The proposal is predicated
15 on out-of-date data and a misfocused,
16 incomplete regulatory impact analysis. The
17 proposal ignores the robust regulatory system
18 implemented by the states and SEC and I'll go a
19 little deeper on that in light of the prior
20 comments. The proposal seems at odds with
21 action taken by Congress to close the
22 retirement savings gap, in part through

1 expanded access to annuities. And finally,
2 implementation of this proposal will leave
3 millions of retirees in an untenable financial
4 situation in their most fragile years. For
5 these reasons, the proposal should be
6 withdrawn.

7 So, let me go through some of the
8 facts and concerns and inaccuracies. The
9 proposal relies on stale data and an incomplete
10 cost-benefit analysis and curtails access to
11 lifetime income products.

12 The proposal's cost-benefit analysis
13 has fatal flaws and misses the mark. It cites
14 studies that disregard the purpose of
15 annuities.

16 The Department hasn't offered
17 empirical data that indicates there is systemic
18 harm to consumers or a need for this approach.

19 This attempt to regulate sales
20 speech is actually regulating consumer access
21 to financial products.

22 The proposal ignores the Fifth

1 Circuit's opinion regarding the DOL's
2 rulemaking authority as well as congressional
3 intent.

4 Most concernedly, the proposal does
5 not regard how the rule will impact savings for
6 low- and middle-income savers over the long
7 term.

8 The proposal ignores the robust
9 regulatory system implemented through
10 significant changes over the past five years.

11 The proposal focuses on conflicts of
12 interest, but it doesn't recognize that the
13 SEC's Regulation BI and the NAIC's "best
14 interest" model deal with the same conflicts
15 without limiting consumer access to guidance.

16 The SEC Regulation Best Interest
17 governs the recommendations of all those
18 selling securities, so that is part of the
19 solution, but the NAIC "best interest" standard
20 requires a financial professional to act in the
21 best interest of the consumer without placing
22 his or her financial interest ahead of the

1 consumer's interest, point 1, and the financial
2 professional must satisfy strong, substantive
3 obligations to meet the "best interest"
4 standard, but here's the key: Commissioners
5 have the authority to act.

6 They can investigate company and
7 agent practices. They can fine or penalize,
8 revoke licensures and refer for criminal
9 investigation. That is a very, again, robust
10 regulatory framework.

11 Simultaneously, state insurance
12 commissioners, state legislatures and governors
13 in 41 states, regardless of their political
14 affiliation, have adopted this "best interest"
15 standard. These measures were purposely
16 harmonized with the SEC's Regulation Best
17 Interest.

18 77.6 percent of U.S. consumers are
19 now covered by enhanced consumer protections
20 without losing access to retirement options.
21 By the end of the next year, we expect coverage
22 to be 100 percent.

1 So, together the NAIC "best
2 interest" model and SEC Regulation BI provide a
3 robust consumer protection for Americans
4 planning for retirement.

5 This proposal seems at odds with
6 action taken by Congress to close retirement
7 savings gaps, in part, through expanded access
8 to annuities.

9 Congress has provided extraordinary
10 bipartisan leadership to address these
11 challenges, which resulted in two pieces of
12 legislation being signed into law by both the
13 previous and current presidents, legislation
14 that included multiple provisions to expand
15 access to protected lifetime income.

16 The implementation of this proposal
17 will leave millions of retirees in the
18 untenable financial situation in their most
19 fragile years.

20 Annuities are unlike any other
21 financial product. They are a legally
22 enforceable promise made by an insurance

1 company to provide monthly income throughout a
2 worker's retirement. And unlike other
3 financial products, an annuity provides a
4 guaranteed income for life.

5 For many Americans whose only
6 savings is a 401(k) or IRA, they can turn those
7 savings into a pension without an annuity. It
8 provides a set-it-and-forget-it strategy that
9 needs no further management just like that of
10 Social Security.

11 Annuities and mutual funds differ.
12 With the mutual fund, the retiree assumes the
13 risk. With an annuity, the risk shifts to the
14 insurance company and it guarantees lifetime
15 income. It's insurance.

16 A retirement can last for 30 years
17 or more, but not just any 30 years. A very
18 vulnerable 30 years most of the time without
19 substantial opportunities to earn a living.
20 And in that period, there are all kinds of
21 shocks like financial crises and health crises.

22 An annuity is designed for a retiree

1 to weather those shocks. When you're 80 years
2 old, you don't want to have to make choices
3 between health and finances. We all understand
4 that. And an annuity makes those years
5 consistent and protected.

6 With an option for protected
7 lifetime income and a strong regulatory
8 framework of consumer protections in place, it
9 is no surprise that annuities are a product
10 sought and used by middle-income Americans.

11 The median household income among
12 annuity holders is \$76,000. The median
13 household income in the U.S. is \$63,000.
14 Annuities provide protection, security and
15 peace of mind.

16 So, here are the consequences people
17 will face because of this rule. Retirement
18 savers will suffer.

19 In 2024, the largest number of
20 Americans in history will turn 65 and most
21 Americans turning 65 do not have traditional
22 pensions, as has already been noted.

1 They are self-funding their
2 retirement through 401(k)s and other employer
3 plans. Social Security provides a safety net,
4 but for many it's not enough to live
5 comfortably in retirement.

6 Again, Congress understood this,
7 which is why they made annuities more available
8 through SECURE 1 and SECURE 2. Annuities are a
9 set-and-forget strategy.

10 Communities of color will suffer.
11 The financial savings gap is especially
12 persistent among black and Hispanic Americans.

13 One of the consequences of the
14 racial wealth gap is that it also leads to a
15 savings gap. The median retirement savings for
16 black and Hispanic households is less than
17 \$39,000.

18 Nearly 2/3rds of Hispanic families
19 and more than half of black families don't have
20 any form of retirement savings account.

21 Given that fiduciary-only advisors
22 often require account holders to make initial

1 investments upwards of \$100,000, it would
2 exclude the vast majority of black and Hispanic
3 Americans from accessing the help they need to
4 even begin to consider retirement savings
5 products.

6 This proposal would increase the
7 wealth gap by reducing projected IRA balances
8 of black and Hispanic Americans by 20 percent
9 over ten years. It builds a barrier to
10 financial inclusion.

11 Middle-income earners will suffer.
12 If the 2016 fiduciary regulation remained in
13 place, it would have reduced the projected
14 accumulative retirement savings of 2.7 million
15 individuals, American workers with incomes
16 below \$100,000. By how much? \$140 billion over
17 ten years. Thankfully, for these retirement
18 savers, the proposals were struck down.

19 So, I will close with how I started.
20 The proposal is based on flawed data. It
21 ignores the robust regulatory system that's in
22 place, it seems at odds with the intent of a

1 bipartisan Congress, and the rule packet
2 undervalues the essential role annuities play
3 in providing certainty for middle-income
4 retirees.

5 It turns a blind eye to the very
6 real challenges retirees face and will create a
7 scenario in which there are winners and losers
8 in retirement.

9 It is out of synch with the
10 collective bipartisan mission to close
11 retirement savings gaps for middle-income
12 savers. This is about the real lives of people
13 with real consequences and real impact.

14 Our ask is clear. Remove this
15 proposal in its entirety and focus instead on
16 increasing access and certainty for American
17 workers saving for retirement. Thank you for
18 the opportunity to share these thoughts.

19 MR. HAUPTMAN: Good morning. I am
20 Micah Hauptman, Director of Investor Protection
21 at the Consumer Federation of America.

22 Thank you for the opportunity to

1 testify today in strong support of the
2 Department's retirement security proposal.

3 I want to devote my time to first
4 making the case for why this proposal is
5 necessary for the protection of retirement
6 investors, and, second, rebutting the meritless
7 and cynical claims by the industry opponents.

8 As we all know, retirement investing
9 can be complicated and many retirement
10 investors turn to financial professionals for
11 advice.

12 Retirement investors reasonably
13 expect and believe the financial experts they
14 turn to will act in their best interest and
15 retirement investors trust and rely on the
16 advice that they receive.

17 Retirement investors' beliefs and
18 expectations about the relationships they are
19 in and the services that they receive isn't
20 misplaced.

21 It's because everything financial
22 professionals and their firms do is designed to

1 send the message that they are in relationships
2 of trust and confidence with investors and they
3 provide advice in investors' best interest that
4 should be relied upon.

5 From the titles they use to how they
6 describe their services and relationships and,
7 most importantly, how they function, any
8 reasonable person would view these as trusted
9 advice relationships.

10 To provide some examples, I've
11 pulled some previous comments and public-facing
12 materials by the trade associations represented
13 on this panel.

14 For example, ACLI has repeatedly
15 highlighted the, quote, benefits of using a
16 financial advisor, end quote.

17 Stated that, quote, families turn to
18 life insurance companies and trusted agents and
19 advisors to protect their financial futures,
20 end quote, refer to the need to preserve,
21 quote, advice about annuity purchases, end
22 quote, and compare the value of, quote,

1 commission-based advice to fee-based advice,
2 end quote, suggesting that the critical
3 difference between the two is the method of
4 payment for the advice, not that they are
5 different services and relationships
6 altogether.

7 Similarly, FSI has stated that it,
8 quote, advocates on behalf of independent
9 financial advisors so that they can provide
10 affordable, objective financial advice to
11 hard-working, Main Street Americans, end quote.

12 FSI has further stated that, quote,
13 now, more than ever, individual investors need
14 to have confidence in the reliability of the
15 investment advice they receive, end quote.

16 So, who are the professionals these
17 groups purport to represent? Advisors. What
18 do these advisors do? Provide advice.

19 What should consumers think of these
20 advisors? They should have trust and
21 confidence in them.

22 You know what retirement investors

1 don't want or expect? To be steered to
2 overpriced, suboptimal products or services
3 that aren't in their best interest by people
4 who seek to evade their regulatory obligations
5 and accountability all so they can get a big
6 payday.

7 Unfortunately, that's what the 1975
8 five-part test defining "fiduciary investment
9 advice" allows.

10 It allows investment professionals
11 to function as advice providers, to occupy
12 positions of trust and confidence with
13 retirement investors, and to foster reliance on
14 the advice that they provide while evading the
15 fiduciary duty appropriate to their advisory
16 role.

17 The five-part test is inconsistent
18 with the text of ERISA and it defeats
19 investors' reasonable expectations about the
20 relationships they are in and the services that
21 they are receiving.

22 The proposed redefinition of

1 "fiduciary investment advice," on the other
2 hand, is faithful to the statute and it would
3 honor retirement investors' reasonable
4 expectations when receiving advice from
5 financial professionals who hold themselves out
6 and function as trusted advice providers.

7 It would appropriately cover
8 rollover recommendations, plan advice, advice
9 about insurance and other nonsecurities.

10 Insuring regardless of the type of investment
11 professional a retirement investor works with
12 or the type of product the professional
13 recommends, their advice would be subject to a
14 strong "best interest" framework that ensures
15 conflicts of interest don't taint their advice.

16 Turning to rebutting industry
17 opponent's meritless and cynical claims, let's
18 first consider their most cynical claim that
19 small savers would lose access to advice under
20 the proposal.

21 This is little more than a scare
22 tactic based on their 2016 rule assumptions

1 which are not applicable to the current
2 proposal.

3 First, the proposal broadly aligns
4 with the SEC's Regulation Best Interest and
5 there is no evidence that that rule has reduced
6 small savers' access to investment
7 recommendations.

8 We expect the DOL rule to operate
9 similarly providing comparable protections to
10 retirement plans and participants and to IRA
11 investors.

12 Second, many financial professionals
13 already support and successfully operate under
14 a strong fiduciary standard while serving
15 clients of all means.

16 If some firms were to decide to pull
17 out of the market, others would step in to
18 provide high-quality products and services
19 without harmful conflicts.

20 The reality is small savers have the
21 most to gain from the DOL Proposed Rule. They
22 can least afford to lose any of their

1 retirement savings to bad advice, yet they are
2 particularly vulnerable to the detrimental
3 effects of conflicted advice.

4 I'll also remind the Department that
5 those claiming small savers would lose access
6 to advice argued in court that they don't
7 provide advice. They provide arm's-length
8 sales pitches like car dealers.

9 While I strongly disagree with that
10 assertion, they can't be allowed to continue to
11 make mutually inconsistent arguments to
12 different audiences based on whatever is most
13 advantageous to them at the time.

14 Now, let's consider another argument
15 that they make that the Department has
16 disregarded protections by other regulators.

17 The reality is that neither the SEC
18 nor the NAIC have fully addressed the problem
19 of conflicted retirement advice.

20 The SEC's Reg BI is limited to
21 recommendations to retail customers about
22 securities. So, it doesn't apply to

1 recommendations about nonsecurities or
2 recommendations to retirement plans, as Candace
3 said, and the NAIC model rule for annuity
4 transactions is a "best interest in name only"
5 standard.

6 Under the model, a producer has been
7 deemed to have met the, quote, "best interest"
8 standard if they satisfy four component
9 obligations, none of which includes an explicit
10 requirement to act in the consumer's best
11 interest.

12 The key standard that they have to
13 meet, as Candace stated, having a reasonable
14 basis to believe the recommended option
15 effectively addresses the consumer's financial
16 situation, insurance needs and financial
17 objectives, is largely a restatement of the
18 previous suitability rule.

19 In addition, the model defines
20 material conflict of interest to exclude both
21 cash and noncash compensation.

22 As a result, it does not require

1 producers recommending annuities to mitigate
2 their compensation-related conflicts.

3 In short, the only interest the NAIC
4 model rule serves is the insurance industries,
5 which helps to explain the strong endorsement
6 by ACLI.

7 The reality is this proposal largely
8 extends the Reg BI framework where Reg BI
9 doesn't apply providing uniformity across the
10 regulatory regimes.

11 When the industry trade associations
12 supported Reg BI and urged consistency across
13 regulatory frameworks which they claimed would,
14 quote, best serve consumers and avoid harmful
15 regulatory arbitrage, end quote, perhaps it was
16 just rhetoric.

17 Their shifting arguments suggest
18 that what they really want is a patchwork of
19 different standards which allow them
20 opportunities to continue their very
21 profitable, but harmful, conflict-ridden
22 practices.

1 In sum, the DOL proposal is
2 appropriately tailored to ensure that ERISA's
3 fiduciary standards uniformly apply to all
4 situations where retirement investors can, and
5 should, place their trust and confidence in
6 investment advice providers and the industry
7 opponent's self-serving arguments should not
8 divert the Department from completing this
9 important investor protection project. Thank
10 you.

11 MR. KHAWAR: I'm struggling with the
12 mute button, but, Mr. Smith, I believe you're
13 next.

14 (Pause.)

15 MR. KHAWAR: Have we lost Mark? I
16 know I saw him earlier.

17 (Pause.)

18 MR. KHAWAR: Maybe should we go to
19 Q&A while we're waiting for him to rejoin just
20 to take advantage of the time we have?

21 So, maybe I'll start with a question
22 for Ms. Neely. I appreciated your testimony.

1 One of the points you made is that between the
2 efforts of the SEC with Reg BI and the NAIC
3 model rule, which ideally testimony will be
4 adopted in all jurisdictions by the end of next
5 year that the waterfront has kind of covered,
6 one of the points that the Department made in
7 the preamble is that in the context of Reg BI
8 advice to plan fiduciaries isn't covered.

9 First, I want to ask about that. Is
10 that, in your view, a limitation of the current
11 regulatory framework? And if not, why not?

12 MS. NEELY: Well, I think contrary
13 to what was presented or what the last speaker
14 said, the NAIC model explicitly requires "best
15 interest" recommendations, not suitability.

16 It is a "best interest" standard.
17 Certainly it's not -- ACLI asserting that it's
18 -- I think all insurance commissioners would
19 interpret it that way along with the governors
20 and state legislatures in 41 states that have
21 adopted the "best interest" standard. So, it's
22 a --

1 MR. KHAWAR: I appreciate that,
2 ma'am. I'm sorry to interrupt.

3 (Simultaneous speaking.)

4 MR. KHAWAR: I was asking about Reg
5 BI, which you referred to in your remarks. So,
6 Reg BI doesn't apply to advice to plan
7 fiduciaries.

8 Do you view that as a limitation or
9 do you think the current regulatory framework
10 is sufficient for plan fiduciaries when it
11 comes to Reg BI?

12 MS. NEELY: So, we would say that the
13 combination of Reg BI and the NAIC "best
14 interest" model as adopted in 41, on its way to
15 all, states is a robust regulatory system and
16 we can consider what else we might offer in our
17 comments to reinforce that.

18 MR. KHAWAR: Okay. I appreciate
19 that. And one more question. So, neither Reg
20 BI nor the NAIC model rule, I think, no matter
21 your perspective on the strength or weakness of
22 any of the regulatory approaches, there are

1 certain products that aren't within the remit
2 of either of those.

3 I'm thinking, for example, about a
4 plan investment in real estate, not a REIT, but
5 a direct purchase of real estate or certain
6 other kinds of commodities.

7 Those wouldn't fall under the
8 jurisdiction of the SEC or the insurance
9 commissioners.

10 What is your sense of the
11 protections that are in place for plans and
12 plan participants at this moment in time when
13 it comes to those kinds of assets?

14 MS. NEELY: Well, I will allow those
15 who represent those products to speak to that.
16 We are focused on insurance products.

17 We're focused on the value of
18 annuities and we think the robust regulatory
19 system in place between Reg BI and the states
20 is -- references are made to 1975 or 2016.
21 These are significantly increased protections
22 that are in place since in the last five years.

1 MR. KHAWAR: Okay. And maybe one
2 last question then. So, to the extent there
3 are no protections in place for those products,
4 would you be supportive of the Department
5 taking that action only in those segments of
6 the market?

7 MS. NEELY: Well, we'll speak to
8 insurance products and the appropriate
9 regulators need to address those other
10 products.

11 But from a standpoint of insurance
12 products and the impact this would have, the
13 harmful impact this would have on retirement
14 savings, we believe the reg should be withdrawn
15 -- or the proposal should be withdrawn.

16 MR. KHAWAR: Okay. Thank you.

17 MS. HANSEN: I would like to follow
18 up just on one thing you said there, Ms. Neely.
19 You made a comment that 41 states had adopted
20 the NAIC model rule, but you also said, "on its
21 way to all states."

22 What is the basis, so that I

1 understand where that comment -- what's the
2 basis for saying that all states are adopting
3 that rule?

4 MS. NEELY: We are well aware
5 there's activity in nine other states, and the
6 states promulgate insurance regulation through
7 different means. Some through the state
8 legislative process, some through the insurance
9 commissioner, through the executive process
10 have the ability to promulgate a reg.

11 And it's our understanding that in
12 nine other states they are on their way to
13 adopting this. So, we anticipate we'll be at
14 100 percent sometime in 2024.

15 Where we are now at 41 states has us
16 at, what, 77.6 percent of the U.S. population
17 covered by the "best interest" standard at this
18 point.

19 MR. HAUSER: Thank you. First off,
20 can --

21 (Audio interference.)

22 MS. LLOYD: Following up with Micah

1 Hauptman, there's some talk of the idea of a
2 seller's exception or an exception for
3 sophisticated advice recipients, and I was
4 wondering what your reaction is to that
5 suggestion.

6 MR. HAUPTMAN: We would oppose a --
7 any carve-out and we don't think that it's
8 necessary given how the proposal is drafted.

9 I think you're specifically asking
10 about the second prong of the investment advice
11 definition and -- sorry, I just wanted to pull
12 it up -- we think that it is, you know, it's
13 based on the, you know, what's in the best
14 interest of the investor. It's based on the
15 investor's needs and circumstances. And so,
16 the circumstances ensure that it's advice that
17 can and should be relied upon.

18 If it's outside of that context,
19 then a sophisticated party is not going to meet
20 that definition.

21 MS. LLOYD: You said that you would
22 not be in favor of any specific carve-outs,

1 just sort of a straight application of the test
2 based on the circumstances then?

3 MR. HAUPTMAN: Correct.

4 MS. LLOYD: Thank you.

5 MR. KHAWAR: Sorry, could I follow
6 up on that point?

7 So, Mr. Hauptman, if instead of
8 making changes to the operative text to include
9 a specific carve-out, the Department, for
10 example, included illustrative examples in the
11 preamble or in the operative text, not creating
12 an explicit carve-out, but showing how this
13 kind of contextual test would be applied in
14 certain different settings and illustrated the
15 point that you were making that, in the context
16 of a sophisticated investor or that kind of
17 relationship, that it wouldn't be treated as a
18 fiduciary relationship under this test, would
19 that also give you pause?

20 MR. HAUPTMAN: No. I think that
21 providing guidance on what circumstances would
22 meet the definition would be helpful to market

1 participants and it would provide further
2 clarity, which I think could be helpful. And I
3 see that as different than a seller's carve-out
4 or a sophisticated party's carve-out.

5 MR. KHAWAR: Thank you.

6 MS. ZIMMERMAN: Ms. Neely, you had
7 mentioned in your comments that RIA was relying
8 on some stale data.

9 I just wanted to know if there was
10 any specific data you would want to direct the
11 Department to.

12 MS. NEELY: Yes. Happy to expand
13 upon that in some detail in our comment letter.

14 MS. ZIMMERMAN: Thank you.

15 MS. LLOYD: You talked about the
16 proposal creating sort of barriers to advice
17 and I'm just wondering if you could -- is there
18 anything short of just withdraw of the proposal
19 that you would support? Are there any changes
20 that you think could address the concerns that
21 you have?

22 MS. NEELY: No. We do think the

1 proposal needs to be withdrawn. We can be much
2 more expansive in our comment letter with going
3 deeper on some of the points that we made in
4 the executive summary of the testimony.

5 MS. HANSEN: I have a followup,
6 Micah, to something you were mentioning. You
7 read a few quotations that you had pulled from
8 various public sources and I was curious if you
9 had any information as to whether retirement
10 investors, when they are making decisions with
11 regard to their retirement accounts, to what
12 extent they are looking at those sources of
13 information, to what extent retirement
14 investors are considering those sources that
15 you pulled from -- the extent to which that's
16 considered by individuals making retirement
17 investment decisions for their own accounts.

18 MR. HAUPTMAN: Well, the sources
19 that I pulled from were primarily the 2015
20 comments in response to the 2015 proposal, as
21 well as some things that they had sent to the
22 Hill, and also their comments in response to

1 Reg BI. So, they're primarily regulatory and
2 Hill-focused.

3 However, all of the marketing, all
4 their marketing to consumers in advertisements,
5 in TV, in how, you know, they present their
6 services and offerings and the relationships
7 directly to investors is designed to send the
8 message that these are relationships of trust
9 and confidence and these are investment advice
10 relationships.

11 And so, it's reasonable to expect
12 that you're going to get advice, not a sales
13 pitch.

14 MS. HANSEN: Thank you.

15 MR. HAUSER: So, I have one
16 question, which is can anybody --

17 (Audio interference.)

18 MR. KHAWAR: I don't think we heard
19 your question, Tim.

20 (Pause.)

21 MR. KHAWAR: While Tim's working on
22 his technical difficulties, maybe one more

1 question for Mr. Hauptman.

2 You described a pretty distinct
3 difference, in your view, between the NAIC
4 model rules adopted, as Ms. Neely pointed out
5 for 40 states, and the Reg BI standard.

6 To what extent, you know, just
7 following up on the question that Ms. Hansen
8 just asked you, to what extent do you believe
9 that those differences are understood by
10 consumers?

11 It looks like we have Mr. Smith
12 back. So, after this, we'll maybe do his
13 testimony and then go back to Q&A.

14 MR. HAUPTMAN: The short answer is
15 they're not understood by consumers. People
16 hear the term "best interest" and they think
17 that the financial professional and firm are
18 going to do what's best for them and provide
19 them the most optimal set of products and
20 services and account types that are the best
21 match for them, but that's just not the case
22 with the NAIC model rule.

1 So, unlike Reg BI, which includes an
2 explicit "best interest" standard, the NAIC
3 model does not.

4 As I said, it's met by satisfying
5 four component obligations which don't have --
6 none of them have a "best interest" obligation.

7 And unlike Reg BI, which defines
8 material conflict of interest broadly to cover
9 all forms of compensation, the NAIC model rule
10 excludes cash and noncash compensation.

11 And, I mean, unless you have spent
12 hours and hours poring over the difference
13 between Reg BI's language and the NAIC model
14 rule's language, which I assume very, very few
15 people have done besides the people who are
16 probably testifying and the Department of
17 Labor, then you're not going to know those
18 differences and they're critical.

19 MR. KHAWAR: I will maybe note as
20 prior personal privilege, I am disappointed
21 that retirement security policy is not of
22 greater interest to the broad general public.

1 But although we have additional
2 questions for these panelists, Mr. Smith,
3 welcome back. I'm glad you were able to
4 overcome your technical difficulties. If you
5 don't mind, we will take your testimony now and
6 then go back to Q&A.

7 MR. SMITH: Thank you, Ali. My
8 apologies. Webex apparently decided as well
9 that I am cynical and lack any merit. So, I'm
10 glad to be back in now.

11 I'm Mark Smith of Eversheds
12 Sutherland testifying for the Financial
13 Services Institute on behalf of the honest,
14 hardworking, middle-class Americans who grew up
15 listening to their parents struggle with money
16 matters around the kitchen table and resolved
17 to dedicate their careers to helping other
18 middle-class Americans do better.

19 FSI represents those middle-class
20 Americans who became financial professionals
21 and found their way to the Main Street firms
22 that comprise the independent financial

1 services industry and who every day give their
2 best to help their neighbors with financial
3 planning for a home, or college for their kids,
4 or for a dignified retirement and to invest
5 wisely in support of those plans.

6 Our financial professionals do not
7 pass through one-size-fits-all investment
8 recommendations that come down from on high.
9 Instead, they apply their training and
10 experience and professional judgment and
11 identification with their clients from living
12 and working in the same community, from running
13 into folks at the grocery store and soccer
14 field to find the best resolution that best
15 serves the client's individual goals and needs.

16 Our financial professionals have the
17 expertise and commitment to provide that kind
18 of value every day to other middle-class
19 Americans and on Halloween our financial
20 professionals heard the compensation they
21 fairly earn for that valuable service derided
22 as junk fees for the sake of a lazy sound bite

1 that lasted one news cycle.

2 Our financial professionals are now
3 asking us, wait, aren't I already required to
4 provide my broker-dealer clients with
5 recommendations that are in their best
6 interest?

7 And as a registered investment
8 advisor, aren't I already required to act as a
9 fiduciary? And, by the way, as a certified
10 financial planner, aren't I also required to
11 ask, as a fiduciary, when I provide financial
12 planning advice?

13 And isn't it inevitably the case
14 that adding another layer of unique compliance
15 obligations on top of these existing fiduciary
16 and "best interest" obligations will only serve
17 to drive up costs, add complexity, and result
18 in fewer Americans being able to afford
19 much-needed investment services for retirement?
20 And we don't have a good response to those
21 questions.

22 We don't doubt the sincerity of the

1 Department's institutional conviction that
2 broad ERISA "best interest" regulation is
3 essential to protect retirement investors, but,
4 in our industry, the SEC already addressed the
5 consumer protection "best interest" concern
6 2-1/2 years ago at the specific behest of
7 Congress.

8 The SEC, FINRA, the states, are
9 being more than diligent in demanding and
10 enforcing that "best interest" means "best
11 interest," to use the SEC Chair's words,
12 including for IRA rollover recommendations.

13 Just last week FINRA issued a new
14 release taking expansive positions on
15 Regulation Best Interest.

16 In contrast, as was the case in
17 2015, the gravamen of the Department's proposal
18 is that in 1974 the Congress and the Federal
19 Pension Law, of all places, appointed the Labor
20 Department, of all agencies, to be the
21 universal and ultimate standard of conduct
22 regulator for investment insurance

1 professionals across the financial services
2 industries; however, they are primarily
3 regulated, an appointment made so quietly by
4 Congress was only recently discovered. And I
5 have to say those dots still don't connect and
6 that dog still won't hunt.

7 FSI's comp letter will have some
8 things to say about particulars about the
9 proposal, but I can offer some global
10 observations today.

11 I can tell you that FSI continues to
12 support a "best interest" standard of care, we
13 supported the SEC's adoption of Reg BI in 2019
14 and the Department's issuance of PTE 2020-02
15 three years ago.

16 As in 2015, FSI's differences with
17 the Department will be in the scope and details
18 of its proposal.

19 And I can tell you, and this will
20 not come as a surprise, that we have parsed the
21 regulatory impacts analysis and find that the
22 Department is proceeding without any evidence

1 of the incidents in 2023 of adverse outcomes to
2 retirement investors due to conflict the
3 interests on the part of investment
4 intermediaries.

5 The preamble says as much. There is
6 no empirical basis for the heavy regulation and
7 liability Department is proposing.

8 It will also come as no surprise
9 that we were unpersuaded by the Department's
10 creative effort to reconcile the proposal with
11 the statute or with the Fifth Circuit's opinion
12 on the meaning of Section 3(21), and that we
13 find the proposal, again, makes new law on the
14 crucial issue of who is an ERISA fiduciary.

15 And respect to the additional
16 conditions the proposal would add to PTE
17 2020-02, we find it unreasonable for the
18 Department to order our members to rebuild
19 their compliance systems just 18 months after
20 the exemption took full effect.

21 In general, we find the new
22 conditions increase compliance cost and legal

1 exposure for our members without any practical
2 return for the quality of decisions made by
3 retirement investors and certainly no return
4 commensurate with those burdens.

5 Perhaps a practical demonstration
6 will help. Let's assume the case -- hold on
7 for just a second here.

8 Let's assume the case of a
9 retirement investor who's decided to roll out
10 to an IRA -- technical problems abound here --
11 and establishing a new broker-dealer
12 relationship with one of our financial
13 professionals.

14 Now, let's consider the
15 documentation that transaction requires. The
16 exemplars I'm going to show you today are all
17 documents in the public domain pulled off the
18 internet from companies with nationally
19 recognizable names.

20 An IRA typically consists of two
21 operative legal documents; the IRF Form 5305,
22 which still manages to squeeze the applicable

1 tax rules onto two pages.

2 The IRA custodian, then, is allowed
3 to add administrative and other provisions as
4 appropriate. This particular example runs
5 about nine pages, which is typical.

6 It's normal these days to also have
7 an account application that goes along with
8 that. This application is 12 pages long and
9 that's also pretty normal in the industry
10 today.

11 After the operative -- in addition
12 to the operative documents, the investor gets a
13 series of disclosures about the account and the
14 firm.

15 The IRS is always required a
16 disclosure about the applicable tax rules for
17 IRAs. This one runs an economical six pages.
18 They're usually more like eight or ten pages.

19 The IRS requires also a financial
20 projection. I'm throwing in, but one page as a
21 proxy for that.

22 Then the investor gets disclosures

1 about the conflicts of the firm in several
2 forms. First, the firm's SEC Form CRS -- and
3 this is a different firm now from the custodian
4 I started with -- the Form CRS, four pages
5 long; the PTE 2020-02 fiduciary acknowledgment,
6 two pages long.

7 And this particular firm then
8 supplements those two required disclosures with
9 an additional disclosure about its business
10 practices and conflicts management, 20 pages
11 long.

12 And of course you can go to FINRA's
13 website and pull a broker check report on the
14 firm. For this particular firm it's five pages
15 long -- or, I'm sorry, 20 pages long.

16 And then the IRA rollover
17 disclosure. This particular sample comes from
18 a vendor who provides a system for financial
19 institutions to use to develop that report.
20 Its output is usually four pages.

21 So, we have -- to get the account
22 open and disclosed, we have a stack of about 80

1 pages of documents here. And that's not
2 inclusive of things like potential transfer
3 paperwork or receipt for prospectus delivery or
4 other miscellaneous documents.

5 Speaking of prospectus delivery now
6 that we have the account open, we need to get
7 it invested. And let's assume, for simplicity,
8 that the IRA is going to be wholly invested in
9 one of the leading balance funds used in
10 retirement savings arrangements.

11 So, for that fund, we have the
12 summary prospectus, eight pages long; the
13 statutory prospectus, 71 pages long; the most
14 recent annual or semiannual report, 80 pages
15 long; and then, God help me, the statement of
16 additional information which weighs in at 185
17 pages and that's not -- there's nothing unusual
18 about that.

19 The SAI is what you end up with when
20 you require disclosure of every single item
21 that might be of benefit to the retirement
22 investor.

1 So, at this point --

2 MS. WILKER: Mr. Smith?

3 MR. SMITH: Yes.

4 MS. WILKER: Just want to let you
5 know it's been ten minutes. So, if you could
6 wrap up your --

7 MR. SMITH: I need about two
8 minutes. Thank you very much -- a stack of
9 about 485 pages here as it stands today.

10 Now, let's look at what the proposal
11 would add. And for these documents -- or has
12 under consideration. And for these documents
13 I'm using proxies.

14 The disclosure of rollover
15 assumptions, I got six pages for that. The
16 proxy -- the financial institution's policies
17 and procedure summary, I'm allowing an
18 optimistic ten pages for that.

19 Let me skip over all the other
20 documents that are available on request and go
21 to the big-ticket item, which is the public
22 website disclosure that you all have under

1 consideration.

2 When our larger members spec'd out
3 that comparable disclosure under the BIC
4 Exemption in 2016, they projected it would run
5 hundreds of pages of disclosure law.

6 My proxy today has about 200 pages
7 in it, but call it 100, call it 300, call it
8 whatever you want. This disclosure plainly
9 gets into the territory of SAI overdisclosure.

10 So, after the proposal to get a
11 rollover IRA open and disclosed, we're looking
12 at 15 or more separate documents totaling in
13 excess of 500 pages. I mean, this stack here
14 is actually 650.

15 And we're doing that -- hold on.
16 Let me catch up with my notes again.

17 MS. WILKER: Mr. Smith, I'll let you
18 know it's getting over two minutes.

19 MR. SMITH: Let me --

20 MS. WILKER: So, please wrap --

21 MR. SMITH: I'm sorry.

22 MS. WILKER: -- up quickly.

1 MR. SMITH: I will. Now, let me
2 benchmark that against the stack of real estate
3 closing documents for the house I bought in
4 2016.

5 What are we accomplishing here? To
6 avoid duplicate remedies for a very limited
7 number of bad actors with the professional
8 community, we're engaging in regulatory
9 overkill that is massively beyond any practical
10 utility of retirement investors driving up
11 costs and complexity, driving firms to limit
12 their services for retirement investors,
13 reducing much-needed access to retirement
14 investment services for middle-class Americans.

15 For all these reasons, we are
16 compelled to respectfully --

17 MR. KHAWAR: We need to --

18 (Simultaneous speaking.)

19 MR. SMITH: Thank you for the
20 opportunity here today and for your
21 consideration.

22 MR. KHAWAR: It's over your time,

1 sir.

2 So, a couple of questions for you
3 form me and others have a few questions as
4 well. So, maybe one thing that I'd like to get
5 your perspective on is you described the
6 regulatory landscape and parts of it you were
7 relatively complimentary of, others you were
8 more concerned about.

9 One of the things you highlighted is
10 that 2020-02 is part of the existing regulatory
11 landscape -- sorry, let me see if I can adjust
12 -- maybe someone else wants to ask a question
13 while I'm -- I just got a comment in the chat
14 that my audio needs some --

15 MR. HAUSER: I'd like to ask a
16 question if I can be heard. Can you hear me?
17 Okay. This is a first for the last hour.

18 So, I mean, Mr. Smith, this rule, at
19 least the way I see it, and this whole
20 regulatory package, it's not fundamentally a
21 disclosure package.

22 And I appreciate the props, you

1 know, some of which included documents that
2 were mandated by other regulators, but, at
3 bottom, this rule requires that if an
4 investment professional holds themselves out as
5 somebody who is providing individualized advice
6 that's in the customer's best interest, that
7 they can rely upon to get their best interest,
8 that they be prudent, they be loyal, that they
9 not overcharge them, that they not make
10 material misstatements. That's at bottom what
11 this rule is.

12 And my question is just, do you
13 believe any of those duties are inconsistent
14 with what, you know, financial professionals
15 who are making recommendations of annuity
16 products are doing right now?

17 Do you believe any of those
18 obligations are kind of incompatible with
19 providing advice or, you know, result in this
20 untoward consequences that you're concerned
21 about and why?

22 MR. SMITH: Thank you, Mr. Hauser.

1 Let me repeat FSI supported the adoption of
2 Regulation BI. We supported the issuance of
3 PTE 2020-02.

4 Our disagreements with the
5 Department primarily are with respect to the --
6 its authority to make new law in the definition
7 of who is a fiduciary and with respect to
8 particulars of the current proposal as seen to
9 us to be counterproductive to advancing the
10 interest of retirement investors within -- with
11 respect to the duplication and the complexity
12 and cost they add.

13 With respect to my props, and thank
14 you for admiring them, I much appreciate that,
15 the Department and ERISA do not operate in a
16 vacuum here.

17 You know, I have disclosure
18 documents from -- required by three different
19 agencies here. Our members do not operate in
20 an ERISA vacuum. Retirement investors don't
21 make choices and aren't protected in an ERISA
22 bubble.

1 I mean, your regulation is part of a
2 national system of regulation and we point out
3 only that it has consistency, of how you fit
4 into that overall pattern of regulation as
5 consequences here not only for the industry,
6 but also for retirement investors, and that
7 it's important that we all be mindful of that
8 as we think about how we're proceeding here.

9 MR. KHAWAR: I'll try again.

10 MR. SMITH: Yes.

11 MR. KHAWAR: Mr. Smith, do you
12 believe 84-24 needs to be amended?

13 MR. SMITH: That -- we've been
14 working with the proposal for, what, 6-1/2
15 weeks now? That's at a level of detail I'm not
16 prepared to respond to upon today.

17 We will take that up in our comment
18 letter, but that's not something I'm ready to
19 talk about today.

20 MR. KHAWAR: Okay. Ms. Neely, I have
21 the same question for you.

22 Do you believe that any changes are

1 needed to 84-24?

2 MR. SMITH: No changes needed -- oh,
3 I'm sorry, Susan.

4 MS. NEELY: It's all right. I'm
5 putting my video back on here.

6 You know, we -- for all the reasons
7 I outlined, it's based on flawed, inaccurate
8 data. It ignores the robust regulatory system
9 that has been put in place in the last, just,
10 two or three years. Not 2016, not 1975, but
11 just in the last two or three years.

12 And it will -- it's at odds with the
13 intent of Congress as it relates to making
14 annuities more accessible to more people, and
15 it is a -- we think will be contrary to the
16 interest of consumers.

17 For all those reasons we think the
18 proposal should be withdrawn.

19 MR. KHAWAR: Okay. Mr. Hauptman, THE
20 same question. Do you believe 84-24 needs to
21 be amended?

22 MR. HAUPTMAN: I think it does. It

1 -- and the way that the Department has proposed
2 to do it makes a lot of sense.

3 Given the fact that independent
4 insurance agents who may be recommending
5 products from different insurance companies
6 don't have one insurance company who is
7 ultimately supervising all their activities and
8 ensuring that conflicts are appropriately
9 mitigated and not -- and, therefore, not
10 willing to serve as co-fiduciary, I think that
11 it's a pretty elegant solution to ensuring that
12 independent agents are able to continue to
13 provide advice about nonsecurity annuities
14 while still ensuring appropriate consumer
15 protections.

16 MR. KHAWAR: Okay. And just in the
17 interest of time, I'm going to try and limit
18 myself to just one more question, Mr. Smith.

19 One of the examples you highlighted
20 is for a CFP certificate, that there are
21 significant new obligations that they would
22 undertake because of this proposal.

1 Can you expand on that a little and
2 describe where you see some of the differences
3 between the CFP standard and in our proposal?

4 MR. SMITH: We still have that issue
5 under study. Clearly there are differences
6 between your proposal and Regulation BI in
7 terms of disclosures and processes and so
8 forth.

9 We suspect that your proposal is
10 more restrictive than Reg BI in certain
11 respects and we offer -- we're considering
12 whether there are potential conflicts there,
13 but all of that we still have under study and
14 we're not ready to talk about yet.

15 MR. KHAWAR: I appreciate that.
16 Thank you all.

17 MR. HAUSER: Are there any more
18 questions for this panel?

19 (Pause.)

20 MR. HAUSER: If not, I think we're
21 scheduled for a break until 11:45 and then we
22 start up again; is that right?

1 MS. GOMEZ: Yes.

2 MR. HAUSER: All right. So, at
3 11:45 if Panel 3 could be back, which includes
4 Stephen Hall, representatives of NAIFA and the
5 U.S. Chamber of Commerce's representative.
6 Thank you.

7 (Whereupon, the above-entitled
8 matter went off the record at 11:37 a.m. and
9 resumed at 11:46 a.m.)

10 MR. HAUSER: Okay. I think we're
11 ready to get started. Excuse my new space
12 gear. I'm trying to deal with my myriad of
13 tech issues this morning.

14 So, first up on this panel I think
15 we have Stephen Hall from Better Markets.

16 MR. HALL: Thank you, Tim. Can
17 everybody hear me? I'll take that as a yes.
18 Good morning, everyone. My name is Stephen
19 Hall and I'm the Legal Director and Securities
20 Specialist for Better Markets.

21 Better Markets is an independent
22 nonprofit organization that advocates for

1 reforms that make our financial markets more
2 stable and more equitable for all Americans
3 seeking to build a better financial future. We
4 appreciate the opportunity to testify at this
5 important hearing.

6 We strongly support the DOL
7 collection of proposed rules and we commend the
8 DOL for taking action to better protect
9 retirement savers.

10 We offer three main points in our
11 testimony this morning. First, advisor
12 conflicts of interest continue to take a huge
13 toll on the financial resources and the quality
14 of life that millions of American workers can
15 sustain in retirement. The damage is on the
16 order of tens of billions of dollars a year.

17 Second, the DOL proposals, and, in
18 particular, the updated definition of an
19 "investment advice fiduciary," are absolutely
20 necessary to mitigate the harmful impact of
21 conflicted investment advice.

22 The current definition is nearly 50

1 years old and yet it still contains huge
2 loopholes that allow advisors to avoid their
3 fiduciary duties and to place their own
4 interest ahead of their client's best interest.
5 The DOL's Proposed Rule would close those gaps.

6 Third, there are no persuasive
7 arguments in, being advanced in opposition to
8 these proposals. For example, contrary to what
9 some opponents claim, neither the SEC's
10 Regulation Best Interest nor the State
11 Insurance regulations are adequate substitutes
12 for the powerful safeguards in ERISA.

13 In addition, retirement savers with
14 small nest eggs will not lose access to advice
15 once these important rules are in place. And
16 finally, disclosures by themselves cannot
17 adequately protect retirement savers.

18 Now, I'll turn to the toll that
19 conflicted investment advice continues to take
20 on retirement savers.

21 For decades, advisors of many
22 stripes have been allowed to foist investment

1 products, trading strategies and account types
2 onto unsuspecting retirement investors which
3 cost too much, pose excessive risks, lock up
4 savings in illiquid investments and provide
5 meager returns.

6 The advisors increase their profits,
7 win bonuses or receive lavish noncash rewards
8 while investors' retirement savings are eaten
9 away.

10 This practice inflicts enormous harm
11 on investors and it is especially acute with
12 respect to rollover transactions. Those are
13 pivotal moments for retirees when their entire
14 life savings are often at the mercy of an
15 advisor who may not have the investor's best
16 interest at heart.

17 Overall, numerous studies show that
18 advisor conflicts of interest cost tens of
19 billions of dollars a year in lost retirement
20 savings, and these estimates are conservative
21 as they examine the corrosive impact of
22 conflicts of interest only in relation to

1 certain types of account and certain types of
2 investments within those accounts.

3 This pattern of behavior is uniquely
4 harmful as it affects retirement. It is
5 predatory and it is fundamentally at odds with
6 what Congress said and intended in ERISA.

7 After all, the statute categorically
8 bars advisors from acting on their conflicts of
9 interest or engaging in self-dealing of any
10 kind subject only to exemptions the DOL is
11 expressly authorized to create.

12 Yet, since 1975 the rule defining
13 "investment advice fiduciaries" has included
14 huge loopholes that have allowed advisors to
15 avoid the duties imposed by ERISA.

16 For example, the current rule
17 requires that advice be given on a regular
18 basis, thus carving out many rollover
19 recommendations no matter how much money may be
20 at stake.

21 Second, the rule provides that
22 advice must be rendered pursuant to a mutual

1 agreement or understanding. That the advice
2 will serve as the primary basis or a primary
3 basis for the client's investment decision.

4 Advisors have often exploited this
5 senseless requirement by disavowing it in
6 fine-print contracts, thus avoiding the
7 obligations that ERISA would otherwise provide.

8 Neither of these elements in the
9 current five-part test is found anywhere in the
10 statute, which defines a fiduciary simply and
11 broadly as a person who renders investment
12 advice for a fee or other compensation.

13 Now, I'll turn to the proposed
14 reforms. First and foremost is the amended
15 definition of an investment advice fiduciary.

16 Critically it closes the regular
17 basis and the primary basis loopholes in the
18 1975 rule ensuring, for example, that rollover
19 recommendations and advice to plan sponsors
20 will be covered under ERISA.

21 The amended definition is
22 appropriately broad and protective. For

1 example, it defines the compensation and
2 recommendation elements expansively. It
3 expressly negates the impact of evasive
4 disclaimers and it contains no carve-out for
5 supposedly sophisticated investors.

6 At the same time, the proposal
7 incorporates reasonable limits. For example,
8 in an accommodation to the Fifth Circuit's 2018
9 opinion, it applies only where it is reasonable
10 to conclude that the advice is individualized
11 and that the investor may reasonably trust and
12 rely upon that advice.

13 Moreover it leaves all business
14 models intact, including commission-based
15 sales, and the DOL has also sought to harmonize
16 the elements of the definition with the
17 provisions in the SEC's Reg BI and the
18 standards under the Investment Advisor's Act
19 all with an eye to minimizing compliance costs.

20 The proposal also makes beneficial
21 adjustments to the prohibited transaction
22 exemptions, or PTEs.

1 I'll note that with respect to PTE
2 2020-02, we have previously expressed concern
3 that in its 2020 iteration it did not actually
4 go far enough to protect retirement savers.

5 We will continue to consider those
6 issues as we comment on the proposal; however,
7 it is clear to us that in conjunction with the
8 new definitional rule, PTE 2020-02 will do an
9 enormous amount to safeguard retirement savers
10 from advisor conflicts of interest.

11 Finally, I'll briefly address some
12 of the most common arguments in opposition to
13 these important reforms. None of them are
14 persuasive.

15 First, contrary to some claims,
16 there is no other regulatory regime that
17 adequately protects retirement savers from
18 conflicted investment advice.

19 The SEC's Reg BI only applies to
20 recommendation regarding securities, yet
21 retirement savers are often advised to purchase
22 a wide array of nonsecurities products,

1 including fixed indexed annuities, real estate,
2 cryptocurrencies, precious metals, CDs and even
3 derivatives such as futures and options.

4 In addition, Reg BI only applies to
5 individual retail customers. That means, for
6 example, that advice to an employer seeking to
7 create a menu of high-quality investment
8 options for their employees remains vulnerable
9 to conflicted investment advice, nor could
10 State insurance regulation come close to
11 filling the current regulatory gaps in the DOL
12 rules.

13 The model regulation governing
14 annuity transactions adopted by the NAIC is a
15 "best interest" standard, as others have said,
16 in name only. It nowhere prohibits producers
17 or insurers from placing their interest ahead
18 of their customer's interest.

19 Instead, it feebly provides that an
20 insurance producer, quote, has met their "best
21 interest" obligation if they simply have a
22 reasonable basis to believe the recommended

1 option effectively addresses the consumer's
2 financial situation and insurance needs.

3 In addition, the NAIC model rule
4 remarkably excludes both cash and noncash
5 compensation from its definition of material
6 conflicts of interest even though such forms of
7 compensation obviously create the most intense
8 conflicts of interest among advisors.
9 Moreover, like Reg BI, the NAIC model rule does
10 not cover advice to plan sponsors.

11 Second, small account savers will
12 not lose access to advice if these rules are
13 finalized. Claims to the contrary have no
14 credible support in theory or in practice.

15 In the first instance, the proposal
16 is designed to leave current advisory models
17 intact from fee-based to commission-based
18 accounts. Firms of all types are essentially
19 free to continue operating as they have been
20 provided they act in their client's best
21 interest when dispensing advice and comply with
22 the impartial conduct standards.

1 Experience in the investment advice
2 marketplace also belies fears about loss of
3 access. Many financial professionals,
4 including the certified financial planners,
5 already successfully operate under a fiduciary
6 standard while serving clients all along the
7 income spectrum.

8 In addition, the proposal broadly
9 aligns with the SEC's Reg BI and there is no
10 evidence that that rule has reduced small
11 savers' access to investment recommendations.

12 And in those states where
13 broker-dealers are subject to a fiduciary duty
14 under state law, no evidence has emerged that
15 lower-income retirement savers have been denied
16 access to quality advice.

17 Far from harming small savers, the
18 proposal would provide them with important
19 protections as they are the most vulnerable to
20 the losses attributable to advisor conflicts of
21 interest.

22 Third, and finally, while disclosure

1 is an important element of any investor
2 protection regime, it cannot, by itself,
3 adequately protect investors against abuses by
4 financial professionals.

5 Based on experience and expert
6 studies, we know that disclosure is subject to
7 numerous failings. Often investors don't read
8 them, don't receive them in a timely fashion or
9 don't understand them.

10 Even when effective disclosures are
11 imparted, investors often remain very unclear
12 about what course of action they should take in
13 light of the information they have received.

14 Moreover, disclosures can readily be
15 overridden by assurances from advisors that the
16 disclosures are merely technical boilerplate.

17 Above all, it is clear that reliance
18 on disclosure is not what Congress intended in
19 ERISA, which imposes the most stringent,
20 affirmative obligations and protections on
21 those who provide investment recommendations to
22 retirement savers.

1 That concludes my testimony. Again,
2 I appreciate the opportunity to share our views
3 and I look forward to questions.

4 MR. HAUSER: Thank you. Bryon Holz,
5 are you ready to speak?

6 MR. HOLZ: Yes, thank you. Can you
7 hear me okay?

8 MR. HAUSER: Yes, perfectly. And I
9 understand you have another person with you to
10 testify as well; is that right?

11 MR. HOLZ: That is correct, yes.

12 MR. HAUSER: Okay. Very good.

13 MR. HOLZ: Okay. Thank you to
14 Department of Labor and the members of this
15 panel for the opportunity to testify today.

16 My name is Bryon Holz and I've been
17 an independent financial advisor for more than
18 40 years and serve as president of Bryon Holz
19 and Associates in Brandon, Florida.

20 In addition to serving my clients, I
21 currently serve as the President of the
22 National Association of Insurance and Financial

1 Advisors, NAIFA, one of the nation's oldest and
2 largest associations representing the interest
3 of insurance professionals and I'm testifying
4 on their behalf today.

5 Like many NAIFA members, I'm a small
6 business owner. And though I'm licensed to do
7 both fee-based and commission-based work, the
8 vast majority of our clients are best served on
9 a commission basis and would not likely have an
10 advisor otherwise.

11 Based in Florida, the majority of
12 our clients are between the ages of 60 and 80
13 with the bulk of our clients' assets invested
14 in qualified retirement accounts such as IRAs,
15 and approximately half of our household
16 accounts contain less than \$100,000.

17 Our primary focus is retirement
18 planning, helping ensure our clients don't
19 outlive their income.

20 In addition, we protect their
21 families against loss of income due to death or
22 disability and help them invest for college and

1 other financial goals.

2 My story is representative of NAIFA
3 members and their clients in every city and
4 state across the country.

5 NAIFA members are Main Street
6 advisors who primarily serve and maintain
7 longstanding relationships with individuals,
8 families and small businesses in their
9 communities, but nearly all of NAIFA's members
10 and many of our clients will be significantly
11 impacted by the Department's proposal and
12 lower- and middle-income savers hit the
13 hardest.

14 By moving forward with this proposed
15 rule, the Department is ignoring the negative
16 impact this rule will have on lower- and
17 middle-income savers and the real-world
18 experience that our members saw firsthand
19 before the 2016 fiduciary rule was vacated.

20 The Proposed Rule would again force
21 advisors to move away from brokerage services
22 into a fee-for-service model that is tailored

1 to higher-income clients. This model simply
2 does not work when a year round fiduciary duty
3 is imposed.

4 A 2017 study found that while the
5 rule was in effect, 53 percent of study
6 participants reported limiting or eliminating
7 access to brokerage advice for smaller
8 retirement accounts.

9 A more recent analysis found that a
10 rule similar to the 2016 rule would cause a
11 retirement savings of 2.7 million individuals
12 with incomes below 100,000 to plummet by \$140
13 billion over ten years. This is clearly not
14 the Department's intent.

15 After the Department issued the
16 Proposed Rule, NAIFA began to survey its
17 members on the potential impact.

18 The survey remains open due to the
19 limited time between when the Proposed Rule was
20 released and this hearing, but more than 1,000
21 of our members from across the country have
22 already responded.

1 The survey found that more than 70
2 percent of respondents do not currently impose
3 any minimum asset requirements and only 13
4 percent require minimum asset threshold of
5 \$50,000.

6 If the Proposed Rule is finalized,
7 that number would jump to 47 percent of
8 respondents who would issue a minimum threshold
9 exceeding \$50,000 and the percent of
10 respondents who had maintained no minimum asset
11 requirements would drop from 70 percent to 28
12 percent.

13 Since the Department last acted on
14 this issue, the regulatory landscape has been
15 significantly strengthened to address potential
16 conflicts of interest.

17 Under the SEC's Regulation Best
18 Interest along with 41 states, and counting,
19 that have enacted NAIC's model regulations,
20 investment advisors and insurance professionals
21 are already operating today under a "best
22 interest" standard.

1 These rules, along with NAIFA's own
2 Code of Ethics, are already working to achieve
3 the Proposed Rule's objectives to ensure
4 advisors act in the best interests of their
5 clients.

6 There is no demonstrated need for
7 additional rulemaking. Reproposing the rule
8 that the Fifth Circuit previously invalidated
9 will only add more uncertainty for our members
10 and their clients.

11 The Department's proposed definition
12 of "fiduciary" is a recycled version of the
13 previously vacated definition and would apply
14 to anyone providing investment recommendations
15 on a regular basis as a part of their business.

16 The Proposed Rule would even apply
17 to onetime rollover recommendations with 54
18 percent of our members reported in the survey
19 can make up more than 20 percent of their
20 overall business.

21 If finalized, virtually all NAIFA
22 members will be considered fiduciaries. This

1 is a dramatic change for NAIFA members and
2 their clients and will require significant
3 change in relationships with clients and pose
4 new cost burdens without any additional
5 benefits for consumers.

6 Further, the Proposed Rule is
7 inconsistent with a long history of state-based
8 insurance regulation which Congress approved in
9 1945.

10 Under the proposed amendment to PTE
11 84-24, the Department is substituting insurance
12 companies for state regulators to oversee
13 independent agents.

14 Insurance companies would be
15 required to determine and annually review
16 whether an independent agent is fit to sell the
17 insurer's products, and the insurer must review
18 customer complaints, disciplinary history and
19 regulatory actions concerning the independent
20 agent as well as the independent agent's
21 training, education and conduct.

22 I would now like to introduce one of

1 my longstanding clients, Chuck Ross, to talk
2 about his experience as a consumer.

3 MR. ROSS: Thank you, Bryon. Can
4 you hear me alright?

5 (Pause.)

6 MS. GOMEZ: Now, you're muted.

7 MR. HAUSER: I'm afraid you're muted
8 now. There you go. I think you're on.

9 MR. ROSS: Thank you. I'll start
10 over. Thank you for allowing me to testify. I
11 first met Bryon almost 40 years ago when my
12 wife, Donna, was with the local school system
13 and I was a Vietnam veteran serving as a Naval
14 Reserve captain and working in the hospitality
15 industry.

16 Bryon assisted us with our
17 retirement savings and helped us to protect our
18 young family with life and disability
19 insurance.

20 Over the next four decades we have
21 relied on Bryon to serve and assist us during
22 various life stages.

1 This included the loss of our
2 parents, helping our now-adult children and
3 eventually our own retirement.

4 We have been grateful for our
5 continued relationship -- I'm going the wrong
6 way. We've been grateful for our continued
7 relationship particularly how important it has
8 been for us to receive Bryon's advice to update
9 our financial plans, products and services to
10 meet these changing circumstances.

11 We value his expertise and know that
12 Bryon puts our best interest first, but,
13 unfortunately, that relationship and advice,
14 particularly when we're just starting out with
15 only limited assets at the time, would likely
16 not be possible for others in a similar
17 situation today if this proposed rule moves
18 forward. Thank you for this opportunity.

19 MR. HOLZ: Thank you, Chuck. This
20 proposed rule would place additional burdens on
21 both insurers and agents and advisors while, at
22 the same time, hurting those savers who need

1 our advice the most.

2 I would be happy to answer any
3 questions that you have and, again, I
4 appreciate you giving us the time today to
5 testify.

6 MR. HAUSER: Thank you for your
7 testimony. I think we have one more person on
8 this panel, Chantel Sheaks.

9 MS. SHEAKS: Thank you so much. I
10 am Chantel Sheaks. I'm Vice President of
11 Retirement Policy at the U.S. Chamber of
12 Commerce.

13 The Chamber of Commerce is unique in
14 that we represent nearly every aspect of the
15 retirement world, including employers, plan
16 sponsors, service providers, pension
17 consultants and asset managers.

18 Unfortunately, because of the timing
19 of this comment period, our comment letter
20 isn't finished and we haven't even yet finished
21 discussing the proposal with a number of our
22 members.

1 And, in fact, I think you must have
2 looked at my calendar because I actually have a
3 call today at 1:00 p.m. where I need to discuss
4 the proposal with another one of our members.

5 Given the breadth of the proposed
6 regulation and the significant changes not only
7 to PTE 2020-02, but also to PTE 84-24, which
8 has been in use for almost 40 years, and
9 including a number of other PTEs, it's taken
10 some time for our members to fully understand
11 and recognize the impact this is going to have
12 on their businesses.

13 It's also been very difficult to
14 receive feedback and truly understand the
15 impact on businesses given that the comment
16 period has spanned three nationally recognized
17 holidays and other holiday observances, and it
18 included and took time away from preparing our
19 comment letters to prepare for this hearing and
20 participate in it as well.

21 As such, my testimony today is going
22 to focus on questions that we actually have for

1 the Department of Labor.

2 Because I only have ten minutes, I
3 know it isn't possible for the Department of
4 Labor to respond at this time to the questions
5 I'm posing. However, given that DOL stated
6 that one of the benefits of holding a public
7 hearing before the comment period closes is
8 that testimony will inform comments EBS
9 receives, I ask that DOL will commit to
10 providing answers to these questions to the
11 public well in advance of the January 2nd, 2024
12 comment due date.

13 I'm happy to submit the Chamber's
14 questions in writing for the record to assist
15 in this.

16 Today, I want to focus my questions
17 on four areas. The first is going to be the
18 process; second, scope; third, severability;
19 fourth, jurisdiction; and the last, economic
20 impact. Again, many of these will be
21 high-level questions given that we have not
22 completed our comment letter or had appropriate

1 time to consult with our members.

2 First of all with respect to
3 process, first question, has EBSA ever held a
4 hearing on a proposed regulation during a
5 comment period? And if so, for what proposed
6 regulation and why?

7 Second, generally DOL affords at
8 least 60 days -- and with respect to the 2016
9 rule, 75 days -- for comments on proposed rules
10 and for comments on individual proposed
11 amendments to PTEs.

12 For example, for the proposed
13 amendment to the QPAM regulation, DOL provided
14 an additional 15 days for the comment period,
15 which was very much appreciated.

16 Can DOL explain why it feels that
17 the 60-day comment period for not only a
18 proposed regulation, but amendments to six
19 PTEs, is appropriate?

20 Next, we found that there are over
21 180 instances in the proposal in which DOL
22 asked for comments both on substance and on the

1 economic impact.

2 Is there a reason why DOL issued a
3 proposed regulation and proposed amendments to
4 six PTEs rather than a quest for information
5 given the number of the unknowns in DOL's
6 analysis?

7 Finally, with respect to process,
8 PTE has been fully enforceable for less than 15
9 months. Can DOL explain why it thought it
10 should be amended so soon?

11 Has DOL investigated any financial
12 institutions or investment professionals and
13 found specific issues or areas of concern
14 during the 15-month enforcement period that
15 would necessitate immediate amendments?

16 Going on to scope. In the preamble
17 to the proposed regulations, DOL states, and I
18 quote, the Department considered proposing a
19 definition of "investment advice fiduciary"
20 that would be broader in scope similar to the
21 2016 final rule.

22 In promulgating the 2016 final rule,

1 the Department expanded the definition of a
2 "fiduciary" beyond the five-part test,
3 including the 1975 regulation.

4 Given that the proposed regulation
5 eliminates the current regular basis test, the
6 primary basis test, and the mutual agreement,
7 arrangement or understanding test, can DOL
8 explain how it narrowed the scope in the
9 proposed regulation and what entities would not
10 be covered under the proposed regulations
11 compared to the 2016 final regulation?

12 Next, could DOL explain the
13 difference between a sales pitch in marketing
14 and investment advice under the proposed
15 regulation especially in the institutional
16 context?

17 Next, paragraph (c)(1)(c) provides
18 that an entity is a fiduciary if the person
19 either directly or indirectly has discretionary
20 authority or control with respect to the
21 purchasing or selling of securities or other
22 investment property for the retirement

1 investor.

2 Did DOL intend to make someone a
3 fiduciary if they, or an affiliate, have
4 discretionary authority of control over any
5 asset of a retirement investor, including
6 assets that have no connection with either
7 Title 1 or Title 2 assets?

8 Next, both PTEs; 2020-02 and 84-24,
9 contain provisions that would limit
10 eligibility. One new provision is that an
11 entity cannot rely on either PTE for ten years
12 if a foreign affiliate is convicted of any one
13 of the litany of crimes unrelated to Title 2
14 Title ERISA or Title 2 assets.

15 For example, if a foreign affiliate
16 of a financial institution in Taiwan is
17 convicted of a theft, a financial professional
18 in the United States who works for the
19 financial institution in the United states can
20 no longer rely on PTE 2020-02 when providing
21 investment advice to a participant in Nebraska.

22 Can DOL explain how revoking

1 eligibility for PTE 2020-02 based on a theft in
2 Taiwan by an affiliate of the financial
3 institution is related to a financial
4 professional providing advice to a participant
5 in the United States and how this limitation
6 helps that particular participant in the U.S.?

7 Similarly, PTE 2020-02 states that
8 an entity will not be able to rely on it if DOL
9 finds the entity, and I quote, engaged in a
10 systematic pattern or practice of failing to
11 report prohibited transactions to the IRS on
12 Form 5330 and pay the resulting excise tax.

13 Can DOL explain what would
14 constitute a systematic pattern or practice and
15 the reasoning for applying the same
16 consequences for this failure as applied for
17 felony misconduct?

18 Next, I want to move on to
19 severability. With respect to severability
20 given that DOL has now cast the net so wide for
21 who is a fiduciary for purposes of providing
22 investment advice for a fee, for many entities

1 to provide investment advice they now must rely
2 on an exemption to be able to conduct business.

3 Furthermore, DOL has narrowed which
4 exemptions may be used for fiduciary advice to
5 only 2020-02 or 84-24, but only for independent
6 producers.

7 Can DOL explain how the proposed
8 regulation PTE 2020-02 and 84-24 are not
9 interdependent if someone who is now a
10 fiduciary under the proposed regulation would
11 be unable to conduct business were it not for
12 having to use either one of the PTEs?

13 Moving on to jurisdiction. One
14 prong of the new test of the proposed
15 regulation is that an entity, quote, makes
16 investment recommendations to investors on a
17 regular basis as part of their business.

18 Does DOL believe that it has
19 jurisdiction over any entity that makes any
20 investment recommendation regardless of whether
21 those assets are in Title 1 or Title 2 plans?

22 Next, the proposed regulation itself

1 never defines "best interest." However, PTE
2 2020-02 defines it as, and I quote, investment
3 advice will be in the retirement investor's
4 best interest if the advice; A, reflects the
5 care, skill, prudence and diligence under the
6 circumstances then prevailing that a prudent
7 person acting in a like capacity and familiar
8 with such matters with using the conduct of an
9 enterprise of like character with like aims
10 based on investment objective, risk tolerance,
11 financial circumstance, needs of the retirement
12 investor and does not place the financial or
13 other interest of the investment professional
14 financial institution or affiliate-related
15 entity or other party ahead of the interest of
16 the retirement investor or subordinate the
17 retirement investor's interest on their own.

18 Can DOL explain how this definition
19 of "best interest" is different than the ERISA
20 standard under ERISA Section 404(a)?

21 Finally, with respect to
22 jurisdiction, the proposed amendments of 84-24

1 import the requirements similar to PTE 2020-02
2 for independent producers and require insurers
3 who DOL admits are not ERISA fiduciaries to
4 have policies and procedures and impose
5 substantive requirements on insurers such as
6 prudently reviewing each recommendation to
7 ensure it meets the impartial conduct standard,
8 mitigating conflicts of interest which require
9 eliminating certain pay structures, including a
10 customer complaint process, certifying whether
11 the independent producers are qualified to sell
12 the product and a retroactive review that also
13 imposes substantive requirements.

14 Can DOL explain how it has authority
15 to impose substantive requirements on insurers
16 who they admit are not fiduciaries under ERISA
17 and who otherwise are not covered by ERISA?

18 MS. WILKER: Ms. Sheaks, it's been
19 ten minutes. Could you please wrap up your
20 testimony?

21 MS. SHEAKS: I will. Thank you very
22 much. With respect to the economic impact

1 analysis, I'd be happy to provide those
2 questions and we will also be addressing that
3 in our written commentary once we have talked
4 to our members. Thank you very much.

5 MR. HAUSER: Okay. Thank you very
6 much. Ms. Sheaks, are you also planning to
7 submit your questions in writing or --

8 MS. SHEAKS: I would be happy to
9 submit them in writing.

10 MR. HAUSER: We'll have the
11 transcript in --

12 MS. SHEAKS: Okay. If you would like
13 them, I'm happy to do it, too.

14 MR. HAUSER: Sure. That would be
15 appreciated.

16 Let me first ask do any of the other
17 folks have questions for the witnesses?

18 MS. LLOYD: Can -- I just talked a
19 lot about --

20 (Audio interference.)

21 Like some of the other panelists,
22 I'm just wondering are there any ways that the

1 proposal could be changed that could take away
2 some of the negative impacts that you're
3 seeing?

4 MR. HOLZ: I don't believe so.

5 MR. HALL: And for my part, my
6 answer to that would be that -- would be to
7 challenge the premise.

8 I haven't heard persuasive reasoning
9 or evidence suggesting that it is -- in any way
10 needs to be diluted or narrowed.

11 MR. HAUSER: So, maybe I could ask a
12 few -- I'm sorry, is there a follow-up there?

13 MS. SHEAKS: I was just going to say
14 we will be addressing that in our comment
15 letter after we've had a chance to speak with
16 all of our membership and have them review our
17 comment letter.

18 MR. HAUSER: Okay. Thank you.

19 Mr. Holz, maybe if I could ask a
20 couple questions, first, I wonder if, and maybe
21 using Mr. Ross as an example, but could you
22 describe a little bit what that relationship

1 looks like?

2 You know, what work do you do to
3 decide whether to recommend an annuity to
4 somebody and what the right annuity is?

5 MR. HOLZ: I think I would need more
6 than a few minutes to explain all that, but
7 basically we have a long-term relationship
8 where I get to know the client, get to know
9 their needs, their objectives, their risk
10 tolerance and try to figure out what the best
11 products and services are to meet those needs.

12 Annuities often play into that, of
13 course, because, as we know, most of America
14 doesn't have any defined pension plan or
15 defined benefit plans anymore and an annuity
16 comes the closest to providing that on an
17 individual basis.

18 Typically, again, we go through a
19 process of reviewing two or three different
20 essential solutions and trying to determine
21 which one best meets their needs and is in
22 their best interest.

1 It could be a fixed, a variable, a
2 fixed indexed annuity, an immediate annuity.
3 There are many different types.

4 So, it just depends upon their
5 circumstance and we go through that analysis
6 and we, again, through a long-term
7 relationship, get to know that client well in
8 order to make the recommendation.

9 MR. HAUSER: And typically when you
10 recommend an annuity, do you meet with them one
11 time? Do you meet with the customer multiple
12 times? What kind of work is involved in
13 figuring out what the right recommendation is?

14 MR. HOLZ: Having a mature practice,
15 I know most of my clients fairly well. But if
16 it were a new client, we typically meet at
17 least a couple times, I would think, on a
18 regular -- for the most part and just make sure
19 that we understand how it works and explain it
20 and it best meets their needs.

21 Annuities are great, but they're not
22 for every solution, of course.

1 MR. HAUSER: Is it fair to say that
2 you do not view yourself as just a salesperson?
3 I assume, you view yourself, in substantial
4 part, as an investment professional and an
5 advisor to these folks?

6 MR. HOLZ: Absolutely. I am
7 absolutely not a salesperson. An advisor and
8 somebody who helps and serves my clients,
9 that's my highest ethic and creed.

10 MR. HAUSER: And do you believe
11 that's typical of the folks in your profession
12 and other people who sell annuity products?

13 MR. HOLZ: Absolutely. I believe
14 those individuals who are called to serve
15 others gravitate towards professions like ours.

16 And, of course, it's demanded by the
17 regulations -- existing regulations licensing
18 and supervision that's in place currently.

19 MR. HAUSER: And when your customers
20 come to you, what can you say about their
21 background and expertise on these products?

22 I mean, do people tend to be, you

1 know, quite knowledgeable about the annuity
2 products and their various attributes or is
3 this something that people need, you know, your
4 assistance on?

5 MR. HOLZ: Overall, they have less
6 knowledge and information about them or
7 experience about them.

8 Again, being in Florida, heaven's
9 waiting room, they tend to have a --

10 MR. HAUSER: That's terrible. Is
11 that --

12 (Laughter.)

13 MR. HOLZ: We have a more mature
14 population here. They tend to be more aware of
15 them as of late and that's always helpful,
16 right, and that's helpful in the process.

17 So, typically they certainly don't
18 know as much as we do as advisors, but they're
19 increasingly more and more savvy and aware of
20 them based on all the different marketing and
21 all the different information out there whether
22 it's our colleagues in the different

1 associations -- there's quite a bit more
2 information out there today.

3 So, we're very fortunate now to be
4 able to have clients and prospects who know
5 more about them and actually approach me and
6 say, I think I need an annuity. What type
7 would be best to help meet my needs? And we
8 can go through that process and determine which
9 one would be.

10 MR. HAUSER: And my sense, but I
11 wonder if you agree with it or not, is that
12 this is -- the products available to people in
13 the annuity marketplace, I mean, there are more
14 products and there are more complicated
15 products available now than before really were.

16 Would you agree with that or do you
17 think --

18 MR. HOLZ: That's an interesting
19 question and it's really a two-part answer that
20 I have.

21 First of all, yes, there are more
22 moving parts and more, shall we say,

1 complicated, perhaps, but the good news is
2 there are more -- there are better solutions
3 and better annuity products available now than
4 ever before to help more people.

5 In the past, it was somewhat limited
6 and I remember when they started really
7 addressing the needs in a greater manner.

8 So, yes, they're more difficult and
9 complicated, but the good news is there are
10 better solutions than ever before.

11 MR. HAUSER: Right. And to
12 understand these products, I mean, for example,
13 to really understand an indexed annuity or a
14 registered index-linked annuity or even a
15 variable annuity with some of the writers that
16 are available to people nowadays, I mean, is it
17 fair to say you need to understand how the caps
18 work, how the floors work, how the
19 participation rates work, what indices are
20 being used, all of those things go into your
21 assessment of the product?

22 MR. HOLZ: Surely all those points,

1 all those features, all those components are
2 important to understand and communicate.

3 I think many of our clients at the
4 end of the day, though, don't necessarily want
5 to know how much -- what the clock takes to
6 work. They want to know what time it is.

7 Again, it's not to say we don't
8 provide that information and discuss it and
9 make sure they have a good understanding of
10 what they can, but most of them just want to
11 know what it's going to do for them at their
12 retirement.

13 MR. HAUSER: Okay. Understood.
14 Well, that's -- so, let me just ask you the way
15 you look at it, I mean, do you view, for
16 example, the relationship you have with a
17 customer like Mr. Ross, I mean, do you think
18 you have a sort of relationship of trust and
19 confidence with your customer?

20 MR. HOLZ: Absolutely. I don't
21 think that my clients would stick with me for
22 decades if they didn't.

1 MR. HAUSER: And, you know, at least
2 -- I understand there are many things that
3 folks have concerns about in connection with
4 this regulation and Ms. Sheaks, I think,
5 tripped through some of them, but if the rule
6 said nothing more than you should adhere to a
7 standard of care, you should put the interest
8 of your investor customer first, you shouldn't
9 overcharge them and you shouldn't be misleading
10 with them, are any of those principles that you
11 have problems with or you think would interfere
12 with your ability to provide advice to your
13 customers?

14 MR. HOLZ: I haven't had a chance to
15 compare that to the existing regulations in
16 place. So, I think that's something I'd like
17 to address in our followup comment letter,
18 please.

19 MR. HAUSER: Perfectly fair. Thank
20 you. And I just -- he's not really on the
21 screen, but thank you very much for having Mr.
22 Ross with you, too.

1 It's one thing for folks in the
2 business to testify, but appreciate a
3 perspective of one of your customers and I
4 appreciate his willingness to step up and
5 testify. So, thank you very much.

6 MR. HOLZ: Thank you.

7 MR. HAUSER: I think I'm about ready
8 for lunch, but does anyone else have any more
9 questions to ask of people on the panel?

10 (Pause.)

11 MR. HAUSER: All right. With that, I
12 think we'll take a break. What time do we come
13 back?

14 MS. WILKER: We come back at 1:30
15 after lunch.

16 MR. HAUSER: Okay. Thanks to all the
17 witnesses. You are relieved. Take care.

18 (Whereupon, the above-entitled
19 matter went off the record at 12:29 p.m. and
20 resumed at 1:33 p.m.)

21 MS. HANSEN: Okay. Good afternoon,
22 if you are here with us on the East Coast. So

1 it's still good morning if you're joining us
2 from elsewhere.

3 We are getting ready to go ahead and
4 get started with Panel Number 4. Just as a
5 quick refresh, in case anybody was not here
6 this morning, the panels will be set up so that
7 each panelist has ten minutes to speak. And we
8 do ask that each panelist stay within that time
9 so that the Government can ask any
10 clarification questions or other follow-up that
11 is necessary.

12 And again, just to repeat from this
13 morning, nothing should be taken to imply, or
14 suggest, or foreshadow anything from the
15 Government's questions. We are simply trying
16 to get clarification and ensure that we
17 understand the testimony being presented by
18 each of the panelists here today.

19 With that, I believe our first
20 panelist, the Panel 4, is Mr. Mason. Go ahead.

21 MR. MASON: Thank you, Megan. Thank
22 you to all the Department of Labor panelists.

1 My name is Kent Mason, I'm partner
2 in the law firm of Davis and Harman. I'm here
3 on behalf of a group of firm clients. I thank
4 you for holding this hearing, I thank you for
5 the opportunity to testify today. And it
6 really is a pleasure to be here. So thank you.

7 Now turning to the more serious
8 stuff, in order to prevent widespread cost,
9 harm and disruption, we would urge you to
10 withdraw this proposal. I say that with, you
11 know, great respect. I know that all the
12 hardworking folks at the Department of Labor
13 truly believe that this proposal will enhance
14 retirement security. Unfortunately that is not
15 the case, in fact it will be the opposite.

16 And I know Karen has asked on a few
17 occasions, are there discrete changes that, you
18 know, we would suggest? No, I am not here to
19 suggest discrete changes, there are no number
20 of discrete changes that would make this
21 proposal either workable or legally valid. I'm
22 here just to sort of really give a glimpse into

1 what's going to happen.

2 And first, and I think we all really
3 know this, if this rule is, you know, we don't
4 expect major changes in the final rule. And
5 accordingly there will be law suits filed in
6 the Fifth Circuit to invalidate this rule. And
7 those law suits are very likely to prevail.

8 I mean, just look at the facts. In
9 2016 a rule turned sales people into
10 fiduciaries. In 2018 the Fifth Circuit said
11 turning sales people into fiduciaries is
12 impermissible. So what did the 2023 proposal
13 do, it turned sales people into fiduciaries,
14 very clearly. Oh, that's invalid.

15 Second, the 2016 rule eviscerated
16 the five-part test. The Fifth Circuit said,
17 and I'm quoting here, The five-part test
18 captures the essence of a fiduciary's
19 relationship, unquote.

20 What does the 2023 proposal do? It
21 eviscerates the five-part test in basically the
22 same way in 2016. There's a little window

1 dressing difference, but there's no substantive
2 difference.

3 Third, in 2016 the Department turned
4 one-time advice into fiduciary advice. The
5 Fifth Circuit said, and again I quote, AIt is
6 ordinarily inconceivable that one-time advice
7 can be fiduciary advice. What does 2023 do, it
8 turned one-time advice into fiduciary advice.
9 Boom, boom, boom, this is going to be
10 invalidated.

11 And the exemptions are not going to
12 fare any better. They look, aside from the
13 contract, the 2023 proposals regulate IRA
14 advisors beyond the Department of Labor's
15 jurisdiction in basically the same way they did
16 in 2016, again invalidation.

17 But in fact, the exemptions get
18 worse, and easier to invalidate. Let's just
19 take one example. The preambles to both
20 2020-02 and 84-24 make it very clear that it is
21 per se illegal to provide your top producer
22 with a paid vacation or a paid educational

1 conference.

2 So if I send my top producers to
3 Hilton Head for a four-day conference with
4 six-hour a day meetings, that is per se illegal
5 under this rule. Really, I mean, what is the
6 possible justification for that. And if that's
7 illegal, why is the \$50,000 bonus for the top
8 producers permissible?

9 So an educational conference is
10 impermissible, and a \$50,000 bonus is
11 permissible? If you look up arbitrary and
12 capricious in the dictionary, that's what it
13 says, that's the example it gives, that's
14 poetic license.

15 Or maybe what the Department's
16 really saying is the \$50,000 bonus is illegal.
17 In which case, then what the Department is
18 saying is that without a word of discussion on
19 the substance or the economic analysis, it is
20 invalidating the compensation structure of
21 every financial institution in the country, so
22 either way, invalid.

1 One more comment on the exemptions,
2 the requirement to accept fiduciary status,
3 just not thought out. What it does is it says
4 -- there are companies out there that have tens
5 of millions of client interactions every year.
6 So what are they supposed to do? They don't
7 know in advance which ones are fiduciary and
8 which ones are not.

9 So they're going to be forced to
10 accept fiduciary status with respect to every
11 one of those. You know what that's going to do
12 to their liability, their fiduciary insurance?
13 It's going to make this system unworkable.

14 So this is going to be invalidated.
15 Who's going to pay for the billions of dollars
16 that we waste sort of trying to comply with an
17 invalid rule, retirement savers. That's bad.

18 And even in the interim, before the
19 invalidation, we're required to take about a
20 year to invalidate, what's going to happen?

21 Well, what's going to happen is, as
22 happened in 2016, Deloitte found that ten

1 million people lost access to investment
2 assistance because of the 2016 rule.

3 So I was fascinated. I was looking
4 forward to reading the preamble to see what
5 answers does DOL give. Two answers, first it
6 says, oh, that Deloitte study was a predictive
7 study.

8 No it wasn't. It was a study about
9 what actually happened.

10 Second, the response was they cited
11 a variable annuity study that said low to
12 middle income individuals were not harmed by
13 the proposal. I looked at that study. I saw
14 that statement, so I looked at the citation.

15 Do you know what it cited? The only
16 citation it had for the fact that low and
17 middle income individuals weren't hurt, the
18 2017 Deloitte study which said the exact
19 opposite thing. Oh, that's variable annuity
20 study self-destructing.

21 The Hispanic Leadership Fund found
22 that a resurrection based on the actual results

1 of what happened in 2017, that a resurrection
2 of this proposal would cause a 20 percent
3 increase in the racial wealth gap.

4 So I am fascinated to look, what did
5 the Department say in response to that? The
6 only thing they said was to cite a 2016 study,
7 before the 2016 proposal rule was finalized,
8 that incorrectly predicted no harm, no loss of
9 assistance, so a completely off point citation.

10 I'm going to close. I have probably
11 a minute left. I'm going to give you back the
12 rest of my time. I'm just asking you, look at
13 the facts, look at the harm, look at where this
14 is going, and please reconsider, please
15 withdraw this proposal. And thank you again
16 for allowing me to testify.

17 MS. HANSEN: We have up next
18 Federation of Americans for Consumer Choice. I
19 believe you are muted.

20 MS. O'BRIEN: Yes. I hate it when
21 that happens. The Federation of Americans for
22 Consumer Choice, FACC, appreciate the

1 opportunity to testify.

2 We represent independent agents,
3 independent insurance marketing organizations,
4 and insurance agencies who provide consumers
5 with guaranteed insurance products, including
6 fixed annuities.

7 I'm Kim O'Brien. I've spent my
8 career in the insurance industry, most recently
9 advocating for independent insurance
10 professionals and marketing organizations.
11 With me today is FACC's Counsel, Don
12 Colleluori, a principal at Figari and
13 Davenport, who represents FACC.

14 I'm here today once again because
15 the Department of Labor is proposing regulatory
16 requirements that will not work for independent
17 insurance agents and will ultimately harm
18 consumers, especially middle and low income
19 consumers who seek to protect their hard earned
20 retirement savings with guaranteed insurance
21 products.

22 FACC's opposition should, of course,

1 come as no surprise. You've already received
2 our letter from our Counsel expressing our
3 strong view that the rule proposal is
4 incompatible with ERISA.

5 FACC believes the DOL is trying to
6 turn 50 years of ERISA history upside down
7 which we think is wrong, both legally and as a
8 matter of public policy. Putting aside the
9 legal issues for a moment, because those will
10 have their day if this proposal goes forward,
11 we believe that DOL has created a false
12 narrative, for lack of a better phrase,
13 suggesting there is need to bring Title 1
14 regulation for employer plans to IRAs sold to
15 individual consumers covered by Title 2.

16 DOL argues that the world has
17 changed, and thus rollovers and IRAs need the
18 protections afforded to Title 1 plans.

19 We could not disagree more, because
20 that ignores the very purpose of Title 1 which
21 is to protect employees, captive in an employer
22 and Union sponsored plan. Under such plan,

1 these employees are captive and caught in
2 discrete, plan decisions with limited options
3 at the mercy of in-house committees who may
4 have conflicting interests.

5 When Congress created ERISA, it knew
6 what it was doing. And IRAs were not put under
7 Title 1, because they did not need the
8 protections of Title 1. The IRA market has
9 grown over the years into an extraordinarily
10 competitive marketplace and nearly unlimited
11 options, all controlled by nobody other than
12 the consumer.

13 We think it's patronizing and
14 ultimately counterproductive to assume
15 consumers, in a competitive marketplace, are
16 incapable of making choices that are best for
17 themselves. Some may choose to work with a
18 fiduciary investment advisor, however there is
19 no justification for turning insurance sales
20 agents into fiduciaries, which defies decades
21 of history and serve no real purpose in an
22 industry that is vibrant, competitive, and

1 filled with excellent options for consumers to
2 meet their retirement needs.

3 In addition to redacting the
4 underpinning narrative, FACC rejects the
5 disinformation being used all the way up to the
6 White House to say that our products contain
7 junk fees. We are not even sure what that
8 means. However, with its political overtones,
9 it strikes us as a ploy to turn the public
10 against our agents and our products. We think
11 that's unfortunate, but more importantly it's
12 untrue.

13 Fixed annuities and fixed index
14 annuities contain nothing that could seriously
15 be labeled junk fees. While time does not
16 permit for a full rebuttal here, we think the
17 Department knows that fixed annuities contain
18 various costs such as expenses, commissions,
19 and the cost for hedges for index products.

20 But all of that is intrinsic to the
21 value of the product, and none of it is junk.
22 We think the junk fee accusation is simply

1 unjustified and reflects a thought process on
2 the part of the Department and other supporters
3 of these rules that could be characterized as
4 prejudicial, and arbitrary, and capricious.

5 There are many other misstatements
6 and innuendo in the rule's proposal narrative
7 which we'll try to get addressed in our written
8 remarks, though it's going to be hard to unpack
9 and address all of them given the 500-some
10 pages of these releases, and given the limited
11 time allowed by the DOL for our review.

12 But among them, for example, is the
13 DOL's wrongful assumption that there are only
14 4,000 independent agents serving the retirement
15 marketplace. We think the assumption is used
16 by the department, including the starting point
17 of 40,000 independent agents. And the
18 arbitrary assumption that ten percent of them
19 service retirement products is just flat out
20 wrong and illustrates a lack of understanding
21 of our industry.

22 While we're still gathering

1 information using data sources such as LIMRA
2 and the National Insurance Producer Registry,
3 as well as information from our insurers and
4 IMOs, we know there are probably no less than
5 80,000 independent insurance agents, 20 times
6 more than the DOL's estimate.

7 Another flimsy suggestion is that
8 annuity buyers are losing 1.2 percent of
9 investment return per year due to supposed
10 conflicts of interest. We're unclear how the
11 DOL comes up with these numbers. And in any
12 event, we don't agree with them.

13 This estimate seems to imply that
14 consumers would somehow replicate the value of
15 a fixed indexed annuity insurance product on
16 their own which we believe is completely
17 unrealistic. Other DOL estimates try to
18 extrapolate experience from other products to
19 fixed annuities and fixed index annuities which
20 we think is illogical and unconvincing.

21 The one thing we know for certain is
22 that fixed annuity buyers who hold the contract

1 for the duration of their contract will receive
2 the full value of the premium they paid, plus
3 their interest, together with the promise that
4 they will not risk losing any money in the
5 market. It is important to remember consumers
6 buy annuities for the same reason they purchase
7 other kinds of insurance, to protect their most
8 important assets.

9 I also want to just spend a few
10 minutes talking about the overhaul of 84-24.
11 Time does not permit us to delve too deep, but
12 we think the revised PTE 84-24 proposal is
13 confusing, in places contradictory, and raises
14 many questions and concerns.

15 This is a critical class exemption
16 which therefore must be clear and workable.
17 But we fear, as proposed, it is not. This
18 revised PTE 84-24 is also represented as
19 creating a level playing field. But we do not
20 see it that way. Instead what we see is an
21 onerous set of requirements that threaten to
22 cause disruption and could ultimately drive

1 away many agents from the marketplace.

2 In our written comments, we will lay
3 out many questions and concerns, but allow me
4 to give you a few examples here to help
5 illustrate our point showing how this proposal
6 is confusing, onerous, and leaves too many
7 unanswered questions for it to be a foundation
8 of exemptive relief.

9 One is the obvious contradiction
10 whether this applies to any independent agent
11 or only to those who are insurance-only agents.
12 The preamble has it both ways. One place says
13 it's limited to insurance-only agents, another
14 place says it's limited to independent
15 producers.

16 The text of the rule reflects the
17 latter, and we contend the rule only works if
18 it applies to all independent agents.
19 Nonetheless, this is contradictory and must be
20 corrected.

21 Another is the ambiguous limitations
22 on compensation where terms are thrown around

1 loosely with no definition. Key words, such as
2 commission itself, the phrase simple
3 commission, and other terms like revenue
4 sharing that have no obvious meaning in the
5 context of an annuity sale.

6 Other concepts too are wide open to
7 interpretation, like differential compensation
8 which comes with no explanation or examples of
9 what is permitted or not permitted. None of
10 this is self-defining, and yet an entire
11 industry would depend on its clarity for
12 protections.

13 Another example is the record
14 keeping requirement that contemplates
15 information must be shared with clients to
16 enable them to determine whether the conditions
17 of the exemption have been met.

18 This requirement flies in the face
19 of common sense. It is devoid of any clarity
20 as to what exactly must be shared with no
21 exceptions for information that may be
22 confidential, or a trade secret, or otherwise

1 difficult to obtain or provide. Such
2 open-ended books and record keeping
3 requirements are unrealistic and inappropriate.

4 Finally, let me mention one other
5 example which is the critical provision on
6 supervision that limits the duties of the
7 insurer to oversee only its own products.

8 We think what is proposed here is
9 too limited and ambiguous. While the preamble
10 purports to have adopted the same limitations
11 as the NAIC models of regulation, the rule
12 itself does not contain the same limitations,
13 which is confusing unto itself.

14 Beyond that, it must be made clear
15 that the entirety of the insurer's supervisory
16 system as it relates to recommendations, and
17 compensation, and all other aspects of
18 supervision, does not include other companies'
19 products. Nor does it include an agent's
20 consideration, comparison, or compensation as
21 to those other companies' products.

22 We submit the proposed rule is

1 oblique in this regard which makes it
2 potentially unworkable for insurance carriers
3 and agents operating in the independent
4 channel.

5 We'll have much more to say on these
6 points and many other points in our comment
7 letter. But in the meantime, these are just a
8 few examples touching on issues that go to the
9 very question of how our industry would even
10 comply with this exemption.

11 Absent clarity and certainly, there
12 can be no reasonable confidence that these
13 requirements are being met and that the
14 exemption will be rendered of no use.

15 Finally, we are disappointed that
16 the DOL is fast tracking this proposal without
17 proper debate and discussion. While fiduciary
18 issues in general have been around for a while,
19 what is being proposed here, especially with
20 respect to PTE 84-24, is unprecedented and
21 untested.

22 We submit it should not rush forward

1 without more analysis. Accelerating this
2 hearing and allowing only 60 days for comments
3 is really not adequate.

4 We sincerely hope the DOL will
5 consider reversing the course, see that this
6 proposal is unnecessary, and see that it is
7 mostly going to produce more litigation,
8 disruption, and confusion, thereby hurting the
9 very people it is intended to help, the
10 American consumer. Thank you for the
11 opportunity to be heard.

12 MS. HANSEN: Thank you. Next up we
13 have Mr. Naylor.

14 MR. NAYLOR: Good afternoon. It
15 happens to be that time of the day in the Mayan
16 calendar that the sun is coming right through
17 my skylight, so apologies that I am contorting
18 myself out of the frame here.

19 My name, again, is Bartlett Naylor.
20 I am the Financial Policy Advocate for Public
21 Citizen. We are a 50-year-old organization and
22 now count roughly 500,000 members and

1 supporters. We were established to answer the
2 fact that corporate America is extremely well
3 represented in Washington and consumers have
4 less of a voice.

5 Relevant to this proposed rulemaking
6 in this hearing, many of our members are
7 seniors. And again, I appreciate the
8 opportunity to share some basic thoughts.

9 Most importantly, we're here to
10 express our enthusiastic support for the
11 Department of Labor's rule. We appreciate the
12 terminology of junk fees and retirement plans,
13 returns that are as little as one percent less
14 than a better product that does not generate
15 the rich commission can mean a 20 percent
16 shortfall over the life of a plan.

17 We think this is -- generally the
18 junk fee problem is part of a larger problem
19 that Wall Street financialization has learned
20 to take a bigger chunk out of the economy,
21 almost double what it did about 30 years ago.

22 And again, it should be understood

1 that the financial services sector is service
2 industry. It's not an end goal. Trucking is a
3 service industry. And if you were to say that
4 trucking became double the GMP, you would have
5 to wonder if they were driving the trucks half
6 empty.

7 We invite and understand the
8 Department of Labor will listen to laborers and
9 consumers. It's the Department of Labor, this
10 is not the Department of Commerce, certainly
11 not the Chamber of Commerce.

12 And so I think when you assess this
13 and wonder is this going to hurt consumers, if
14 it did then the Consumer Federation of America,
15 under the expert guidance of Micah Hauptman,
16 would certainly tell you that. If this was
17 going to hurt workers, then the AFL-CIO would
18 make sure that you knew your proposal would
19 hurt workers.

20 If some of the technical details
21 were going to manipulate the sales of these
22 products into ways that hurt average Americans,

1 then Better Markets would make sure you knew
2 this. And if this was not in the interest of
3 retirees, then AARP would not let you go
4 forward.

5 But I needn't remind you
6 that all of these organizations, like Public
7 Citizen, are enthusiastic supporters of this
8 proposal.

9 This effort turns on trust and
10 whether or not an average person, unschooled in
11 the nuances and the details of annuities and
12 other products, can rely on his or her advisor.

13 And I worry that some of the
14 information that you are receiving from some of
15 my co-panelists and others may not put
16 consumers at the forefront of their concern.

17 When this rule or this general area
18 was discussed, an interest group put out a
19 study saying that dozens of small businesses
20 were concerned about this, because it was going
21 to harm their ability to retain trusted
22 advisors.

1 I found that curious, because I
2 assumed that the average small business, my
3 family has a hardware store, is far more
4 concerned in the price of hardware, and
5 housing, and so forth, and did not have time to
6 immerse themselves into a Department of Labor
7 rule on the fiduciary duty.

8 And further, I found it odd that
9 this rule was supposed to help small business
10 and why would they think it would hurt small
11 business. The report made it clear that these
12 small business owners were speaking out. So I
13 took that as an invitation to speak with them.
14 Well, in most cases I could not get through to
15 these small business owners who were speaking
16 out.

17 I did get through to a few. One
18 said that the comments that the advocacy
19 organization printed were not accurate.
20 Another one said that the Department of Labor
21 didn't go far enough in protecting employees.

22 One of the more interesting ones was

1 a woman who ran a small business and said,
2 because of her trusted advisor on her
3 retirement plan, she was able to attract and
4 retain employees in greater numbers, that that
5 was one of the pivotal selling points.

6 And so I asked her how many
7 employees, and she said, well, she had one
8 part-time employee and that was her son, and
9 the pension plan was his IRA.

10 So we were concerned that the
11 Department of Labor and, in this case, the
12 media and Congress that were recruited to weigh
13 in on this, were not informed by people who
14 truly were interested in what the consumer,
15 what will benefit the consumer.

16 So again, Public Citizen
17 enthusiastically supports this rule. We ask
18 that you appreciate the details from the groups
19 that we truly think wake up every day and are
20 concerned about consumers. Thank you.

21 MS. HANSEN: Thank you. Next up we
22 have Mr. Rhoades.

1 MR. RHOADES: Thank you. I am Ron
2 Rhoades. I serve as Associate Professor of
3 Finance at Western Kentucky University, and I
4 also own an RIA firm and practice law.

5 I have extensively researched,
6 written, and spoken about the application of
7 state common law to fiduciary client
8 relationships in financial services.

9 My testimony is my own, however, and
10 does not necessarily reflect the views of any
11 institution, firm, cult, or organization to
12 which I now belong or have ever been kicked out
13 of.

14 Please permit me to make eight
15 points today in support of the rule. First,
16 the argument made by some panelists today that
17 the DOL's rule inappropriately limits consumer
18 choice is but a red herring. By their very
19 nature, fiduciary duties imposed by ERISA
20 constrained conduct and, by doing so, countered
21 greed.

22 The U.S. Supreme Court, in a

1 unanimous Hughes versus Northwestern decision,
2 clearly concluded that imprudent investments
3 must be removed from defined contribution plans
4 governed by ERISA. Simply stated, bad choices
5 have no places in retirement plan accounts.

6 Defined contribution plan accounts
7 benefit from economies of scale. And the
8 academic evidence is clear, higher cost
9 products underperform, on average and over
10 time, similar investments that have lower fees
11 and costs.

12 For example, I have never found an
13 instance where a variable annuity sold by a
14 broker survives a cost benefit analysis.
15 Consumer choice is and should be limited under
16 ERISA, only the good choices.

17 Second, while I do not agree with
18 the Fifth Circuit's stretched statutory
19 interpretations in defining fiduciary, permit
20 me to discuss the historic application of a
21 special relationship of trust and confidence.

22 There are many cases under state

1 common law which support the Department's view
2 that the use by securities brokers, or by
3 insurance agents, of titles can support the
4 application of fiduciary status. Court
5 decisions have found that the use of terms such
6 as financial advisor, financial consultant,
7 financial planner, financial guide, investment
8 counselor, investment planner, estate planner,
9 or simply expert, lead to the justifiable
10 repose of trust and confidence by a consumer.

11 In addition, the formation of what
12 might be termed or called a retirement plan, or
13 an investment plan, or an investment policy
14 statement, or an estate plan, these can also
15 trigger the application of fiduciary status
16 under common law. The giving of fiduciary
17 warranties also results in justifiable reliance
18 leading to fiduciary status.

19 I'd suggest that the Department
20 expressly extend the proposed rules application
21 to representations that are made by the firm
22 itself, not just by individual brokers or

1 insurance agents employed by a firm.

2 The ways that financial firms market
3 and describe their services today, and teach
4 their financial consultants to utilize trusted
5 sales techniques and relationship-based sales
6 techniques, should lead to the imposition of
7 fiduciary status.

8 The SEC, in its 1940 annual report,
9 noted that a broker should not disguise himself
10 or herself as a confidant and protector but
11 rather, quote, "must stand at arm's length
12 openly as an adversary," end quote.

13 I note that a stock broker or an
14 insurance agent who states to a customer,
15 either verbally or in written document,
16 including Form CRS, that he or she is acting in
17 the, quote, "best interest," end quote, of the
18 consumer, results in justifiable reliance by
19 that customer. And fiduciary status should
20 attach.

21 To provide recommendations under the
22 mantra of acting in the customer's best

1 interest, a phrase with over 10,000 judicial
2 decisions in the United States have applied as
3 equivalent to the fiduciary duty of loyalty,
4 but then for that person to disavow fiduciary
5 status is tantamount to fraud, actual fraud.

6 I find it disturbing as well that
7 the very plaintiff who secured the Fifth
8 Circuit's opinion, which stressed the need for
9 the Department to approach the application of
10 fiduciary status by applying common law
11 principles, are now opposed to being held
12 accountable as fiduciaries where a relationship
13 of trust and confidence exist.

14 Third, some commentators on the
15 DOL's proposal have opined that sales people,
16 registered representatives, and insurance
17 producers are, quote, "being turned into," end
18 quote, fiduciaries, or that they are
19 historically distinct from fiduciaries. Yet
20 legal history reveals the breadth of the
21 application of fiduciary status upon financial
22 services sales people.

1 By the early 1930s, the fiduciary
2 duties of brokers were already widely known
3 under state common law, applying simply the
4 common law of agency. Judicial decisions from
5 1934 and 1935, all the way back then, applied
6 fiduciary status upon brokers where a
7 relationship of trust and confidence existed,
8 again applying state common law. While the
9 vision has not yet fulfilled, the 1934 Exchange
10 Act was intended by President Franklin
11 Roosevelt to impose fiduciary duties upon
12 brokers.

13 The Landmark Securities market study
14 of 1935 recognized that a broker, quote,
15 "exercises to some extent the function of an
16 investment counsel," end quote, and recommended
17 that conflicts of interest be eliminated.

18 The 1940 FINRA, formerly NASD,
19 concluded that brokers were fiduciaries to its
20 customers, stating that a broker, quote, "owed
21 his customer or principal complete obedience,
22 complete loyalty, and the exercise of his

1 unbiased interest," end quote.

2 FINRA went on to state, quote, "The
3 law will not permit a broker or agent to put
4 himself in a position where he could be
5 influenced by any considerations other than
6 those in the best interest of this customer,"
7 end quote.

8 In its 1940 and 1942 annual reports,
9 the SEC discussed at length a series of cases
10 in which workers were found to be fiduciaries.
11 And the SEC also noted that the very function
12 of furnishing investment counsel constitutes a
13 fiduciary function.

14 Note also that the 1940 Advisors Act
15 exempted workers from registration as
16 investment advisors. This exemption did not
17 negate the fiduciary status of brokers when
18 they entered into relationships of trust and
19 confidence with their customers.

20 In the often cited 1948 Arleen
21 Hughes opinion, the SEC found that a broker was
22 a fiduciary where she created a relationship of

1 trust and confidence with her customers.

2 And finally, in 1963 the SEC study
3 on the capital markets noted that brokers in
4 relationships of trust and confidence with
5 their customers were, in fact, fiduciaries.
6 The study cautioned that brokers should not
7 obscure the merchandising aspects of the retail
8 securities business if they wanted to not be
9 held to fiduciary status.

10 Quickly, I'll go over my other
11 points. The rollover of an ERISA plan account
12 or IRA account into an immediate fixed annuity
13 is a decision of huge financial consequences
14 which requires consideration of very complex
15 and interrelated financial planning issues and
16 should be subject to fiduciary duties.

17 I have advised hundreds of
18 individual investors, but I have never met one
19 that I would regard as a sophisticated investor
20 with the ability to undertake the extensive due
21 diligence required on today's investment and
22 insurance products.

1 Six, I am aghast that an association
2 representing the interests of U.S.
3 corporations, who are plan sponsors for the
4 most part, would oppose badly needed
5 protections for those plan sponsors.

6 Large and mid-size businesses have
7 been subject to many class action suits where a
8 broker's or insurance producer's non-fiduciary
9 status leave the plan sponsor solely liable for
10 the investment recommendations that were
11 previously provided. That association's views
12 seem to be opposite of the interests of the
13 majority of its members' firms.

14 Seventh, reading between the lines
15 of a prior panelist, the position he took was
16 essentially that small investors could not be
17 served except through selling highly expensive
18 products to them. Yet the marketplace now is
19 full of low cost fiduciary options for small
20 investors today.

21 It's been my experience that
22 fiduciary advice is nearly always far more

1 comprehensive, yet less expensive than
2 conflicted commission-based advice. Also
3 realize that every commission could be replaced
4 by a transparent fee directly paid by a
5 consumer.

6 Many non-commissioned annuity
7 products are coming into the marketplace today.
8 In fact, there is no need for commissions
9 anymore. As the SEC's 2008 Rand study
10 revealed, most customers of brokers and
11 insurance producers have no idea how much they
12 paid. I wish I could do an objective
13 independent analysis of the products sold to
14 that customer who testified earlier today.

15 Eighth, some commentators may opine
16 that fiduciary duties only apply to advice, or
17 don't apply to advice, and only apply where
18 fiduciary controls are managed as assets. But
19 that statement is blindly incorrect.

20 Lastly, I would ask who is going to
21 pay for the billions of dollars consumers will
22 lose if this rule does not go forward? I urge

1 the Department to strengthen and finalize the
2 proposal. Thank you for the opportunity to
3 testify.

4 MR. KHAWAR: I think we're at Q and
5 A now.

6 MS. HANSEN: Yes.

7 MR. KHAWAR: Okay. So let's start
8 it. My first question is for Ms. O'Brien. Do
9 you think there are any changes needed to PTE
10 84-24, or so you think it doesn't need to be
11 amended at all?

12 MS. O'BRIEN: Well, I think we start
13 with the answer that we don't believe in the
14 premise. We don't believe in the premise that
15 every agent that sells an insurance product
16 should be a fiduciary. So therefore, without
17 that underlying foundation, we don't think we
18 can go forward with any changes to or tweaks to
19 your 84-24.

20 MR. KHAWAR: Okay, thank you. So
21 Professor Rhoades, I do have a question about
22 the disclaimer and because your future

1 involvement in cults, but I'll maybe reserve
2 that for another time and place.

3 Can you expand a little bit on the
4 point you made about never having met an
5 investor that you consider sophisticated?
6 We've heard a lot of commentary prior to the
7 hearing, and certainly several commentaries at
8 the hearing, about this question about this
9 question of a sophisticated counter party, kind
10 of the context in which -- what you might think
11 a more institutional players are interacting
12 with each other.

13 Is it your position that that kind
14 of thing is something the Department should be
15 considering, where you have maybe a financial
16 professional talking to another financial
17 professional? Or is that not kind of within
18 the scope of what you were getting at?

19 MR. RHOADES: I would agree that if
20 a financial professional was talking to another
21 fiduciary advisor, an expert's trusted advisor,
22 that would be, in essence, the representation

1 of a client by a fiduciary advisor therefore,
2 in essence taking the place of sophistication.

3 I've seen a lot of definitions of
4 sophisticated investor. I seem to relate this
5 to net worth or this person is business owner
6 of a multi-million dollar business and
7 therefore must have some acumen about
8 investments.

9 But I have never encountered that.
10 I have served clients with maybe tens of
11 billions of dollars, and I serve business
12 owners. They are concentrated on other things
13 in their life. They do not have the education
14 and the experience, the training to be able to
15 analyze the very often and very complex
16 products of the day, and also how to structure
17 a portfolio.

18 There's a lot of academic research
19 that should be known by experts and utilized in
20 that process. And quite frankly, I've never
21 met an individual investor or a business owner
22 that possessed the attributes of what I would

1 deem to be a sophisticated investor.

2 How would you -- could you come up
3 with some test to do that, perhaps? You could
4 perhaps require individual investors to take a
5 test to demonstrate their knowledge of all
6 things relating to what is needed to make good
7 investment decisions. Other than that, I would
8 stay away from the area.

9 MR. KHAWAR: Thank you, Ron.

10 MS. HANSEN: All right, so I have
11 a question, Professor Rhoades, for you. If --
12 and unless there is anything else, I will leave
13 this moment up for you.

14 I was wondering if you could expand
15 slightly. I just want to make sure I fully
16 understand your point. You were talking about
17 the titles that are used by various financial
18 service professionals. And I was wondering if
19 you could just clarify how those titles are
20 understood by the individuals receiving the
21 advice. I just want to make sure I understand
22 that point that you're making.

1 MR. RHOADES: When someone holds
2 themselves out as an advisor, or a consultant, or
3 a counselor, especially when that term is used
4 in connection with other terms like adjectives
5 such as financial or wealth manager, or
6 something like that, there becomes what's
7 called justifiable reliance on someone who
8 basically, at that point, relies upon the
9 person.

10 We always rely upon advice of
11 others. I rely on the advice of my plumber.
12 That does not make my plumber, however, a
13 fiduciary. However, I think it needs to be
14 something more. That something more is some
15 type of acceptance of that fiduciary
16 relationship by the fiduciary itself.

17 And the way that that acceptance
18 works is through justifiable reliance, where is
19 the justification for imposing fiduciary
20 status? And that justification can come simply
21 from the use of title, or simply describing the
22 services as advisor in nature as well.

1 So there are many cases that address
2 that. In my written comments that I submitted
3 last night, I cite two and summarize as least a
4 dozen cases along those lines. And I hopefully
5 can furnish some more before the end of the
6 comment period. Thank you.

7 MS. HANSEN: Are there any further
8 questions from the Government?

9 Hearing nothing, I will just say
10 thank you for a very clear testimony that did
11 not require any follow-up questions.

12 And thank you for your time, which
13 brings us to our next break. So we will break
14 now, and we will reconvene for our next panel
15 at 2:45.

16 (Whereupon, the above-entitled
17 matter went off the record at 2:19 p.m. and
18 resumed at 2:46 p.m.)

19 MR. HAUSER: Okay, I think we can
20 get started if everybody's ready. Let's see,
21 we have first up on Panel 5 is David Certner
22 for AARP, followed by Michael Hadley, Committee

1 of Annuity Insurers, the Insured Retirement
2 Institute, and finally Kathleen McBride. So
3 David?

4 MR. CERTNER: Thank you, my name is
5 David Certner, and I'm the legislative counsel
6 and policy director for AARP.

7 And on behalf of AARP, I thank the
8 Department for holding these hearings and
9 providing the opportunity to testify on the
10 important overdue proposal to amend the
11 definition of investment advice fiduciary.

12 One of AARP's top priorities is to
13 assist Americans in saving adequate retirement
14 assets to supplement Social Security. For this
15 reason, AARP strongly supports the Department's
16 proposal.

17 Those retiring and those planning
18 for retirement operate in an environment where
19 investment recommendations need not be made in
20 our best interests. As a result you may be
21 charged excessive fees, sold lower performing
22 and liquid assets, and be placed in investments

1 of unnecessary risk.

2 More directly, it means that many
3 will not be able to retire when planned and
4 will suffer a lower standard of living, when
5 they do. And this is unacceptable.

6 The proposed rule will address some
7 glaring loopholes by adhering to what Congress
8 intended in adopting ERISA, to create uniform
9 fiduciary standards in order to protect
10 retirees and their hard earned assets.

11 The proposal will advance the
12 expectation of the best interest standard for
13 those who need investment advice by updating
14 the definition and broadening what is meant by
15 an investment recommendation.

16 The proposal is a balanced effort to
17 achieve what Congress intended. It takes into
18 account dramatic structural changes in our
19 retirement systems since 1975 when the existing
20 regs were first put in place.

21 It better aligns the standard
22 behavior with other regulators, particularly

1 the SEC, and puts in place a framework
2 consistent with what retirees already believe
3 exist, that advice providers act in their best
4 interest when making investment
5 recommendations.

6 With the shift in pensions to an
7 individual account landscape, responsibility
8 for retirement investments has largely shifted
9 from plan fiduciaries to individuals.
10 Individuals now must plan for retirement and
11 ensure adequate savings. They must address
12 economic conditions and market risks.

13 They need to operate in an
14 environment where financial products are
15 increasingly complex. In making investment
16 decisions, they must often rely on financial
17 professionals for advice. They trust and
18 expect that the advice they receive will be in
19 their best interest.

20 Unfortunately, this is not always
21 true. While many who provide advice already
22 act in the best interest of retirees, some do

1 not. And the recommendations from those who do
2 not may be conflicted and self-interested,
3 benefitting the advice provider at the expense
4 of the retiree.

5 And knowing whether advice is being
6 provided in one's best interest can also be
7 difficult and complex. Broker dealers, for
8 example, are subject to a best interest
9 requirement imposed by the SEC.

10 But the standard mostly extends only
11 to recommendations on qualified securities.
12 The standard does not extend to recommendations
13 to invest in real estate, or fixed annuities,
14 or commodities, for example. This has resulted
15 in higher standards in some areas than others
16 resulting in worse outcomes for some kinds of
17 retirement investments.

18 One-time recommendations are also
19 not covered by the existing standard. This
20 outdated regulatory exception, not found in the
21 statute, has nothing to do with the importance
22 or impact of the advice given.

1 For example, a single recommendation
2 to convert an entire account balance into a
3 fixed annuity, or to roll over an entire 401K
4 down to an IRA, may impact the single most
5 important financial decision made by retirement
6 savers.

7 The decision may be irrevocable and
8 affect tens if not hundreds of thousands of
9 dollars of lifetime savings. It may not be
10 subject to the current definition of advice.
11 Clearly the standard applicable must be updated
12 and should not depend upon the number of
13 recommendations.

14
15 And then there's the fine print.
16 Fiduciary status may also be subject to a fine
17 print disclaimer somewhere in agreement even
18 when everything about the interaction suggests
19 a fiduciary type relationship.

20 All of these loopholes and the lack
21 of a common standard collectively create an
22 impossible situation for investors that must be

1 addressed. The Department's proposal will
2 address these concerns. Foremost, the proposal
3 will do what Congress initially intended,
4 create uniform standards designed to prevent
5 transactions which dissipate or endanger
6 retirement assets.

7 Those providing investment advice
8 for compensation would be subject to the best
9 interest standard. To the extent they hold
10 themselves out as fiduciaries, exercise
11 discretion or control over retirement assets
12 and the business of making such
13 recommendations.

14 Uniform standards will eliminate
15 most of the complex factors under current
16 standards. Second, the best interest standard
17 will no longer depend upon the number of
18 recommendations or the amount of advice. The
19 proposal will eliminate the one-time exception.

20 Recommendations to convert the
21 entire balance of retirement accounts into one
22 investment will need to be in the retiree's

1 best interest irrespective of whether the
2 advice is provided in a single recommendation
3 or through multiple recommendations over a
4 regular basis.

5 Third, the definition of
6 recommendation will explicitly include
7 rollovers. Those deciding whether to pull
8 assets from a retirement plan and put them in
9 an IRA will know that the recommendation must
10 be in their best interests.

11 Fourth, the proposal would fill gaps
12 in the existing regulatory regime by better
13 aligning the DOL's approach with what other
14 regulators have done. The proposal is similar
15 to the SEC's Regulation BI that governs the
16 standards applicable to broker-dealers when
17 dealing with retail clients.

18 Fifth, the effect of fine print
19 disclaimers will be limited. Advisors will not
20 be permitted to tell their clients they are
21 acting in their best interest while disclaiming
22 that standard in fine print that few will read.

1 And finally, while we have focused
2 primarily on advice to individuals, we strongly
3 support the Department's decision to ensure
4 that platform providers have the same duty at
5 least where they make recommendations about
6 specific securities to be offered over the
7 platform.

8 The proposal was that all state
9 contains a number of prudent exceptions. The
10 provision would not apply to education
11 materials, dual marketing efforts to require
12 clients be subject to a best interest standard,
13 at least where the materials do not include a
14 recommendation on how to invest or manage the
15 assets.

16 Now some have criticized the
17 proposal, asserting that changes are
18 unnecessary given the adoption of Reg BI by the
19 SEC and the NAIC model regulation. Others
20 claim this change will somehow harm access to
21 investment advice for lower income retirees.

22 We sharply disagree with these

1 arguments. We believe that a uniform best
2 interest standard will not decrease the
3 quantity of investment advice available to any
4 group of retirees.

5 The proposed rule aligns with SEC's
6 Reg BI, and there has been no evidence that
7 rule has reduced moderate income workers access
8 to investment advice. Those providing advice
9 that have business models based upon
10 conflicting transactions and excessive fees may
11 have to make changes.

12 But this will ensure that retirement
13 savers are receiving advice that is in their
14 best interest rather than in the best interest
15 of their financial advisor. In fact, limiting
16 access to bad advice is a good outcome for
17 retirement savers.

18 In addition, most advisory
19 professionals already act in their client's
20 best interest. And we are confident that, if
21 necessary, they have the capacity to advise
22 additional retirees who seek lower costs,

1 better performing assets, and an appropriate
2 level of risk.

3 As to whether the SEC's standard in
4 Reg BI is sufficient, the SEC's requirements
5 have limited reach and do not protect all
6 potential retirement investments. The SEC
7 standard, as we noted, only applies to
8 investment recommendations involving
9 securities.

10 The Department's proposal looks into
11 recommendations involving other types of
12 retirement plan investments. And much of the
13 discussion has focused on the extension of a
14 best interest standard to insurance products,
15 such as fixed annuities, that don't fall from
16 the definition of the security, and are not
17 subject to SEC's Reg BI.

18 But the new proposal provides needed
19 protection for other products as well. Right
20 now retirees can be subjected to
21 recommendations for a wide range of potentially
22 inappropriate investments not subject to the

1 federal securities laws, including some crypto
2 currencies.

3 These products can be liquid,
4 excessively risky, and sold through marketing
5 materials that could be unclear or misleading.

6 The NAIC model regulation is also not
7 sufficient protection. In fact, it explicitly
8 states it is not fiduciary standard, but a much
9 lower suitability standard. And further, it
10 excludes compensation for material conflict of
11 interest that must be managed and disclosed.

12 The need for best interest advice
13 for any retirement product should not have to
14 depend upon the definition of an investment
15 contract under the federal securities laws or
16 when the advice is given on a regular basis.

17 Requiring financial advisors to put
18 their clients' best interests before their own
19 is common sense and critically important to our
20 retirement system. It comes as a surprise to
21 many retirement savers that this is not already
22 the standard.

1 We spend tens of billions of dollars
2 of tax dollars each year to help ensure an
3 adequate income in retirement. Where advice
4 providers are not required to observe a best
5 interest standard, our national goal of
6 retirement security is undermined, and retirees
7 suffer the consequences.

8 While the losses from
9 self-interested recommendations may be
10 staggering, so are the effects. Retirement can
11 be delayed, or even rendered impossible. The
12 quality of life post-retirement can be
13 significantly reduced.

14 Every day this continues retirees
15 will be impaired. And for the most part, they
16 will not even know. Retirees will continue to
17 trust that their advice providers are acting in
18 their best interest, even when they aren't.

19 We therefore urge the Department to
20 act without delay. And thank you again for the
21 opportunity to share AARP's views on the
22 Department's proposal and look forward to

1 answering any questions.

2 MR. HAUSER: Thank you. Michael
3 Hadley?

4 MR. HADLEY: Hello, Michael Hadley
5 from Davis and Harman. I'm here on behalf of
6 the Committee of Annuity Insurers which is a
7 coalition of life insurance companies formed in
8 1981 to participate in the development of
9 federal policy with respect to annuities.
10 Sorry I have to be here again.

11 The Committee's current member
12 companies represent about 80 percent of the
13 annuity business in the United States and are
14 among the largest issuers of annuity contracts
15 to IRAs and employer sponsored retirement
16 plans.

17 For many years administrations of
18 both parties, and members of Congress on both
19 sides of the aisle, have recognized the
20 critical need to facilitate better access to
21 more use of life annuities and similar
22 arrangements that actually provide retirement

1 income that's guaranteed to continue for as
2 long as the retiree lives.

3 The committee and all its members
4 have tried to be partners in those goals. And
5 we're working every day to create products and
6 services that actually can provide retirement
7 income. And we fully support a retirement
8 regime that requires financial professionals,
9 whether providing services through an
10 investment advisory relationship, or through a
11 brokerage arrangement, or as a sale, to make
12 recommendations that are in the best interests
13 of their clients. And in fact, the SEC and
14 state insurance laws require that.

15 But we are very concerned that the
16 Department's latest resurrection of its same
17 old fiduciary rule proposal once again
18 threatens to eliminate or severely curtail the
19 availability of important financial services,
20 recommendations, and products that provide
21 protections that only an annuity can provide in
22 retirement.

1 This latest project's not only
2 necessary, contrary to well established law.
3 And there was a document, negative reaction
4 after the 2016 final rule, with a movement to
5 Fee-based models that favor wealthier
6 Americans. I'll be fine, but many Americans
7 will not.

8 As a result, we strongly urge you to
9 withdraw this latest iteration and take a step
10 back, work with stakeholders on a proposal
11 that's balanced and that could stand the test
12 of time.

13 Like lots of witnesses at this
14 hearing, we're very disappointed that the
15 proposal does not reflect the Fifth Circuit's
16 decision in the Chamber of Commerce case. In
17 fact, it clearly flies in the face of that
18 decision. As the Court unequivocally said,
19 that you're violating ERISA by treating sales
20 people as fiduciaries and by treating one time
21 rollover recommendations as fiduciary advice.
22 That's what the Court said.

1 Now we've had a chance to actually
2 read the proposal, I mean, not a lot of time,
3 but we've had some time, and putting aside all
4 of the talking points we've now read it. And
5 we can tell you there is no meaningful
6 difference between the 2016 proposal, the 2016
7 rule and this proposal.

8 It covers the same types of
9 arrangements, the same financial professionals,
10 and the same conduct as the 2016 rule. I think
11 it said something in the preamble about car
12 salesman. But in terms of financial products
13 and services, it covers the same stuff.

14 In fact, this proposal is, in many
15 respects, worse than the 2016 final rule.
16 Because it relies exclusively on a facts and
17 circumstances test using terms and phrases that
18 are brand new to us, and for which the
19 Department has not provided us sufficient time
20 to digest and react.

21 And if you look at the test, none of
22 the various elements that are new here, that

1 we're trying to digest as quickly as we can,
2 actually distinguish non-fiduciary suggestions
3 from fiduciary recommendations made in a
4 position of trust and confidence.

5 For example, this business about
6 making investment recommendations to investors
7 on a regular basis as part of your business,
8 that doesn't have any impact. That's true for
9 anyone who interacts with investors.

10 This business about may be relied
11 upon by retirement investors as a basis for
12 investment decisions that are in the best
13 interest, every suggestion that somebody else
14 makes to another human being is intended to do
15 that. The prior speakers trying to influence
16 your decision, they're hoping you're going to
17 rely on what they say. I'm doing the same.

18 The fact is that all it takes under
19 your test to be a fiduciary is make some kind
20 of money, that you make a suggestion that
21 somebody takes a course of action in
22 circumstances that suggest that's based on

1 their individual circumstances. And you're
2 going to get paid in some way. That's
3 basically the 2016 test, and that's this latest
4 proposal.

5 As I already said a couple of times,
6 to make matters worse you're not providing us
7 with adequate time to review and respond to the
8 proposed regulation and the related exemptions.
9 So this is a big deal, and we need time to make
10 sure that we can provide meaningful comment.

11 I just have to take a detour and
12 point out that the administration has engaged
13 in what we believe is unwarranted, completely
14 inappropriate political rhetoric about
15 annuities which is going harm retirement
16 security.

17 I'm not going to justify that
18 political spin by repeating it or even dignify
19 it. But I will reiterate something we said
20 over and over again for the past 12-plus years,
21 more than 12 years. Annuities have been, are,
22 and always will be a critical element of

1 providing guaranteed income to retirees. And
2 we strongly believe that the proposed
3 exemptions do not make this proposal workable.

4 You cannot solve the problem of
5 turning people who are not fiduciaries, who are
6 not in a position of trust and confidence, into
7 fiduciaries and then solve it by saying not to
8 worry, you have an exemption from the
9 prohibited transactions which inevitably
10 result, especially with the conditions that you
11 are putting forth.

12 Our comment letter, we're putting it
13 together as fast as we can, will lay out the
14 ways in which we believe you've missed the mark
15 with these exemptions. I'm going to mention a
16 few. But I will say again what many speakers
17 have said, tweaking the exemptions is not going
18 to make this proposal workable. It's going to
19 have the unfortunate effects that we saw in
20 2016. But I'll go through them anyway.

21 First of all, despite what the
22 Department has asserted, the new burdens under

1 84-24 that are imposed on insurance companies
2 far exceed the regulatory requirements that
3 apply under existing state insurance laws and
4 SEC rules.

5 And those additional burdens you're
6 imposing are completely unnecessary, given that
7 the actual regulators have protections that are
8 designed to provide the protections that you
9 are seeking in your proposal.

10 Number two, 84-24, as you proposed
11 it, is inexplicably limited to capital I
12 insurance commissions paid directly by the
13 insurer rather than covering other types of
14 compensation which are completely allowed under
15 2020-02. The only justification that the
16 Department provides for this restriction is,
17 and I'm quoting, "that it's consistent with the
18 Department's historical understanding and
19 intent."

20 That's a pretty paper-thin
21 justification, especially since the whole idea
22 behind this whole thing is to reflect changes

1 in the marketplace. In any event, that sort of
2 restriction is completely ill conceived and
3 should be removed.

4 Third, under the proposed amendments
5 to 84-24 and 2020-02, the Department has given
6 itself unprecedented power to put an insurance
7 company out of business by acting as a
8 gatekeeper under the eligibility conditions and
9 turning yourself into a second regulator for
10 life insurance. We already have one of those,
11 they're our state insurance regulator. You
12 guys are good at a lot of things, but you are
13 not going to be good at that.

14 Fourth, you're drawing indefensible
15 lines about the types of compensation that can
16 be paid to financial professionals and
17 prohibiting us from rewarding somebody who is
18 successful.

19 Fifth, we have significant concerns
20 with the changes that you're making to the
21 fiduciary acknowledgment. Those are not
22 clarifications. Not only do they appear to

1 turn all recommendations into fiduciary
2 recommendations, but we're very concerned they
3 create a new private right of action that
4 wouldn't otherwise exist which is what the
5 Fifth Circuit said ERISA does not allow you to
6 do.

7 I'll close by saying we are working
8 as fast as we can to identify additional issues
9 in the exemption and in the test, places where
10 it goes awry. We're going to get as many of
11 them in our comment letter as we can, given the
12 time you've given us.

13 But I'd just reiterate that tweaking
14 the exemption is not going to solve the
15 underlying problem with this proposal which is
16 that you're burdening every insurance salesman,
17 and most wholesalers, with the highest duty
18 known to the law. You're not giving them a
19 choice about that.

20 And you're attempting to solve that
21 by offering exemptions that impose requirements
22 far more stringent than the actual regulators

1 of these products and services impose on the
2 same conduct.

3 And you're giving yourself the
4 unchecked ability to put an insurance company
5 out of business with very little due process.
6 Accordingly, this proposal should be withdrawn.
7 It's not because we don't support
8 recommendations be made in somebody's best
9 interest. We do. It's because imposing
10 fiduciary obligations where it doesn't belong
11 does not make sense.

12 With that, thank you for the time
13 and happy to take questions.

14 MR. HAUSER: Thank you very much.
15 Let's see. The Insured Retirement Institute, I
16 don't know if Mr. Chopus or Mr. Berkowitz are
17 going first.

18 MR. CHOPUS: I'll go first. Thank
19 you. Good afternoon, everyone. Thank you for
20 the opportunity to share our initial views with
21 all of you here today.

22 My name is William Chopus. I'm the

1 president and CEO of the Insured Retirement
2 Institute. We are the trade association
3 representing the entire supply chain of the
4 insured retirement industry. That includes
5 insurers, distributors, asset managers,
6 solution providers, and many others. And my
7 colleague Jason Berkowitz and I will also share
8 our members' initial views about your
9 Retirement Security Rule.

10 The name itself, we think, is ironic
11 given that it will certainly increase
12 retirement insecurity that far too many workers
13 and retirees already now feel. And as we've
14 stated, IRI was dismayed by the Labor
15 Department's rejection of what we thought was a
16 very reasonable request for additional time to
17 comment, especially given the complexity of
18 this proposal and a comment period during a
19 time that includes federal and religious and
20 cultural holidays.

21 Most discouraging were the
22 President's remarks announcing the rule.

1 Rather than explain why the rule was necessary,
2 the President completely mischaracterized the
3 entire insured retirement industry and our
4 products to justify a rule imposing unnecessary
5 and redundant regulatory burdens on investment
6 advice. The President disparaged our industry
7 and its workers by inventing a link to his
8 efforts to fight junk fees, but as you know,
9 there are no mention of that term in the 495
10 pages of the new regulation that he announced.

11 Our industry champions workers and
12 retirees and has long sought bipartisan
13 policies to strengthen financial security. We
14 advocate for expanding retirement savings
15 opportunities and facilitating protected
16 lifetime income solutions to secure and dignify
17 retirement for America's workers, retirees, and
18 their families, and we do so proudly.

19 Financial professionals are
20 dedicated, caring women and men, who work daily
21 in their communities nationwide to provide
22 tailored financial strategies and products that

1 serve their clients' best interests.

2 And millions and millions of workers
3 and their families have chosen to purchase
4 annuities to protect their retirement assets
5 and provide a stream of guaranteed lifetime
6 income, very similar to the defined method
7 pension plans available to many union and
8 governmental workers. Those individuals who --
9 their median household income is \$76,000, rely
10 on our industry's innovative products to meet
11 their accumulation, income, and asset
12 protection needs.

13 And this proposed rule is completely
14 contrary to the President's inclusive economic
15 principles and will actually harm the very
16 consumers he and the Department have said they
17 wish to help. The rule will deepen the
18 nation's retirement crisis by eliminating
19 access to sound financial advice.

20 A similar regulation in 2016, by the
21 Obama-Biden administration caused 10.2 million
22 retirement account holders, who collectively

1 held 900 billion in savings, to lose access to
2 their financial professionals.

3 And a study from the Hispanic
4 Leadership Fund found that reinstating that
5 rule would increase the wealth gap for black
6 and Latino workers and retirees by 20 percent
7 when looking at accumulated individual
8 retirement savings alone. Thankfully, a
9 federal court vacated that rule in 2018.

10 And less than a year ago, IRI and
11 many others testifying at today's hearing
12 successfully advocated for the bipartisan
13 Secure 2.0 Act, a critically important
14 retirement security law, signed into law by
15 President Biden. The new law and its
16 predecessor, which was the Secure Act of 2019,
17 expanded access to workplace retirement plans
18 and facilitated the varying lifetime income
19 products that the President disparaged when he
20 announced the rule.

21 But by reducing or eliminating
22 access to critical financial advice and

1 lifetime income products, this rule will
2 threaten the retirement goals of many lower-
3 and middle-income workers and raise their risk
4 of outliving their retirement savings. That is
5 the opposite of what the Secure Act and Secure
6 2.0 were meant to achieve.

7 The President and Department showed
8 a fundamental misunderstanding of how the
9 insurance industry and annuity products work
10 for the benefit of consumers. And the best
11 outcome for America's workers and retirees
12 seeking to build a secure and dignified
13 retirement is the immediate withdrawal of the
14 rule.

15 Thank you again for your time today.
16 I appreciate the opportunity, and I will now
17 turn it over to Jason Berkowitz.

18 MR. BERKOWITZ: Thank you, Wayne.
19 And good afternoon, everyone. My name is Jason
20 Berkowitz, and I am IRI's chief legal and
21 regulatory affairs officer. In the spirit of
22 the eight nights of Hanukkah, I am going to

1 cover eight of the -- our members' most
2 significant concerns.

3 First, this proposal is nearly
4 identical to the now vacated 2016 rule, which,
5 as Wayne mentioned, caused significant consumer
6 harm. The regulatory impact analysis,
7 unfortunately, neglected to adequately consider
8 this fact. And this proposal will almost
9 certainly have the same result, if not worse,
10 with, as Wayne mentioned, a disproportionate
11 impact on lower- and middle-income savers and
12 underserved communities.

13 Second, the proposal is a solution
14 in search of a problem. The evolution of the
15 regulatory framework in recent years makes this
16 entirely unnecessary. Reg BI, the NAIC's best
17 interest model, which, by the way, has been
18 badly mischaracterized by several other
19 speakers today, along with PTE 2020-02,
20 collectively hold all financial professionals
21 to a best interest standard.

22 Reg BI and the NAIC model were

1 developed by regulators with the expertise
2 needed to craft rules that make sense for the
3 industries to which they apply, and there has
4 been no evidence presented that these rules are
5 not working to protect retirement savers.

6 Third, the proposal flies in the
7 face of the Fifth Circuit's vacatur of the 2016
8 rule. The court clearly stated that fiduciary
9 status should exist only where there is a
10 special relationship of trust and confidence,
11 which is extremely rare in the context of sales
12 activity, even when accompanied by incidental
13 advice.

14 This proposal, which would bring
15 nearly all sales activity under the fiduciary
16 umbrella, explicitly and inappropriately
17 rejects this dichotomy between advice and
18 sales.

19 Fourth, by treating rollover
20 recommendations as fiduciary advice under Title
21 1 of ERISA, the proposal would expose a vastly
22 expanded universe of fiduciaries to the risk of

1 a private right of action. This appears to be
2 a back-door effort to circumvent the Fifth
3 Circuit's ruling that the Department cannot
4 directly create a new private right of action;
5 only Congress has that authority.

6 Fifth, the breadth of the proposal
7 and the lack of applicable carve-outs is highly
8 problematic. For example, our responses to
9 RFPs from plan sponsors would likely trigger
10 fiduciary status in all or most cases. And as
11 a result, plan sponsors will likely lose access
12 to the extensive information they need to
13 satisfy their fiduciary obligations when
14 selecting service providers for their plans.

15 Sixth, the pursuit of a level
16 playing field is inconsistent with Congress's
17 intent in giving the Department authority to
18 issue exemptions that are appropriate to
19 different situations. We fundamentally
20 disagree with the premise that the need for a
21 level playing field outweighs the value of
22 tailoring exemptive relief to the specific

1 situations in which it is needed.

2 To illustrate why the desire for a
3 level playing field is misguided and dangerous
4 in this case, consider that PTE 2020-02 was
5 designed for use in the retail space, but under
6 this proposal, a wide range of institutional
7 business practices would have to somehow be
8 shoehorned into that framework. This would be
9 like requiring airplanes to follow the same
10 precautions as automobiles.

11 Similarly, the overall regulatory
12 framework for some products is more robust than
13 others. Mutual funds and annuities are heavily
14 regulated by well-established agencies, under
15 strong and effective rules. While the rules
16 for cryptocurrency, for example, are still
17 under development. More vigorous rules may be
18 appropriate in some cases, but there is simply
19 no need to impose extensive new burdens on
20 well-regulated products.

21 Seventh, while we appreciate the
22 preservation of PTE 84-24, the proposal

1 needlessly limits who can use the revised
2 exemption and the types of compensation and
3 types of products for which it can be used.

4 And it imposes such overly burdensome and
5 unworkable conditions that, in practice, very
6 few independent producers would actually be
7 able to use it.

8 And eighth, the draconian
9 disqualification provisions in both PTE 84-24
10 and PTE 2020-02 could force entire enterprises
11 out of the retirement business for a decade due
12 to convictions of affiliates in foreign
13 countries, even if those convictions are
14 unrelated to the provision of investment advice
15 to American retirement savers.

16 This is especially troubling when
17 thinking about the many foreign nations whose
18 criminal justice systems do not provide the
19 same due process protections we enjoy in this
20 country.

21 For these reasons and so many
22 others, IRI urges the Department to withdraw

1 this dangerous, misguided, and unfixable
2 proposal and redirect its efforts -- its
3 resources, rather, to efforts that will
4 actually benefit retirement savers, including
5 robust enforcement of existing rules and
6 rulemaking to implement the many positive
7 reforms in Secure and Secure 2.0.

8 I would be happy to answer any
9 questions you may have.

10 MR. HAUSER: Having a little mute
11 button trouble there, which, if you know me, is
12 a frequent occurrence. Ms. McBride?

13 MS. MCBRIDE: Thank you for the
14 opportunity to testify today. I am Kathleen
15 McBride, founder of FiduciaryPath, a fiduciary
16 best practices training firm, and also, an
17 ERISA 402(a) Named Fiduciary expert at
18 Fiduciary Wise, where we become the plan's
19 professional named fiduciary and run the plans
20 solely in the best interest of participants.
21 We don't manage assets or provide investment
22 advice. I currently serve as chair of the all

1 volunteer committee of the -- for the Fiduciary
2 Standard. The views expressed here are my own.

3 As an accredited investment
4 fiduciary analyst with the Center for Fiduciary
5 Excellence, I've audited the fiduciary best
6 practices of more than 100 organizations. This
7 testimony is based on 45 years of experience in
8 the investment industry, with a focus on
9 investment management and fiduciary best
10 practices that help investors reach their
11 goals.

12 It's been fascinating to hear
13 opponents of the proposed rule who work so hard
14 on behalf of those who want to appear to be
15 acting in the best interest of retirement
16 clients but turn around and claim in court that
17 they are salespeople, just like car dealers.
18 Financial intermediaries and firms can't have
19 it both ways. Anyone who works with retirement
20 clients needs to work solely in the best
21 interest of those clients.

22 I strongly support the Department of

1 Labor's Retirement Security Proposal. The
2 ERISA standard of care is what retirement --
3 savers expect and what anyone advising them
4 must provide. When high expense,
5 cost-inefficient investment options are in
6 plans, retirement savers end up with less than
7 they should have at retirement, often missing
8 hundreds of thousands of retirement dollars;
9 dollars that should be in their retirement
10 accounts, not taken from their accounts in the
11 form of high expenses.

12 The DOL rule should cover advice to
13 plan sponsors. It's crucial for plan sponsors
14 to always receive advice that is solely in the
15 best interest of plan participants. That's not
16 covered under the existing law.

17 And as indicated by numerous
18 lawsuits against large client sponsors,
19 expenses of plan investments and service
20 providers are often much too high. I oppose a
21 seller's exemption carve out. If you look at
22 plan lawsuits, it's clear that even very large

1 plan sponsors are not sophisticated enough to
2 guard against high plan expenses and subpar
3 fund menus. Costs really do matter.

4 Plan investment options that carry
5 high expenses are not cost-efficient. It's a
6 drag on performance. This matters because
7 investments that are not cost-efficient can rob
8 a plan participant of a third or half of their
9 - even half of their retirement savings,
10 leaving them much less secure.

11 Former Yale endowment manager David
12 Swenson advised nonprofessional investors to
13 invest their retirement savings solely in
14 low-cost index funds. He noted that just one
15 percent in excess fees over the retirement
16 saving years could reduce the retiree's nest
17 egg by half.

18 A study by AARP found that 41
19 percent of investors think they don't pay any
20 fees or expenses on their investment accounts.
21 Another 12 percent are not sure that they pay
22 fees or investment expenses at all. And nearly

1 two-thirds, 52 percent, don't know how much
2 they pay.

3 The study also found that two and
4 three investors think that it would be
5 unacceptable for financial advisors to maximize
6 their earnings by selling their clients
7 higher-cost investment products when similar
8 lower-cost investment products are available.
9 This makes clear that there is deception in
10 some quarters of the retirement investment
11 marketplace.

12 Rollovers also need to be covered.
13 I have a true example that I'll give to you
14 here. Richard Smith had just turned 65. After
15 college, he joined the Navy, retiring as a
16 lieutenant after his term. He entered the
17 private sector and saved -- create a retirement
18 nest egg, and he was the beneficiary of two
19 very large corporate pension plans and a
20 government pension, as well as 401(k)s.

21 Shortly after his 65th birthday,
22 Smith got a call from an advisor who began by

1 asking whether he was confident he'd have
2 enough to live on for the rest of his life. He
3 insinuated the -- that the employers with the
4 pensions, one a Fortune 40 company and the
5 other a Fortune 20 company, might go out of
6 business, taking Smith's monthly pension with
7 them. He asked Smith what would happen to you
8 then.

9 He urged Smith to take lump sum
10 payments out of his two corporate pensions,
11 well into the six-figures, and roll that into a
12 guaranteed annuity in an IRA. Each month, it
13 would pay Smith several hundred dollars less
14 than the pension plan, but, he said, it would
15 be guaranteed.

16 He hounded Smith until he rolled one
17 of his pensions into an IRA, ready for that
18 annuity. This caused him irreversible harm.
19 It's too late for Smith, but it's not too late
20 to close that kind of loophole in which a
21 service provider preys on the fears of people
22 who are retiring, even when their pensions are

1 as secure as these were.

2 The proposed rule's redefinition of
3 fiduciary investment advice is necessary
4 because many areas of the retirement advice
5 industry are not covered by the SEC's Reg Best
6 Interest or NAIC's weak annuities purpose.
7 Retirement savers are left to fend for
8 themselves when products like annuities are
9 recommended.

10 The DOL's rule would help retirement
11 savers by covering all advice and
12 recommendations, and -- and Reg BI doesn't
13 cover the problem of conflicts of interest in
14 retirement advice. It only covers securities
15 transactions. The NAIC model for annuities is
16 weak. Its best interest provisions are really
17 suitability, the sales standard, not the
18 fiduciary standard. It's a wolf in sheep's
19 clothing standard.

20 The 1975 Five-Part Test, it's very
21 important for the DOL to help close the
22 loopholes in the 1975 Five-Part Test. The test

1 was issued in an era when corporate pensions
2 were the norm, and employers were responsible
3 for providing pension plans for employees. But
4 now that rule is 50 years old, and parts of the
5 Five-Part Test have been hijacked and are being
6 used in ways that were never intended, to
7 recommend products that provide higher
8 commissions and fees to the seller. That's a
9 zero-sum game.

10 So when big paydays go to sellers of
11 investment or insurance products, these fees
12 and commissions come out of the pockets of
13 retirement investors. Too often this takes the
14 form of a hit-and-run sale with no additional
15 advice from the seller. Thus, it's a way for
16 the seller to abscond with more of the
17 retirement saver's money by -- selling a
18 one-hit high-commission annuity that strips the
19 retirement investor of assets and liquidity.

20 Also, when many of these annuities
21 are examined, there is no way for the
22 retirement investor to break even over the

1 course of their lifetime, but that is clearly
2 not disclosed.

3 And for indexed annuities, the
4 issuing company can reset the participant rate,
5 patient rate, and cap rate annually, and most
6 will do that. This is a distinct advantage to
7 the insurer but not the retirement saver.

8 And in the likely event that the
9 annuitant dies before a full payout, the
10 remainder goes back to the insurance company
11 unless the annuitant has named a beneficiary
12 and paid for survivor benefits.

13 About rollovers, a study by Pew
14 Trusts found that rolling out of a 401(k) costs
15 retirement savers a lot of money once they no
16 longer get the benefit from institutional share
17 classes that a 401(k) should use. The amount
18 of retirement savings lost in such rollovers
19 potentially reaches tens of billions of
20 dollars. In 2018 alone, investors rolled 516
21 billion from employer retirement plans into
22 traditional IRAs.

1 An analysis of fee differentials
2 suggest that over a hypothetical retirement
3 period of 25 years, those retail investors
4 could see an aggregate reduction in savings of
5 about 45.5 billion dollars, just from that
6 single year of rollovers.

7 Let's talk about access, choice, and
8 compensation. This rule is very different from
9 the 2016 proposal. It will not result in a
10 loss of access for investors that some
11 companies would refuse to serve because many
12 fiduciary professionals are ready, willing, and
13 able to serve investors of all means, based on
14 a fiduciary standard.

15 The industry claims that the
16 proposal would result in a loss of access to
17 advice are inconsistent with their legal claims
18 before the Fifth Circuit, that they provide
19 arm's length commercial sales pitches like car
20 dealers, not advice.

21 This rule, instead of limiting
22 access or choice, would improve products and

1 services and promote innovation. We saw real
2 product improvements in 2016 and '17, but many
3 of those products and services that were
4 announced, and we were so hopeful about, never
5 came to market after that rule was struck down.

6 And one more thing, this is not
7 about commissions versus fees either.
8 Investors would be able to receive advice and
9 be able to pay for it according to a variety of
10 fee models with this rule. Those who make the
11 loss of access claims would not have been
12 providing trusted advice anyway.

13 Advisors who do provide trusted
14 advice in the best interest of plan
15 participants and retirement investors are fully
16 prepared to pick up any slack should certain
17 firms feel ill-equipped to work in the best
18 interest of clients of any size, background, or
19 walk of life.

20 And finally, the framework of PTE
21 2020-02 and 84-24 and the Impartial Conduct
22 Standards are very important to protect

1 retirement savers from conflicted advice.

2 In short, we hope the Department
3 will pass this proposed rule and accompanying
4 revisions and PTEs. A strong, final rule will
5 benefit retirement investors and enable them to
6 avoid many of the most serious and irreversible
7 harms that are present now and to have a more
8 secure retirement.

9 Thank you so much for the
10 opportunity to testify here.

11 MR. KHAWAR: Okay. Thank you, all.
12 I just had a couple of questions, start with
13 Mr. Hadley.

14 You mentioned a concern about the
15 restriction in 84-24 to the receipt of
16 commissions. Can you talk about some of the
17 other forms of compensation that you think
18 should be included in 84-24?

19 MR. HADLEY: Well, the point I'm
20 going to make is we need to run all our stuff
21 through our members. We're still working on
22 that. I've never had to testify before. I've

1 written a comment letter before, so we -- we
2 need to do that.

3 But here's what I will say: we don't
4 think it makes any sense to have any
5 restriction that applies just to that one
6 little slice of the IRA and retirement plan
7 market. There's not any justification really
8 given, and it really doesn't make any sense.

9 So, in our mind, an exemption needs
10 to be available for any type of compensation,
11 as long as it meets other restrictions, such as
12 that it's reasonable. Nobody has a problem
13 with the restriction on reasonable
14 compensation. It's been the law for a long
15 time.

16 So, the -- as I understand it -- and
17 we are still gathering input, as you'd expect
18 -- there are a variety of ways in which the
19 sale of insurance products are compensated.
20 And -- and they should all be allowed. You
21 shouldn't have regulatory arbitrage for
22 particular products.

1 MR. KHAWAR: Okay. Understood. And
2 under -- the qualifier is also understood that
3 it's not necessarily the official position, at
4 this point, of your -- your client.

5 Mr. Berkowitz or Mr. Chopus, whoever
6 wants to answer for IRI, just a couple of
7 questions for you. Is it your view that right
8 now IRI members are providing best interest
9 advice when they are operating pursuant to the
10 NAIC model rule on -- or even if they're in a
11 state that doesn't require -- that hasn't
12 adopted the NAIC model rule?

13 MR. BERKOWITZ: Yes. I would say
14 so. Ali, thank you for the question. You
15 know, we are, and our members have been
16 committed to operating under a best interest
17 standard for a very long time.

18 And I can tell you, as one of the
19 only people that has been before you today that
20 was sitting at the table with the NAIC when
21 that model was being developed, that it is the
22 result of a very, very robust public and

1 transparent process for which any of the
2 objectors today could have made an appearance
3 and expressed their views. I don't remember
4 seeing more than maybe one or two of consumer
5 advocates at those various public hearings.

6 But that process, really, you know,
7 there -- as I mentioned in my testimony, there
8 has been so much miscommunication and
9 misstatement about the NAIC model that I'd love
10 to be able to just address some of those
11 comments because I think for -- for you to
12 really understand why the -- our members
13 believe this is the case, it really helps to
14 try to dispel some of those misconceptions.

15 So, the first thing I would just say
16 is we've heard

17 (Simultaneous speaking.)

18 MR. KHAWAR: I have a couple of
19 other questions, and we've got limited time for
20 folks to answer, so just one other -- one other
21 question from me. And then, if we have time,
22 maybe we can circle back to the points you want

1 make that you didn't make in your testimony.

2 So, in terms of how your, maybe,
3 retail-facing members interact with their
4 customers, do they kind of convey that they are
5 providing best interest advice? Is that your
6 sense of how they're interacting with their
7 customers?

8 MR. BERKOWITZ: Well, between the
9 fact that they're required to under the NAIC
10 model, and they're required to under the SEC's
11 Reg Best Interest depending on what product
12 they're selling, I would say yes. They're
13 operating in accordance with the requirements
14 of applicable law.

15 MR. KHAWAR: I may circle back in,
16 but I wanted to make sure we have time for
17 others.

18 MR. HAUSER: So just a few
19 questions, maybe starting with -- well,
20 actually, Mr. Hadley or Mr. Berkowitz, either
21 one can answer.

22 But one question I have is just you

1 both, I think you in particular, Mr. Hadley,
2 drew a distinction between salespeople and
3 trust and confidence kind of advisors, and I
4 just want to understand what is your conception
5 of that. When the Fifth Circuit talked about a
6 trust and confidence relationship, did you
7 think that the intersection between insurance
8 agents and people with those kind of
9 relationships was kind of a null set? Did you
10 think it was some of them but not all of them,
11 and how would you draw the line?

12 (No audible response.)

13 MR. HAUSER: I think you're muted if
14 you're talking.

15 MR. HADLEY: Sorry about that. I
16 think the problem

17 (Simultaneous speaking.)

18 MR. HADLEY: The Five-Part Test did
19 a pretty good job. If you look at that test,
20 it really establishes somebody who has an
21 agreement where they will provide ongoing
22 advice, where there's an agreement that both

1 sides understand what's being provided and what
2 doesn't. I am sure there are people that are
3 -- that sell insurance products and act as
4 fiduciaries and meet the Five-Part Test.

5 And that test makes a lot of sense
6 because it is a -- exactly the type of
7 fiduciary relationship that Congress intended
8 when it borrowed from -- from trust law. And
9 we think that makes sense, and we think you
10 should keep it.

11 MR. HAUSER: I think our -- I'm
12 sorry. Go ahead, Jason.

13 MR. BERKOWITZ: Oh, yeah. I just
14 wanted to add to that. You know, I think that
15 it's really important to understand that we are
16 not saying that there should be no fiduciaries.
17 Right? What we are saying is that there needs
18 to be a diversity of options available in the
19 marketplace so that different types of
20 solutions and different types of relationships
21 that may be beneficial or more workable for
22 differently situated consumers have access to

1 what makes sense for them.

2 And so, while there are
3 circumstances where it is appropriate to assign
4 fiduciary status based on the actual facts and
5 circumstances involved in a particular
6 relationship, to take a broad brush and paint
7 all interactions between financial
8 professionals and retirement savers, regardless
9 of whether they're in an IRA or 401(k) or
10 otherwise, as all being subject to the same
11 ERISA standard, that's where we start to have a
12 problem.

13 We fully support the idea of best
14 interest standard, and that's why we've been so
15 proactive in -- in supporting uniform adoption
16 of the NAIC model across the states, why we've
17 been so supportive of the SEC fully and
18 aggressively enforcing Regulation Best
19 Interest, and you know, so I think it's just
20 important to keep that all in mind.

21 MR. HAUSER: I appreciate that. But
22 I guess, the question though as -- I mean, our

1 -- I mean, just to put it on the table, our
2 concern is certainly the Five-Part Test is
3 going to capture circumstances where people
4 have a relationship of trust and confidence. I
5 don't think there's much doubt about that. If
6 you meet each of those five prongs with respect
7 to any instance of advice, you're in a trust
8 and confidence relationship.

9 But part of the concern is it's
10 underinclusive. There are circumstances where
11 a party has that relationship of trust and
12 confidence, where the customer legitimately
13 believes they're receiving individualized
14 advice, that that advice is calculated to serve
15 their interest not the competing interest of
16 the advisor, that they're -- really, the person
17 is acting a trust and confidence relationship.

18 And one example may be -- I mean, I
19 don't know if you -- you both heard it, but you
20 know, we had a conversation earlier with Bryon
21 Holz about his relationship with his customers,
22 which he characterized as one of trust and

1 confidence. And you know, it involved the sale
2 of annuities after repeated meetings and
3 individualized assessment of the customer.

4 But you know, when he's first
5 recommending an annuity -- I'm just -- I'm
6 using him now hypothetically, not -- that may
7 have been his first interaction with that
8 customer, with respect to plan assets or an IRA
9 investment. Is it really the case that those
10 -- I mean, is it your view that, even so, that
11 should be cut out from any kind of a
12 trust-and-confidence-based test?

13 MR. BERKOWITZ: So, in my -- in our
14 opinion -- and thank you for that question,
15 Tim, and I certainly can't speak to the
16 specifics of Mr. Holz's situation. But
17 generally, what I would say is when there is a
18 relationship of trust and confidence that falls
19 within the -- within the Five-Part Test, that
20 is within the Department of Labor's
21 jurisdiction and appropriate authority to take
22 steps to protect that consumer.

1 If similar advice is being provided
2 to someone without that relationship, where it
3 hasn't been developed yet, where it is a
4 one-time advice, that's why there are other
5 regulatory bodies. So if there's -- are
6 recommendations related to securities, in that
7 circumstance, that should be subject to Reg BI.

8 In - if it's an insurance product
9 that is not a security, it should be subject to
10 and regulated under the best interest standard
11 from the NAIC. That is why we have different
12 jurisdictions and different regulators with
13 different areas of expertise.

14 So I'm not suggesting that that
15 situation should be uncovered. I'm simply
16 suggesting that that is not necessarily the
17 Department of Labor's job to cover that. There
18 are other regulators who are charged with that
19 -- with that responsibility.

20 MR. HAUSER: And I understand your
21 position, I guess, but I mean, are you saying
22 that it's not even conceivable that absent

1 prior advice with respect to plan assets, one
2 could have that trust and confidence
3 relationship?

4 I mean, just to give you an example,
5 suppose the person receiving the advice had
6 received -- you know, had a long-standing
7 relationship with the advisor in the context of
8 all kinds of other investments, but they didn't
9 involve plan assets.

10 Under the Five-Part Test, that's not
11 going to be fiduciary, but you could have a
12 long relationship. The person is holding
13 themselves out as acting in the customer's best
14 interest. They're giving individualized advice
15 after multiple visits. Are -- we really think
16 that the -- that Congress excluded us from
17 regulating that as trust and confidence advice,
18 as fiduciary advice?

19 MR. BERKOWITZ: Yeah, I mean, again,
20 I would come back to all of that previous
21 relationship was governed by regulations under
22 the securities laws or the insurance laws, and

1 to the extent that that particular advice about
2 the rollover is not a part of a long-standing
3 relationship of trust and confidence with
4 respect to retirement plan assets, the laws of
5 -- under the securities laws and the -- and the
6 state's insurance laws would be there to serve
7 that function.

8 The protection is being provided.
9 You know, the fact that it's not coming from
10 the Department of Labor does not mean that it
11 is not effective regulation.

12 MR. HAUSER: Mr. Hadley, do you have
13 anything to add to that? And then I have a
14 couple follow-ups for you.

15 MR. HADLEY: I guess I'll make two
16 points. The first is, the advantage of having
17 done this more than -- more than a dozen years,
18 I know a question coming from Tim Hauser that's
19 not really a question. But I'll answer it,
20 nonetheless.

21 I think if that's really your
22 concern, that sounds great. We'd set -- we'd

1 ask you withdraw and repropose that captures
2 that situation and not all these other
3 situations involving a single suggestion that
4 is tailored to the individual circumstances of
5 the recipient of the suggestion.

6 We'd be happy to discuss that, and
7 we think if you had a proposal that captured
8 that but not everything else, that would be
9 something we could provide comments on.

10 MR. HAUSER: Well, I think the aim
11 of our proposal is not to capture a single
12 hypothetical, but it is, and I think you should
13 take it as a given that we're doing our level
14 best to implement what we think is a fair
15 reading of the Fifth Circuit's opinion. And we
16 are trying to get at relationships of trust and
17 confidence.

18 And if you think there's a better
19 way for us to write that, that doesn't involve
20 a read of the statute that says anytime says
21 something to another human, it's possibly
22 conceived of as -- as falling within the

1 definition, I'm all ears. I'd welcome that,
2 but clearly, that's not what was intended here.

3 MR. BERKOWITZ: I would just say
4 that the Five-Part Test already accomplishes
5 that.

6 MR. HAUSER: Okay. Just let me --
7 one more question. So both of you have alluded
8 to our authority in this space. The statutory
9 text itself just refers to advice to a plan for
10 a fee, direct or indirect. It doesn't have a
11 Five-Part Test, which you now, as I understand
12 it, are saying is kind of this sine qua non of
13 a trust law standard.

14 Do either of you have any case law
15 authority under the Common Law of Trust, under
16 the Common Law of Agency, under the Common Law
17 of Fiduciary Responsibilities for the Five-Part
18 Test? Is there -- is there a precursor in that
19 law to the Five-Part Test? Are you aware of a
20 body of law that -- that actually said the only
21 circumstance somebody can be a fiduciary is
22 when the Five-Part Test is met?

1 MR. BERKOWITZ: I would say to refer
2 back to the Chamber of Commerce case. In the
3 decision from the Fifth Circuit there, they did
4 a very thorough job of analyzing the -- the
5 common law and describing why it makes sense
6 for the Five-Part Test to serve as a proxy for
7 that relationship of trust and confidence.

8 So, I -- that's -- you know, I'm not
9 going to try to do something more effectively
10 than what the Court's already done.

11 MR. HAUSER: Yeah, I think, however
12 one reads that opinion -- I mean, I guess my
13 question is just, I mean, -- do we -- do you
14 think that trust and confidence is limited
15 under any case law you can think of to the
16 Five-Part Test? Outside -- you know, the --
17 we've -- as I said, we're doing our level best
18 to interpret and apply the -- the Fifth Circuit
19 opinion, but is there other case law in this
20 question?

21 MR. BERKOWITZ: At this point, given
22 that we've been so focused on trying to get

1 through the entire proposal in the time that
2 you've given us, I haven't had the time to do
3 that sort of extensive legal research, but I
4 certainly, you know -- if -- but, if need be,
5 we certainly can come to that and do that
6 analysis. And you know, if we -- I just -- I
7 can't imagine that we would have the time to do
8 that before the comment period closes, but
9 perhaps we could do that and get back to you
10 sometime in the new year with information on
11 that.

12 MR. HAUSER: I mean, if your -- if
13 your view is just this is compelled by the
14 Fifth Circuit, I understand. I'm just
15 wondering if you have any other authority or
16 citing.

17 (Simultaneous speaking.)

18 MR. BERKOWITZ: Not at this time
19 that I can share.

20 MR. HAUSER: All right. Mr. Hadley?

21 MR. HADLEY: Yeah, I'm not -- I'm
22 not going to fall into a trap. You're a very

1 good litigator, my friend. What I will say is
2 that, in our view, your new proposal covers the
3 same conduct, the same suggestions, same
4 products and services. It covers rollovers.
5 It covers IRAs, just like the old proposal. We
6 don't see much difference, very little.

7 And we didn't see much explained, so
8 in our view if that's you're covering stuff not
9 allowed under the Fifth Circuit test, that's
10 pretty much the end of it. I don't need to
11 cite more than one binding circuit court
12 opinion.

13 MR. HAUSER: No, that's okay. I
14 think I understand your point of view. But, I
15 mean, again, I just -- and this isn't a
16 question, since you, you know, suggested that
17 sometimes I ask questions that aren't really
18 questions, but I'm just going to tell you.

19 Our intent is not to suggest that
20 just because another human may rely upon a
21 communication that that counts as the sort of
22 advice we're talking about. The aim of that

1 language is to encompass relationships where
2 the person is really holding themselves out as
3 somebody who's acting for the investor, in
4 their interest, in a confidential sort of
5 relationship, and they're basing the
6 recommendation, not just on sales, but on an
7 assessment of the person's individualized
8 circumstances.

9 If you think there is a better way
10 for us to write that, in addition to just
11 saying that we're repeating what the Fifth
12 Circuit said, which I don't -- you know, forbid
13 -- prohibited, which I don't agree with, we
14 would invite you, we would encourage you to
15 suggest what language you think would draw that
16 line unless your view truly is that only the
17 Five-Part Test, that's it, or that salespeople
18 who insurance agents can never be fiduciaries.

19 So I'm just asking if you could, you
20 know, as you're -- as you're doing your work on
21 your comment, if you could, think of that.

22 The other statement I'm just going

1 to make is just so we're clear about it, there
2 are significant differences between this and
3 the -- and the 2016 Reg. Assistant Secretary
4 Gomez alluded to them at the outset, but I
5 think some of them are worth repeating here.
6 There is not, in fact, a contract requirement
7 in this -- in the -- these documents.

8 Mr. Berkowitz, you suggested we were
9 trying to backdoor one. We are not.

10 You all -- the only remedies that
11 are available to anyone under any of these
12 provisions are the one that Congress gave.
13 It's -- there is -- there's an excise tax under
14 the code. There is -- there's whatever
15 remedies are available under Title 1. That's
16 it.

17 If you want to disclaim in your
18 papers, in your dealings with the customer, a
19 contract obligation, you may. There is
20 literally nothing in this document that
21 requires somebody to execute a document with a
22 customer. We pick up robo-advice. We didn't

1 have that before. We don't require website
2 disclosure.

3 The rule that the Fifth Circuit was
4 looking at was one that made every direct
5 communication to a retail investor
6 automatically a fiduciary, subject to some
7 carve-outs. This rule does not do any of that.
8 It's a facts and circumstances test based on
9 trust and confidence. So I don't agree with
10 assertions that just say we're just repeating
11 ourselves.

12 And the last thing I don't agree
13 with, and this is a question, is what do you
14 mean, Mr. Hadley, when you refer to -- you
15 know, when you contrast us with the actual
16 regulators responsible for this space? Is it
17 your view that ERISA doesn't encompass
18 insurance products, that it doesn't cover
19 advice with respect to retirement assets? What
20 is the distinction you're drawing there, and
21 you know, what are you saying about our
22 authority with respect to insurance products

1 sold to IRA customers or to plan investors?

2 MR. HADLEY: It's easy. It allows
3 you to regulate the fiduciaries, but it doesn't
4 allow you to turn non-fiduciaries into
5 fiduciaries.

6 MS. WILKER: As we are -- where we
7 are wrapping up, I would just like to see if
8 Ms. McBride has anything (audio interference.)
9 standards like (audio interference.) ERISA
10 standards are what investors expect.

11 MS. MCBRIDE: I do think that it --
12 that people who are going to play in this pond
13 and talk with a retirement investor about
14 anything to do with their plan, rolling out of
15 their plan, what to put in -- their money into
16 in the plan, they need to do this on a very
17 strict fiduciary basis. And that is not
18 happening now because the Five-Part Test is not
19 -- is being hijacked to allow for one-time
20 advice -- or it's not one-time advice.

21 It's really one-time, hit-and-run
22 sales, and that's unfair to investors, and that

1 turns to them at a time when they are the most
2 vulnerable and have the chance to -- the -- if
3 they take that recommendation, the opportunity
4 to lose the most that they probably would lose
5 in their lifetime on moves such as that out of
6 a plan into an IRA with a high-cost annuity
7 that they probably won't even get the benefit
8 of for their, you know, proposed lifetime.

9 MR. CERTNER: If I could add to
10 that, I -- there

11 (Simultaneous speaking.)

12 MS. WILKER: I know we do need to
13 wrap this up. We are -- we have time. Oh, go
14 ahead.

15 (Simultaneous speaking.)

16 MR. CERTNER: -- said before, you
17 know these Regs were written at a time when
18 individual account holders were really not the
19 concern of the Department. And so, the
20 Five-Part Test, which is found nowhere in the
21 statute, really does not apply to the current
22 pension landscape. It's a very different

1 landscape.

2 And therefore, there are many
3 situations, as Tim alluded to earlier, where
4 this fiduciary relationship does exist and
5 should exist, but it may not be in confidence
6 by the old Five-Part Test. And that's why it
7 needs to be updated. We need more conformity
8 with the way the pension system is today.

9 MS. MCBRIDE: Agreed.

10 MR. BERKOWITZ: I know you have to
11 wrap up, but if I could just encourage you all
12 to -- at the Department to take the time to
13 speak with the state's insurance regulators. I
14 know that they are very, very aware of what is
15 going on here, and they have very strong views
16 about how their model is being
17 mischaracterized.

18 And I think that it would be in the
19 best interest of all of the regulated entities
20 for you to ensure that you really, fully
21 understand what their -- what their rule does
22 and how they're going to be applying it before

1 making a determination about whether there
2 needs to be anything further done that would
3 impact that space.

4 MR. KHAWAR: Thank you, Jason. And
5 unfortunately, we do need to end this panel. I
6 think we now have a break. I did just want to,
7 before we take the break, just highlight one
8 thing because I -- I've heard -- I haven't
9 unfortunately been able to attend the whole
10 hearing today, but I've heard several
11 commenters on the President's remarks.

12 So I did -- maybe food for thought
13 as we take our break, just quote something from
14 the President's remarks: Now, let me be clear
15 about something. Most financial advisors give
16 their clients good advice at a fair price and
17 are honest with them, but that is not always
18 the case.

19 So I just highlight that because
20 I've heard a number of individuals state that
21 the President actually made remarks that
22 painted an entire industry with a broad brush.

1 Anyway, be that as it may, we are on a break,
2 and we reconvene at 4 o'clock with Americans
3 for Financial Reform, Groom Law Group, and the
4 Institute for Fiduciary Standard. Thank you.

5 MS. MCBRIDE: Thank you.

6 (Whereupon, the above-entitled
7 matter went off the record at 3:50 p.m. and
8 resumed at 4:00 p.m.)

9 MR. HAUSER: Okay. I think it's
10 time for the last panel of the day.
11 Everybody's ready to go. It's the Americans
12 for Financial Reform. Jennifer Eller of the
13 Groom Group, and Knut Rostad of Institute for
14 the Fiduciary Standard. And first up is
15 Americans for Financial Reform.

16 MR. CAZARIN: Hello, everybody. I
17 want to start off by saying thank you to the
18 Department of Labor's Employee Benefits
19 Security Administration for the opportunity to
20 testify today.

21 My name is Ivan Cazarin, and I am
22 the policy coordinator at Americans for

1 Financial Reforms Education Fund, an
2 organization and coalition born out of the 2008
3 global financial crisis that continues to
4 advocate for a fair, more stable, and equitable
5 financial system.

6 To that end, we strongly support the
7 Department of Labor's proposed rule to require
8 financial professionals who provide retirement
9 financial advice to put the best interest of
10 their clients ahead of their personal financial
11 interests.

12 As it stands, retirement savers are
13 not fully protected from conflicts of interest
14 when they received investment advice from
15 financial professionals. The Department of
16 Labor's proposed rule will fill a dangerous gap
17 in standards and close regulatory loopholes so
18 that all investment professionals are required
19 to provide advice that is in the best interest
20 of retirement savers and ensure that any
21 conflicts of interest do not skew their advice
22 toward their own financial gain while harming

1 their client's financial health.

2 By taking this essential step, the
3 rule will help people save for retirement and
4 for their family's futures. We are living now
5 in a system with a tremendous power and
6 knowledge-based industry, where everyday
7 investors have little choice but to seek out
8 guidance from industry experts.

9 Many everyday savers and future
10 retirees look to financial advisors to act
11 within their best interest, to look out for
12 them, the same way they feel when they step
13 into a doctor or a lawyer's office. People's
14 finances and financial well-being are just as
15 personal and sensitive as their legal and
16 health information.

17 Financial service professionals
18 should be held to similar standards. As such,
19 they should not be allowed to recommend
20 investments that provide higher commissions or
21 other benefits to them, while leaving their
22 clients worse off.

1 Small account holders and
2 moderate-income retirement savers stand to
3 benefit most from this rule. The academic
4 literature makes clear that it is less wealthy,
5 frequently financially unsophisticated
6 retirement savers who are most at risk when it
7 comes to investment recommendations that are
8 not in their best interests. Often, those
9 recommendations promote investment products
10 with high costs, substandard features, and
11 elevated risks, as well as poor returns.

12 Current laws and regulations do not
13 cover recommendations to invest in
14 non-securities, ranging anywhere annuities and
15 real estate to cryptocurrency and commodities.
16 While the financial advisor may stand to make a
17 substantial profit off of these
18 recommendations, the retirement saver pays a
19 heavy price for investment advice that is not
20 in his or her best interests, amounting to tens
21 or even hundreds of thousands of dollars in
22 lost retirement income for individual investors

1 and tens of billions of dollars lost across all
2 retirement savers.

3 Without strong protections to
4 require that financial professionals act in the
5 best interest of retirement savers and mitigate
6 damaging conflicts of interest, financial
7 professionals and firms are free to put their
8 own self-interest ahead of retirement
9 investor's interests. This exacerbates what is
10 already an uphill climb for many Americans,
11 especially retirees of color.

12 A July 2023 report from the U.S.
13 Government Accountability Office reports that
14 black retirement savers, ages 51 to 64, are the
15 least likely, among all racial and ethnic
16 groups, to have a retirement account.

17 Of the people that do have
18 retirement accounts, the median balance is far
19 below that of similarly aged white adults
20 across all income levels. Black Americans aged
21 65 and over rely much more than their white
22 counterparts on social security and are more

1 than twice as likely to live in poverty. With
2 such a stark disparity in retirement savings,
3 black retirees already face a greater
4 challenge, and protecting their retirement
5 savings from conflicted advice is critical.

6 Access to investment guidance
7 remains a key talking point for opponents of
8 this proposed rule, citing fears that enhanced
9 regulation could restrict a saver's ability to
10 access investment advice, but access to
11 conflicted and possibly self-serving advice
12 from industry experts does not equate to access
13 to wealth-building opportunities.

14 The powerful financial firms that
15 oppose this rule claim that the rule will
16 deprive smaller savers of access to advice,
17 unreasonably drive up the cost of advice, or
18 eliminate commission-based advice entirely.
19 However, when a previous rule addressing
20 similar problems was finalized in 2016, some
21 firms implemented changes in order to comply
22 with the then-upcoming rule proved the

1 contrary.

2 Firms who specialized in serving
3 small accounts announced they were reducing the
4 account minimum for their fee accounts while
5 also lowering the fees on those accounts,
6 simultaneously expanding access to advice for
7 smaller accounts, while lowering costs for
8 retirement savers.

9 Before it was delayed, then
10 eventually overturned, the 2016 rule ushered in
11 a transformation of compensation policies
12 across funds and investments, eliminating
13 conflicts of interest without eliminating
14 commission-based pricing. In reality, the rule
15 opened the door for enhanced pricing
16 transparency for brokerage services, allowed
17 compensation to be based on the actual level of
18 service provided, and encouraged brokers to
19 compete on price as well as service quality.

20 The Department of Labor should move
21 swiftly to finalize and then implement the
22 proposed rule, closing decades-old loopholes to

1 protect all retirement savers, especially
2 retirement savers of low- to moderate-income
3 and retirement savers of color, who we know
4 retire with substantially less savings than
5 their white counterparts.

6 Aligning the interests of financial
7 professionals with their clients is in the
8 interest of investors and responsible advisors
9 alike and could help build a more equitable
10 economy. Thank you.

11 MR. HAUSER: Thank you. Let's see.
12 Ms. Eller?

13 MS. ELLER: Thanks. Good afternoon.
14 I'm Jenny Eller, and I'm a principal at Groom
15 Law Group. I'm here on behalf of a group of
16 firm clients, and I appreciate the opportunity
17 to provide feedback on the Department's latest
18 fiduciary advice proposal.

19 The focus of my testimony today is
20 primarily on the impact of the proposal on
21 institutional asset managers, those who
22 typically act as discretionary fiduciaries for

1 ERISA plans. I have one overarching comment
2 and then three additional points about specific
3 elements of the proposal.

4 First, as you've heard from others
5 today, we urge the Department not to finalize
6 the proposal at this time. You all have made
7 efforts to address certain criticisms that led
8 the Fifth Circuit to vacate the 2016 rule, but
9 the 2023 rule or proposal still suffers from
10 many of the same issues that led the prior
11 rulemaking to be overturned.

12 And I recognize that -- that you all
13 likely disagree with this view, and I don't say
14 that to engage in a debate about the point, but
15 rather, to make our practical concern known.

16 And that's that the retirement services
17 industry, as a whole, spent millions of dollars
18 analyzing and working towards compliance with
19 the 2016 rule.

20 And our clients are very concerned
21 that, once again, they'll be compelled to spend
22 significant resources on compliance without any

1 certainty that, at the end of the day, their
2 efforts will be either necessary or sufficient.
3 So we urge the Department to pause the proposal
4 and consider whether the issues that you were
5 concerned about in 2015 have largely been
6 addressed by actions taken by the SEC and by
7 PTE 2020-02 as it currently stands today.

8 To the extent the Department goes
9 forward with finalizing the proposal, we have
10 the following suggestions to bring to your
11 attention today.

12 The first is that the Department
13 eliminate subsection (c)(1)(i) of the proposal,
14 which provides that a person will be an
15 investment advice fiduciary if they -- if that
16 person makes a covered recommendation to a
17 retirement investor and they or an affiliate of
18 discretionary control, with respect to
19 purchasing or selling securities or other
20 investment property for the retirement
21 investor.

22 And I understand that in drafting

1 the proposal, the Department may not have had
2 at top of mind the potential implications of
3 this subsection for institutional asset
4 managers. However, those implications are
5 significant, and they make the proposal
6 unworkable and overbroad.

7 The affiliate definition and the
8 attribution rules of this subsection reach
9 beyond arrangements where any reasonable person
10 would believe that a retirement investor should
11 have an expectation of trust and confidence.

12 As an example, a portfolio manager exercises
13 discretion over a separately managed account
14 for defined benefit pension plans sponsored by
15 company A. Both the PM and the PM's firm
16 exercise discretion over purchases and sales of
17 securities for the pension plan.

18 Under the attribution rules, the
19 PM's spouse, parent, child, sibling,
20 brother-in-law, and sister-in-law are all
21 affiliates of the PM. Similarly, an officer,
22 director, partner, employee, or representative

1 of the PM's firm is an affiliate of the firm,
2 as is any parent company that controls the
3 firm, any subsidiary the firm controls, and any
4 sibling corporation under common control with
5 the firm.

6 So under this subsection, if any of
7 the persons or entities who are affiliates of
8 the PM or the firm make a covered
9 recommendation to company -- to the company A
10 fiduciary committee and that recommendation
11 leads the affiliate to be hired, the affiliate
12 would be viewed as an investment advice
13 fiduciary and no other context or relationship
14 is required.

15 I don't believe this was the result
16 the Department intended. The preamble to the
17 proposal indicates that the Department views
18 each of the three contexts in subsection (c)(1)
19 as involving circumstances where a retirement
20 investor can reasonably place their trust and
21 confidence in a provider, but this example
22 illustrates that the proposal would -- would

1 reach beyond those types of relationships.

2 And I'm sure you can recognize that
3 it would be impossible for any asset management
4 entity to track the affiliates of the firm or
5 its employees, meaning that every asset
6 management firm would be required to treat, you
7 know, virtually every sales interaction with a
8 plan as involving fiduciary advice.

9 And that leads to my -- my next
10 suggestion, that the Department reconsider its
11 rejection of what it calls a purported
12 dichotomy between a sales recommendation and
13 fiduciary advice.

14 The proposal's broad list of covered
15 recommendations and its pretty narrow view of
16 instances in which hire me or wholesaling or
17 platform provider conversations could escape
18 fiduciary status, leave very little room for
19 descriptions of the types of products and
20 services that a financial firm has to offer.

21 So the impact would be to virtually
22 eliminate many conversations between a provider

1 and a retirement investor about specific
2 products and services and the types of
3 investment strategies that other plans use to
4 achieve certain goals or about the provider's
5 investment philosophy and approach.

6 Providers often respond to RFPs and
7 other solicitations to compete for business,
8 including, for example, to provide asset
9 management services, to offer products such as
10 annuity contracts or pension risk transfer --
11 for pension risk transfers, or to provide
12 ongoing consulting services to a plan.

13 And when evaluating plan
14 investments, fiduciaries are tasked with giving
15 appropriate consideration to the facts and
16 circumstances that are relevant to the
17 particular investment or course of action
18 involved, and with understanding the role the
19 investment will play in the plan's portfolio.

20 When evaluating other fiduciary
21 providers, the Department has said a plan has
22 to engage in an objective process that's

1 designed to elicit information necessary to
2 assess the provider's qualifications, the
3 quality of services offered, and the
4 reasonableness of the fees charged.

5 Similar obligations apply to a plan
6 fiduciary's evaluation of annuity providers.
7 DOL guidance requires an objective, thorough,
8 and analytical search, typically with the help
9 of a qualified, independent expert.

10 Plan fiduciaries take these
11 responsibilities seriously, and they meet them
12 by gathering information about available
13 products and services and evaluating those
14 options in light of the needs of the plan.

15 They may gather this information through an RFP
16 process, through a consultant, or through
17 talking to multiple providers.

18 And we're concerned that even if
19 subsection (c)(1)(i) is eliminated, subsection
20 (c)(1)(ii) doesn't leave space for this type of
21 information gathering by a retirement investor
22 from a provider because the test essentially

1 boils down to facts and circumstances
2 surrounding the level of individualization of
3 the information and the retirement investor's
4 perception of the context of the interaction.

5 Given the significant implications
6 of fiduciary status, providers can't afford
7 uncertainty in this area, and their options to
8 avoid uncertainty are really limited. If a
9 provider takes on fiduciary status in
10 connection with sales conversations, then it
11 has to meet the substantive standards imposed
12 on ERISA fiduciaries, and it has to address
13 prohibited conflicts.

14 Managers are concerned that to the
15 extent recommending the manager's own products
16 and services to a plan causes the manager to be
17 an investment advice fiduciary. The Department
18 hasn't adequately explained how the manager
19 would meet its substantive duties of care and
20 loyalty under ERISA.

21 They know how to meet those duties
22 when providing the actual services they've been

1 hired for, but in terms of talking about
2 services they may be hired for, that -- that
3 really is a mystery.

4 The sale of discretionary management
5 services to an ERISA plan necessarily involves
6 arm's length negotiations between the provider
7 and the plan, and providers don't understand
8 how they would act in the best interest of its,
9 you know, quote, advise client and negotiate a
10 services arrangement at arm's length.

11 And that concern is heightened by
12 the fact that ERISA fiduciaries are subject
13 suit in federal court by other plan
14 fiduciaries, participants, and the Secretary of
15 Labor. Our clients are concerned they could be
16 subject to litigation related to sales
17 conversations if those conversations are deemed
18 to involve fiduciary investment advice,
19 effectively making them guarantors of the
20 success of a particular strategy.

21 To the extent providers are
22 fiduciaries when engaging in sales activities,

1 there's no way to neutralize that potential fee
2 conflict. If a manager sells its services to a
3 plan and is hired, the manager will receive a
4 fee. If the manager is not hired, it won't.
5 Contrary to the Department's statement in the
6 preamble of the proposal, there's no fee offset
7 or structuring approach to address this and
8 allow the manager to avoid a prohibitive
9 transaction.

10 Our last suggestion is just that the
11 PTE 2020-02 is not an appropriate solution to
12 this particular problem. The exemption
13 contains numerous conditions that contemplate
14 an ongoing advice relationship. However, as
15 the Department has recognized, an asset-based
16 fee aligns the interest of the plan and the
17 manager, and therefore, no exemption is
18 required for the ongoing provision of services.

19 The burden of complying with PTE
20 2020-02 as it currently stands, even without
21 the proposed changes, is out of proportion to
22 the need or the benefit where the exemption is

1 only necessary for the transition of retirement
2 investor from a non-client to a client.

3 So I want to thank you all for your
4 time today, and I'll happily take any questions
5 you might have.

6 MR. HAUSER: Thank you. Last up,
7 Knut Rostad.

8 MR. ROSTAD: Okay. Tim, can you
9 hear me?

10 MR. HAUSER: Yes.

11 MR. ROSTAD: Okay. All right. I
12 don't know why the video is not on, but that
13 may be a good sign; it will spare people that
14 piece of what -- what you'll see.

15 First of all, I want -- I want to
16 thank -- thank the Department for having this
17 hearing and for having such an interactive
18 conversational approach to these issues. It is
19 a refreshing difference from what we see in
20 many other places, and I have found it
21 extremely helpful as I have been able to listen
22 in today.

1 Right now, I just want to talk about
2 three issues right, very quickly, and won't try
3 to get into everything that I will cover in our
4 comment letter to follow. On -- the first
5 point is that the 2023 rule differs markedly
6 from the 2016 rulemaking. The second point is
7 the importance of the inclusion of rollovers in
8 closing an important gap.

9 And the third is a different issue
10 in a sense, but it's looking at what you're
11 doing here, in this proposed rule, in the
12 context of history in terms of going back to
13 the notion that fiduciary law is also, in part,
14 a matter of a code of ethics and the
15 significance of that today.

16 So, first of all, I want to point
17 out that the rule is very different from the
18 2016 rulemaking. It only applies to fiduciary
19 status to those who clearly acknowledge their
20 status or have discretionary authority over
21 investment assets or who regularly make
22 investment recommendations to individuals, such

1 that the recommendation is based on the
2 particular needs or circumstances of the
3 retirement advisor and may be relied on in his
4 or her best interest.

5 These criteria focus on the
6 relationship. In each of these circumstances,
7 the retirement investor would be reasonable to
8 believe and expect the broker advisor to act as
9 a fiduciary as a matter of common sense. In
10 each of these circumstances, the broker advisor
11 possesses wide discretion in fulfilling the --
12 these criteria.

13 And I will point out, as other
14 speakers have mentioned today, this is an issue
15 that -- that Arthur Laby at Rutgers has written
16 on fairly extensively, in terms of why brokers
17 should be deemed to be fiduciaries as well.

18 The second point is the inclusion of
19 rollovers in closing an important gap. And
20 what we've done here at the Institute for the
21 Fiduciary Standard is to reach out to our
22 members and ask them for examples that they

1 have seen in their offices where families that
2 they're visiting with have what they've
3 experienced in the -- in their prior advisor
4 relationship.

5 And so, right here, I've got just
6 four quick examples I want to lay out from four
7 of our advisors, the first one from Life and
8 Wealth Advisors in Walnut Creek, California.
9 The situation was a \$1.6 million death of a
10 spouse rollover, client was 68 years old, and
11 with real estate holdings of \$5 million, and
12 there was no debt.

13 The insurance agent's
14 recommendation: sell your portfolio of stocks
15 and bonds and buy two variable annuities with a
16 ten-year penalty and commercial loan pool of
17 \$600,000. The client felt pressured to get
18 this done by the end of the year. There was no
19 explanation for doing so.

20 And the advisor said or -- the
21 advisor's take was a ten percent penalty fee,
22 withdrawals annually, invest in T Bills at 5.5

1 percent because she is risk-averse. So there
2 is one anecdotal example of the -- what the --
3 what can happen without a fiduciary requirement
4 in the context of a rollover.

5 Another one, from Arch Financial
6 Advisors in Bethesda, Maryland, clients were
7 sold a variable annuity in 2006 when they were
8 in their 70s. Alliance put the annuity into
9 one of their IRAs. It was ten-year surrender
10 period. That's just a very brief summary of
11 the situation.

12 Another example, from Tobias
13 Financial Advisors in Plantation, Florida,
14 client was told that the annuity they place in
15 the funds could not go down in value and that
16 it had a guaranteed five percent growth. It
17 was an indexed annuity. That is, of course,
18 subject to market fluctuations. The guaranteed
19 growth applied to benefit base and wasn't a key
20 -- wasn't a number they could access unless
21 they decided to annuitize.

22 Another example, just again, the

1 highlights of some of the examples we've
2 received. Abacus Planning Group in Columbia,
3 South Carolina, a couple in their late 60s just
4 retired. LPL advisor recommended they rollover
5 the wife's 403(b) at -- that was at Vanguard,
6 to her platform, to funds with an
7 across-the-board expense ratio of 0.4 percent
8 higher than the client's existing fees.

9 They put the husband in an annuity
10 with a 7.5 percent surrender charge, declining
11 over seven years in his Roth IRA, with a
12 guaranteed return of 1.5 percent. They -- the
13 couple was never asked for their tax returns.
14 And so, the -- and but, subsequently, it was
15 apparent that there was no need to even -- for
16 them to ever have contributed anything to their
17 Roth IRA.

18 And so, there is just four, as I
19 say, anecdotal examples of what we've seen, and
20 we will have more in our letter -- comment
21 letter. But I think it's good to get an idea
22 of what the numbers in -- the large numbers in

1 rollovers actually mean.

2 But finally, I want to -- I want to
3 comment on some of the comments or general
4 comments from the rule opponents, such as SIFMA
5 and the Chamber of Commerce. And I think they
6 offer vivid examples why this rule is so sorely
7 needed.

8 Their comments reject the underlying
9 rationale for fiduciary advice that had been,
10 until recently, the legislative, legal, and
11 regulatory support for the rationale. That
12 rationale is the fundamental difference between
13 a business model that is designed and
14 constructed to distribute products as opposed
15 to a business model designed to, as much as is
16 humanly possible, as the Supreme Court
17 expressed, deliver competent and objective
18 advice.

19 Their -- their comments, in our
20 view, reject the moral purpose, quote/unquote,
21 behind the securities laws that followed the
22 depression, and our forefathers and

1 foremothers, so to speak, have set out in
2 fiduciary care. Their comments reject
3 fiduciary advice as developed as a code of
4 ethics or conduct, as envisioned by Franklin
5 Roosevelt, literally some 90 years ago.

6 What we do know about the underlying
7 rationale for fiduciary advice is evident in
8 what we see that President Roosevelt sought to
9 do -- sought to achieve as he was looking at
10 securities -- new securities legislation. We
11 see it in the -- from what the authors of the
12 Advisors Act of 1940 sought to achieve, and
13 then, again, what the Supreme Court said, 1963,
14 in the Capital Gains Research decision.

15 There were signs, even later, of
16 this -- of this original intent that we see in
17 the 1995 Tully Commission Report as set out or
18 as put forward by then SEC Chairman Levitt.
19 Underlying premises in the ideas and writings
20 focused on the unique importance of setting
21 high standards and investment advice. That's
22 what we see in these writings and in these

1 ideas.

2 Today, it appears the focus of
3 industry participants is offering the broadest
4 possible number of choices and relying on the
5 SEC's Reg BI to regulate broker-dealers. Some
6 of this -- some results of this environment
7 that we have today, we see retirement investors
8 are -- we -- what they're facing, we see in the
9 obfuscating communications and the opaque
10 products.

11 This may be most apparent when it
12 comes to knowing investment and financial cost.
13 Consumers are regularly chided for not knowing
14 what they pay or believe -- or believing that
15 the services they receive are free.

16 I would just like -- just encourage
17 anyone to stand back and say, when we know that
18 there is so much that is lacking in what many
19 consumers understand about the products that
20 they get or the services they get, what do we
21 think when, for example, TD Ameritrade surveys
22 consumers and finds out that just 27 percent --

1 and that's all, know what they pay for their
2 401(k).

3 And then, you know, does that do --
4 does that mean anything to the industry that is
5 -- that is providing these services? Does it
6 mean that maybe they should be doing some
7 things differently? I don't hear these types
8 of conversations going on, frankly. And I
9 think -- I think they are sorely needed.

10 This may be -- then -- and then, on
11 this point, I will just add that it appears
12 that the -- that these industry opponents, or
13 some of them anyway, oppose fiduciary advice
14 based on transparency, clarity, cost
15 consciousness, that put client's interests
16 first, and that is -- that is something that
17 should be, I think an object of further
18 discussion.

19 I welcome having those discussions
20 with those from the industry who would like to
21 partake because I think that we could do a much
22 better job going forward.

1 So, again, I thank you for this
2 opportunity, and I appreciate, very much, what
3 you are doing in trying to -- in trying to
4 maintain the spirit and the meaning of what
5 fiduciary is supposed to be. Thank you.

6 MR. HAUSER: So maybe I -- I don't
7 think -- it's right at the end of a long day,
8 so maybe the last panel benefits a little bit
9 from that. But I would like to ask just a
10 couple of questions of Ms. Eller. Would Ms.
11 Eller -- which I think are just clarifying a
12 bit maybe.

13 But so, the first -- you know, with
14 respect to the prong of the fiduciary test that
15 is based on discretionary authority over, the
16 advice recipients' investments, I -- or some
17 part of their investments, I think I understand
18 the issue you raised, and that -- it -- I mean,
19 I'll just say I -- I mean, I'd -- as we've, you
20 know, discussed before, I think that's
21 primarily a drafting issue.

22 And I just would ask that if you can

1 provide clarifying language or suggestions on
2 how we could better draft that provision to
3 make sure we're not picking up kind of
4 relationships that don't really involve trust
5 and confidence with respect to that prong, that
6 would be terrific, but that really was more an
7 observation than a question.

8 The second, though, is a question.
9 So, if I understood what you were saying about
10 these transactions involving requests for
11 proposals, transactions between institutional
12 kind of parties, at least part of it seemed to
13 me to fall in two buckets.

14 One are communications that probably
15 don't rise to the level of recommendations in
16 the first place, and perhaps that would benefit
17 from examples, either in the text of the Reg or
18 in the preamble, and I just want to see what
19 you think about that.

20 And the other is -- the other
21 question I guess I have is in the other
22 category of the relationship seemed to me to

1 probably involve advisory transactions where
2 you don't think the party is really standing
3 kind of that confidential relationship.
4 They're really arm's length transactions
5 between big players. And there's a concern,
6 though, that they can sort of inadvertently be
7 swept in as fiduciaries or at least that they
8 don't maybe need all of the provisions of
9 2020-02.

10 And I wonder -- so I wonder if some
11 combination of examples, illustrations, in the
12 preamble, in the text of circumstances, these
13 kinds of transactions that don't rise to the
14 level of fiduciary status would be helpful.

15 And then, if addition, it might be
16 helpful to think about language to include in
17 the exemption for those circumstances where the
18 relationships really are pretty arm's length,
19 but there's some concern so that people have a
20 little bit of a boots and -- you know, a little
21 bit of belts and suspenders, you know, in the
22 exemption as well, with respect to some of

1 those transactions with -- with maybe fewer
2 conditions for those kinds of instances.

3 So I don't know if I was remotely
4 coherent. As I said, it's the end of the day,
5 but do you have any responses or thoughts about
6 those suggestions?

7 MS. ELLER: Thanks. Thanks for
8 those. So, I guess, in terms of examples or
9 what may or may not rise to the level of the
10 recommendation, I mean, I think the definition
11 of recommendation in this proposal and the
12 definition of recommendation in 2016 are
13 identical or basically identical.

14 And you know, in the -- in the prior
15 proposal or prior final rule, I think the
16 preamble discussed certain things that the
17 Department didn't think would be a
18 recommendation then and other things that the
19 Department thought would be the recommendation
20 but nonetheless, you know, were sort of carved
21 out.

22 And my recollection is that the sort

1 of sophisticated investor conversations were
2 ones that the Department said, you know, this
3 would be a recommendation, but we're carving it
4 out, and here's the contours of the carve-out.
5 So it does give me a little bit of pause to,
6 you know, to kind of turn and think about for
7 this proposal where we'll have the same
8 definition.

9 You know, I'd love for these things
10 not to be recommendations. I'd certainly love
11 for, you know, for folks to be able to robustly
12 describe their services to -- you know, to an
13 entity that is charged with trying to gather
14 information about what is available in the
15 marketplace so that that fiduciary can decide
16 what's appropriate for the plan.

17 But I think our concern is that it's
18 just really hard to know based on the
19 definitions and then if you sort of add that to
20 what you all said in 2016.

21 You know, also, when you think about
22 how -- how might the definition of

1 recommendation be adjusted because I do think
2 that's a good threshold place to start, but I
3 -- that's one reaction to -- to what you said
4 about maybe these things don't -- don't fall
5 within the meaning of a recommendation.

6 MR. HAUSER: I might have -- I
7 might've been a little -- it's both that they
8 don't fall within the meaning of
9 recommendation, and in some circumstances at
10 least, or maybe in most of the circumstances,
11 they're -- they may not meet the kind of facts
12 and circumstances test as we've laid it out and
13 that illustrations on that score would be
14 helpful.

15 MS. ELLER: Yeah. Right. And you
16 seem to have a much more clear understanding of
17 what may or may not meet the facts and
18 circumstances tested in the proposal than I do,
19 and that's what makes me nervous because I will
20 have a hard time advising my clients about
21 which side of the line they're on.

22 In terms of the, you know, whether

1 sort of a streamlined set of conditions in an
2 exemption in 2020-02, for instance, might be
3 helpful, I can certainly give that some
4 thought.

5 I guess my -- my first reaction is
6 that with the exemption requiring an
7 acknowledgment of fiduciary status, you know,
8 it -- it doesn't then seem to fit very well in
9 sort of a belt and suspenders approach, right?

10 I couldn't say -- I couldn't advise
11 my clients, well, you know, we think you're not
12 a fiduciary if you do A, B, C, but if you
13 comply with these conditions in the exemption,
14 you might be able to buy yourself some
15 certainty. Well, one of the conditions is you
16 have to acknowledge that you're a fiduciary.

17 So you sort of have this problem
18 where you -- I don't see -- I don't see how we
19 could use it, sort of, in a belt and suspenders
20 approach.

21 MR. HAUSER: Well, I suppose I'm
22 inviting you to make a proposal, make

1 suggestions on ways in which we might
2 accommodate this concern to the extent it makes
3 sense.

4 MS. ELLER: Thanks.

5 MR. HAUSER: Nothing further from
6 me, I don't think. Anybody else?

7 (No audible response.)

8 MR. HAUSER: All right. I think we
9 are finished for today. We start back up
10 tomorrow, and when do we start up? Nine, I
11 think, right?

12 (No audible response.)

13 MR. HAUSER: Okay. 9:00 a.m. must
14 see T.V. We look forward to seeing you all
15 again tomorrow. Take care.

16 MS. ELLER: Thank you, all, very
17 much.

18 MS. GOMEZ: Thank you, all. Have a
19 good day.

20 (Whereupon, the above-entitled
21 matter went off the record at 4:36 p.m.)
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: 12-12-23

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.