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Definition of Fiduciary Investment Advice 03-01-2011

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EMPLOYEE BENEFITS SECURITY ADMINISTRATION
PUBLIC HEARING:
DEFINITION OF FIDUCIARY INVESTMENT ADVICE
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1 P R O C E E D I N G S

2 MR. LEBOWITZ: Good morning. I'm Alan
3 Lebowitz, Deputy Assistant Secretary for Program
4 Operations here at the Employment Benefit Security
5 Administration. Welcome to our public hearing on the
6 Department's proposed regulation defining who is a
7 fiduciary for purposes of rendering investment advice
8 to an employee benefit plan or plan participants and
9 beneficiaries.

10 Prior to introducing today's hearing panel
11 and an introductory statement from EBSA Assistant
12 Secretary Phyllis Borzi, I will address a few
13 procedural matters. Notice of today's hearing was
14 published in the Federal Register on January 12th with
15 an invitation to interested to testify on the
16 Department's proposed regulation. In response to that
17 invitation, the Department received 38 requests, each
18 of which is reflected in the agenda for today's
19 hearing, which also was posted on EBSA's website.

20 Those requesting to testify have been
21 organized into 13 panels generally consisting of three
22 panel members each. For purposes of today's hearing,

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1 each panel member will be allowed ten minutes to
2 present their testimony, and let me just emphasize the
3 importance of sticking to that schedule. We obviously
4 have a very full agenda both today and tomorrow, and we
5 want to make sure that everybody who's on the list has
6 an opportunity to present their views.

7 Following the conclusion of the testimony,
8 all panel members, the government panel members will be
9 afforded the opportunity to ask the witnesses
10 questions. With regard to panel questions, I wish to
11 emphasize that the government panel members are
12 interested in developing the public record as fully as
13 possible, and accordingly, no inferences, conclusions -
14 - or conclusions should be drawn from any questions
15 from government panel members.

16 Witnesses will testify in the order in which
17 they appear on the hearing agenda. To assist us today,
18 we have a few requests of those testifying. First,
19 prior to your testimony, please identify yourself, your
20 affiliation, and the organization that you're
21 representing, if any. Second, as I said a few seconds
22 ago, please limit your remarks to the allotted time of

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1 ten minutes. And in this regard, we will call your
2 attention to our timer, which will assist in monitoring
3 your time.

4 At the end of today's hearing, we will keep
5 the hearing record open for 15 days for those
6 testifying who wish to supplement their testimony and
7 for those who wish to submit comments, views, et
8 cetera, that did not have an opportunity to testify
9 today. All submissions will be made available to the
10 public on EBSA's website.

11 Finally, I will note that today's hearing is
12 being transcribed, and the hearing transcripts will be
13 made available to the public on our website within the
14 next two weeks.

15 Now I'd like to introduce today's panel. On
16 my far left is Assistant Secretary for Employee Benefit
17 Security Phyllis Borzi. Next to me on the left is
18 Michael Davis, Deputy Assistant Secretary of EBSA. On
19 my immediate right, Tim Hauser, Associate Solicitor,
20 Employee Benefit Security Division. Next to him is Joe
21 Piacentini, EBSA Director of Policy and Research. And
22 next to him is Fred Wong, Senior Employee Benefit plan

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1 Specialist in the Office of Regulations and
2 Interpretations.

3 Ms. Borzi?

4 MS. BORZI: Thanks, Alan. I just want to say
5 a few words to kick off this hearing this morning.

6 First I'd like to thank all the EBSA staff
7 who have worked to so hard to make this hearing happen,
8 and especially Susan and Luisa. And I want to thank
9 all of you for coming today to participate in this
10 hearing. In particular I want to thank our colleagues
11 from the SEC who have been working closely with us as
12 we develop this regulation and with whom we've been
13 engaged in ongoing collaboration and coordination, not
14 just on this regulation, but also on various other
15 pension-related provisions in the Dodd-Frank Act where
16 that new statute might intersect with ERISA issues.

17 I also want to welcome our colleagues from
18 the CFTC, with whom we also have been working again to
19 -- on the Dodd-Frank issues. Our goal is to harmonize
20 both statutes. And so whatever sets of rules both
21 agencies put out, the regulated community will have
22 clear and sensible pathways to compliance with both

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1 statutes, and we're confident that this goal can be
2 achieved.

3 So I want to thank again our colleagues at
4 the SEC and the CFTC. We've been working with the SEC
5 for many, many years. Our work with the CFTC is just
6 beginning, so I'm happy to have them join us today, and
7 we want to continue to work with them.

8 I want to just take one other moment to thank
9 one other person who's not here on the panel with us
10 today and who normally would be on the panel. And I
11 see him in the back of the room, and he'll probably be
12 very angry for me to say -- because I said anything
13 about him. But I want to thank Bob Doyle, who many of
14 you know has long been an employee of EBSA and for the
15 past 20 years has headed our Office of Regulations and
16 Interpretations. Bob has recently announced that he's
17 leaving the Department at the end of this week, and so
18 he isn't up here on the panel because he's recused from
19 being on the panel. But I just want to tell you all
20 how much we're going to miss Bob, and he knows we're
21 going to miss him -- I, in particular. I met Bob in
22 1979. We had a dispute over a proposed reg, and

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1 nothing has changed (laughter) in terms of our not
2 always seeing eye to eye. On the other hand, I have a
3 complete and utter respect for Bob, his expertise, and
4 will miss both his expertise and his voice as we move
5 forward on this and other regulations. So Bob, I just
6 want to publicly thank you.

7 (Applause) Okay. Let's get to the matter at
8 hand. By way of background and to provide some context
9 for today's discussion of this proposed regulation, I
10 just want to take a minute to describe the current law.

11 As you know, ERISA provides a simple
12 statutory test for determining who is a fiduciary by
13 reason of providing investment advice. Under this
14 test, a person is a fiduciary if he or she renders
15 advice for a fee or other compensation, direct or
16 indirect, with respect to any monies or any other
17 property of the plan. In 1975, however, the Department
18 adopted a regulation that severely cut back the
19 application of this statutory definition by creating a
20 rigid five-part test for fiduciary status. Under this
21 regulation, before investment professionals can be held
22 to ERISA's fiduciary standards with respect to their

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1 advice, they must first render advice as to the value
2 of property or make investment recommendations. They
3 must do this on a regular basis; they must do this
4 pursuant to a mutual understanding that the advice will
5 serve as the primary basis for investment decisions,
6 and that that person will render individualized advice
7 to the plan based on the particular needs of the plan.
8 If the adviser meets any -- fails to meet even any one
9 of these criteria, it is not a fiduciary. So for
10 example, if a plan hires an investment professional on
11 a one-time basis to advise it on the expenditure of a
12 million dollars on a single complex investment, the
13 adviser has no fiduciary obligations, because the
14 advice was given on a one-time basis rather than on a
15 regular basis as the regulation requires. So it makes
16 no difference under this regulation as to how important
17 or non-important this particular advice was with
18 respect to the plan.

19 You know since the Department promulgated the
20 regulation in 1975, dramatic changes in the retirement
21 marketplace have occurred, including the increased
22 importance of investment advice. As you know, we have

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1 spent a good period of our time focusing on this
2 question of investment advice. Our own experience with
3 the regulations have led us all to question whether
4 this 1975 regulation is still appropriate. And as you
5 know, under the new executive order, we are directed to
6 go back and look at all of our regulatory and other
7 guidance to see whether they are still valid and
8 useful, and this is part of that process.

9 As in most matters since 1975, the world has
10 changed, including significant changes such as the
11 introduction of 401(k) plans in 1978, three years after
12 the current regulation was adopted. The shift from DB
13 plans to DC plans; an increase in the types and
14 complexities of investment products and services
15 available both to plans and to IRA investors in the
16 financial marketplace. This regulation addresses the
17 conduct of investment advisers in both the plan and IRA
18 context since, as you know, EBSA has long had the
19 ability to regulate prohibited transactions in IRAs,
20 although the enforcement for violating those provisions
21 lies in the excise tax imposed by our colleagues in the
22 Internal Revenue Service.

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1 In enacting ERISA, Congress recognized that
2 the security of American retirement plans depends on
3 its fiduciaries. ERISA protects retirement benefits by
4 holding important plan actors to fiduciary standards,
5 protecting workers and retirees from conflicts of
6 interest and providing remedies for violations. Thus,
7 it's vitally important when we define important terms,
8 like who is a fiduciary, we get it right.

9 The proposed regulation that we issued last
10 October and the hearing we're holding today are part of
11 our determined effort to get it right. We believe that
12 the types of advisory relationships that give rise to
13 fiduciary duties should be reexamined and that the rule
14 should be updated so that plan fiduciaries receive the
15 impartiality they expect when they rely on their
16 adviser's expertise and advice. In so doing, we want
17 to be sure that we have the information that we need to
18 create a regulation that accomplishes this purpose and
19 makes sense in the context of today's retirement plans
20 and investment advice environment. We've already
21 received 200 comment letters. Maybe some in this room
22 besides us have read them all. And of course all of

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1 these are posted on our website.

2 We're now ready to continue the dialogue that
3 we intend to have in order to get this right by adding
4 your views on this proposal and adding your testimony
5 to the public record. And as Alan noted, the hearing
6 record is going to remain open for 15 additional days
7 so that those of you who will testify today and
8 tomorrow and those of you who haven't testified will
9 have the opportunity, again as the executive order
10 directs us, to have people comment on the comments on
11 the comments. So there will be ample opportunity for
12 public input here. And after the hearing is over and
13 the record closes, we're going to work through the
14 issues that have been raised both here in the comments
15 and the various meetings that I know will be coming
16 after the hearing is over. We're going to thoughtfully
17 and carefully evaluate the suggestions and concerns we
18 have heard. We're going to continue the dialogue with
19 the regulated community, and we're going to refine the
20 text of proposed regulation -- because after all,
21 that's all it is, is a proposed regulation -- so that
22 we'll be ready to issue final regulations by the end of

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1 the year in accordance with the timetable that we have
2 announced publicly.

3 So again, I want to thank you all for your
4 participation and your input, and so let's just start
5 with the witnesses, Alan.

6 MR. LEBOWITZ: Thank you.

7 First panel, please: Norman Stein, Karen
8 Prange, and Anne Tuttle.

9 MS. BORZI: I should have said one other
10 thing, which is that I'm going to try to be here for
11 most of today and tomorrow, and I apologize in advance
12 to the witnesses whose hearing I won't actually --
13 whose testimony I won't actually hear, because I do
14 have a couple of things that I have to do, to leave.
15 But rest assured that my colleagues will brief me on
16 what you said, and if you have any written statements,
17 I'm going to be reading them.

18 MR. LEBOWITZ: Mr. Stein?

19 MR. STEIN: Good morning. I'm Norman Stein,
20 and I'm testifying today on behalf of the Pension
21 Rights Center. The Center is a nonprofit consumer
22 organization that has been working since 1976 to

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1 protect and promote the retirement security of American
2 workers and their families. The Department deserves
3 high praise for these proposed regulations, which would
4 replace current regulations adopted in 1975 that
5 tightly circumscribe the circumstances under which a
6 person or entity becomes a fiduciary when providing
7 investment advice for a fee. The original regulations
8 were not compelled by the statute, and in our view
9 reflected an improper agency narrowing of the statutory
10 language and congressional intent. In addition, as the
11 Department suggests in its preamble, economic and legal
12 developments in the field of investments and employee
13 benefit plans have rendered the 1975 regulations
14 anachronistic and at times at cross-purposes with the
15 statute.

16 My statement today will cover five points:
17 First, that the current regulations improperly
18 constrict the statutory definition of fiduciary.
19 Second, that the current regulations were promulgated
20 in a different economic and legal environment than
21 today, and as a result sometimes fail today to shield
22 unsophisticated participants in retirement plans from

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1 investment advice tainted by conflicts of interest.
2 Third, that the proposed regulation should not
3 condition fiduciary status on whether a person provides
4 individualized investment advice. Fourth, that the
5 sales limitation on the definition of fiduciary status
6 should not apply to advice given to participants. And
7 fifth, that advice about distributions should be
8 considered investment advice.

9 ERISA provides straightforwardly that a
10 person is a fiduciary if he renders investment advice
11 for a fee or other compensation, direct or indirect,
12 with respect to any monies or other properties of such
13 plan. In 1975 -- the 1975 regulations, however,
14 narrowed the scope of this language by limiting
15 fiduciary status to persons rendering investment advice
16 that is regular, rather than one-time or episodic; that
17 is given pursuant to an agreement or understanding that
18 it will be a primary basis for investment; and that it
19 is individualized to the particular needs of the plan.
20 These limitations are not consistent with the plain
21 meaning of the term "investment advice," and at least
22 in retrospect can be said to have impeded the

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1 congressional goals of limiting self-dealing and of
2 assuring prudent investment to plan assets. As the
3 preamble to the proposed regulations notes, people
4 providing investment advice not covered by the current
5 regulations have considerable influence on the
6 decisions of plan fiduciaries and participants, and yet
7 can have conflicts of interest that result in lower
8 returns and thus less retirement income.

9 The existing regulations were promulgated in
10 1975 at the dawn of the ERISA era. Since then, there
11 have been significant changes in the retirement plan
12 and investment landscape that have undermined whatever
13 arguable justification there might have been in 1975
14 for the regulation's cramped scope. As the preamble to
15 the proposed regulations notes, there has been a
16 seismic shift in the retirement plan world, from
17 defined benefit plans in which investment advice was
18 generally rendered to sophisticated plan fiduciaries,
19 to self-directed defined contribution plans in which
20 investment advice is issued to individual participants,
21 including my mother, many of whom have only rudimentary
22 financial literacy.

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1 Mutual funds and sellers and brokers for
2 mutual funds who played a relatively small role in
3 retirement plans at the time ERISA was enacted have
4 become dominant players in the new economic order. The
5 variety and complexity of investment products has also
6 increased markedly over the last three decades. There
7 have also been significant and unanticipated legal
8 developments since the time the 1975 regulations were
9 written. The Supreme Court in 1993 ruled that a
10 participant generally is entitled to legal relief under
11 ERISA only against a defendant who is a fiduciary whose
12 breach of duty caused monetary loss to a plan. Legal
13 relief is not available against a non-fiduciary even
14 when that non-fiduciary knowingly and for personal
15 profit assisted a fiduciary in the commission of such a
16 breach. A participant can sue a person other than a
17 fiduciary only for equitable relief, and the Supreme
18 Court has narrowly circumscribed the extent to which
19 equitable relief is available.

20 The Department of Labor, which filed amicus
21 briefs arguing against these positions, could not have
22 known in 1975 that the combination of its narrowly

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1 drawn regulation and ERISA preemption would effectively
2 create a largely unregulated playing field for so many
3 actors who have a direct and substantial impact on plan
4 investment performance.

5 Another important change is simply the growth
6 of assets held by qualified retirement plans. In 1975,
7 defined benefit plans and defined contribution plans
8 held \$300 billion in assets. In 2007, qualified plans
9 held over \$6 trillion of assets, and this figure does
10 not include individual retirement accounts. Retirement
11 plans are thus today a critical market for virtually
12 all serious capital market participants. It is simply
13 where the money is. Notwithstanding a somewhat broader
14 definition of the term "fiduciary," vendors of
15 investment products and financial advisers will
16 continue to serve the retirement plan market, even if
17 they now will be required to provide prudent and
18 impartial investment advice. Those who are unwilling
19 to meet such a standard, in our view, have no business
20 advising retirement plan participants on how to prepare
21 financially for retirement.

22 The proposed regulations make a person who

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1 issues investment advice a fiduciary only if the advice
2 is individualized to the needs of the plan, a plan
3 fiduciary, or a participant or beneficiary. We are not
4 certain why a person should be a fiduciary only if his
5 advice to a plan or beneficiary is sufficiently
6 individualized. Many plan participants and
7 beneficiaries will be unable to discern a difference
8 between individualized and non-individualized advice.
9 Moreover, this aspect of the regulations may provide
10 perverse incentives to some providers of investment
11 advice to avoid tailoring their advice to the
12 particular needs of the individual for the very purpose
13 of avoiding fiduciary status.

14 At least with respect to participants, we
15 would prefer that the regulations provide that advice
16 that is directed to a particular participant to
17 purchase or sell a particular security is investment
18 advice, even though not necessarily individualized to
19 the particular needs of the participant. If the final
20 regulations take this position, as we hope it will, the
21 Department can clarify in the preamble to those
22 regulations that this will not prevent the furnishing

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1 of non-fiduciary investment education so long as the
2 participant is not given specific investment
3 recommendations.

4 The proposed regulations also provide that a
5 person shall be considered to be a fiduciary investment
6 adviser if such person -- I'm sorry, will not be
7 considered a fiduciary investment adviser if such
8 person can demonstrate that the recipient of the advice
9 knows or under the circumstances should have known that
10 the person who's providing the advice or making the
11 recommendations in its capacity as a purchaser or a
12 seller of a security or other property, whose interests
13 are adverse to the interests of the plan or its
14 participants or beneficiaries, and that the person is
15 not undertaking to provide impartial investment advice.

16 While we believe that this limitation may be
17 appropriate when such advice is provided to a
18 sophisticated plan fiduciary, it is not appropriate
19 when the advice is given to individual participants or
20 their beneficiaries. The Center has worked with
21 participants for 35 years, and based on our experience,
22 it is our view that many plan participants will simply

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1 be unable to discern when advice is impartial or
2 conflicted. In addition, even if there is express
3 disclosure of a fiduciary's conflicts in a one-on-one
4 meeting, whether in phone or by person, an
5 unsophisticated investor will often regard the adviser
6 as acting in his interests, notwithstanding the
7 disclosure. Indeed, an adviser salesperson's success
8 may depend on whether he can create in the customer the
9 belief that the adviser is interested primarily in the
10 customer's welfare, despite a declaration by the
11 adviser of self-interest.

12 There is the further fact that most
13 participants will not be knowledgeable about the types
14 of fees and benefits that can accrue to the purchaser
15 or seller of securities, and thus may not be able to
16 evaluate the extent of the adviser's conflicts. Thus
17 we strongly urge the Department to revise the seller
18 limitation so that it only applies to advice and
19 recommendations given to sophisticated plan
20 fiduciaries.

21 The Department asked for comments on whether
22 and to what extent the final regulation should define

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1 the provision of investment advice to encompass
2 recommendations related taking a plan distribution. A
3 recommendation to remove assets from the plan and
4 invest them elsewhere is in effect a judgment about the
5 relative merits of the plan options and the other
6 investments. The person making the recommendation can
7 have interests adverse to the plan participant, and the
8 recommendation can have a substantial effect on a
9 participant's retirement security, not only because of
10 future investment performance but also because of the
11 loss of an economically efficient means of taking
12 retirement income and annuity form and tax
13 considerations.

14 Moreover, under the current interpretation of
15 the Department, the person giving advice in these
16 circumstances has no obligation under ERISA to reveal
17 conflicts of interest. We thus believe it is essential
18 that the regulations treat advice on plan distributions
19 for what it is -- a type of investment advice.

20 In sum, this is a much-needed regulatory
21 change that will better protect plans and plan
22 participants and facilitate more effective enforcement

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1 when misconduct is uncovered. The Pension Rights
2 Center applauds the Department for pursuing this
3 initiative that will benefit both the retirement plans
4 and their participants and beneficiaries.

5 Thank you for the opportunity to be here this
6 morning, even if I went ten seconds over.

7 MR. LEBOWITZ: Thank you.

8 MS. PRANGE: Good morning. I'm Karen Prange,
9 Executive Director and Assistant General Counsel for JP
10 Morgan Chase and Company. I'm here today representing
11 our retirement plan services and worldwide security
12 services lines of business.

13 We believe that the proposed regulation
14 should be modified and re-proposed to eliminate
15 unnecessary and subjective standards. Rather than
16 determining whether a person is impartial or has
17 adverse interests, the regulations will better serve
18 plan sponsors and participants by requiring objective
19 written disclosures from service providers, regardless
20 of whether or not they will be acting in a fiduciary
21 capacity. To enable plan sponsors and participants to
22 continue receiving valuable services from providers, JP

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1 Morgan also believes the various limitations described
2 in the proposed regulation should be expanded or
3 clarified to clearly exclude non-discretionary
4 administrative services and distinguish between the
5 provision of information and advice.

6 Finally, we believe that existing standards
7 governing plan distribution, education and guidance are
8 sufficient and need not be modified in the final
9 regulations.

10 We would first like to address the potential
11 industry impact of having the provision of information
12 regarding plan distribution options swept into the
13 fiduciary definition. The standards articulated by the
14 Department in advisory Opinion 2005-23A are both
15 appropriate and workable. Participants contacting a
16 record-keeper's call center generally do so to obtain
17 basic factual information about the plan, including its
18 distribution and investment options. The analysis in
19 the advisory opinion recognized that in most cases,
20 answering questions and providing plan information
21 about rollovers and other distribution options are
22 ministerial functions, and participants will not have

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1 established any kind of trusting fiduciary relationship
2 with the representative who assists the participant.
3 Record-keepers must be able to provide information to
4 participants about their rights to receive or defer a
5 plan distribution and related concerns, such as tax
6 consequences and rollover vehicles like IRAs, in the
7 same manner as they are able to provide information
8 regarding other plan features, such as contribution
9 rights and the availability and related tax
10 consequences of loans or hardship distributions,
11 without becoming subject to ERISA's fiduciary
12 requirements.

13 Next I would like to address the sales
14 exception. We believe that the adverse and impartial
15 standards as currently drafted are too vague. We
16 propose that the applicability of the sales exception
17 should turn on whether the service provider and plan
18 sponsor understand that the advice is being provided in
19 a sales context. Such an understanding could be
20 imparted through a written disclaimer that the service
21 provider is acting in a non-fiduciary capacity.

22 Also, record-keepers are frequently asked by

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1 plan sponsors to develop proposed investment fund menus
2 during the sales process. These proposed menus are
3 sometimes used to create a uniform basis upon which the
4 fees of various record-keepers may be compared. The
5 Department should clarify in the final regulations that
6 developing such proposed fund menus does not constitute
7 investment advice that gives rise to fiduciary status.

8 We believe the written disclosure standard
9 for application of the platform exception is generally
10 appropriate, but suggest that the Department expand
11 this exception to apply to any objective data that a
12 service provider supplies to the plan sponsor for the
13 purpose of monitoring a plan's existing investment
14 funds for all types of plans, as long as the provider
15 does not make a specific investment recommendation
16 based on the data. Narrowly interpreting this
17 exception could deny plan sponsors and fiduciaries
18 valuable tools for monitoring their plan investments.
19 Further, the Department should expand this exception by
20 either removing or clarifying that the exception is
21 applicable when a service provider makes securities or
22 other property available without regard to the

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1 individualized needs of the plan. Plan sponsors often
2 ask record-keepers to create sample fund line-ups from
3 the investments available on the record-keeper's
4 platform to evaluate sales or marketing proposals. But
5 by its very nature, this information may be deemed to
6 take into account the individualized needs of the plan.
7 However, if the information provided is accompanied by
8 a disclaimer regarding the record-keeper's non-
9 fiduciary status, it should not be considered the
10 provision of investment advice.

11 Elimination or at least clarification of the
12 individualized need standard is even more warranted in
13 the context of the selecting or monitoring exception.
14 Information supplied by a service provider for the
15 purpose of assisting plan sponsors in monitoring the
16 plan's investments would be meaningless if that
17 information does not consider the individualized needs
18 of the plan. As long as the information does not
19 include a specific recommendation for a fund and does
20 not include a disclaimer -- excuse me, and does include
21 a disclaimer similar to the one previously mentioned,
22 it should not be considered investment advice.

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1 We also suggest that the selection or
2 monitoring exception be decoupled from the platform
3 exception. Currently the selecting or monitoring
4 exception is tied to the activities described in the
5 platform exception, so it appears to apply only to
6 participant-directed defined contribution plans when
7 sponsors of all types of plans rely on data and
8 analysis to fulfill their fiduciary oversight
9 obligations. For this purpose, service providers can
10 provide various types of analytic and reporting
11 services to plan sponsors based on the information and
12 data they maintain. These services do not involve any
13 discretion by the provider. Rather, they involve
14 comparisons of plan data to criteria designated by the
15 plan sponsor or the application of standardized
16 algorithms such as comparing an investment manager's
17 performance to a benchmark, reporting to a plan sponsor
18 if an investment does not meet a manager's guidelines,
19 or the generation of a list of potential investment
20 managers based on plan sponsor specifications. In all
21 cases, the service provider's analysis or reporting
22 provides information to the plan sponsor, but contains

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1 no recommendations regarding actions that might be
2 taken based on that information.

3 Therefore, we believe the Department should
4 clarify in the final regulations that all non-
5 discretionary analytic and reporting services do not
6 constitute investment advice. Lack of such clarity may
7 lead service providers to discontinue valuable non-
8 discretionary analytic and reporting services.

9 With respect to the exception regarding
10 preparation of general reports or statements, we
11 suggest that the exception apply to any report or
12 statement that merely reflects the value of an
13 investment, regardless of whether the report or
14 statement is provided due to regulatory requirements or
15 on a continuous basis for a plan sponsor or
16 participant's convenience. We believe the proposed
17 regulation should make clear that service providers,
18 such as trustees and custodians, reporting valuations
19 of hard-to-value plan assets are not providing
20 investment advice under ERISA. Service providers do
21 not independently value these assets, nor do they
22 typically review the valuations provided by third

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1 parties except to test the valuation's reasonableness
2 based upon a standardized process. The service
3 providers simply report the values provided by third
4 parties without the exercise of discretion.

5 We urge the Department to revise the
6 regulations to ensure that the standards for
7 determining whether a service provider is a fiduciary
8 are clear and objective, to enable providers to
9 determine in advance whether or not their activities
10 are fiduciary in nature and to design and implement
11 their business model based upon whether they intend for
12 their activities to be fiduciary activities and to
13 avoid potential litigation due to uncertainty. The
14 scope and generality of the proposed regulations will
15 cause functions that were previously considered
16 ministerial to become fiduciary, forcing service
17 providers to reconsider the authoring of the services
18 and related fees to address the increase in risk and
19 oversight requirements.

20 Finally, we are concerned that a service
21 provider may fall within the definition of a fiduciary
22 merely because it has an affiliate that is a registered

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1 investment adviser. When a service provider offers a
2 service and presents itself as a fiduciary with respect
3 to that service, it should be subject to the fiduciary
4 requirements of ERISA. However, we urge the Department
5 to provide in the regulations that a service provider
6 that offers an administrative service and provides a
7 written representation that it is not acting as a
8 fiduciary with respect to that service should be
9 presumed not to be a fiduciary with respect to those
10 services. Such a disclaimer puts the parties on notice
11 that there is no mutual understanding that the services
12 are intended to be fiduciary in nature, creates a clear
13 delineation between the plan sponsor and service
14 provider responsibilities, and will prevent dramatic
15 increases in uncertainty and litigation based on after-
16 the-fact claims of an understanding that a service
17 provider's communication relating to plan assets could
18 be considered investment advice.

19 I appreciate the opportunity to appear today
20 on behalf of JP Morgan. Thank you.

21 MR. LEBOWITZ: Ms. Tuttle.

22 MS. TUTTLE: Good morning, and thank you for

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1 the opportunity to testify today. My name is Anne
2 Tuttle, and I'm here today as the general counsel of
3 Financial Engines.

4 We applaud the Department's proposal to
5 update the definition of fiduciary. We support the
6 Department's objective of improving protections for
7 participants and beneficiaries. We applaud the
8 Department for confirming that persons providing
9 individualized investment advice be subject to ERISA
10 standards of fiduciary conduct. We share the concern
11 that the current regulation may no longer adequately
12 protect the interests of participants. ERISA's
13 fiduciary standards provide important protections
14 against conflicts of interest and self-dealing. And
15 particularly in light of changes in the financial
16 industry, it is timely to reexamine the types of
17 investment advice that should give rise to fiduciary
18 duties under ERISA.

19 As the Department has pointed out, it's a 35-
20 year-old rule. Thirty-five years ago when this
21 regulation was adopted, financial engines did not
22 exist. I was still in middle school. Our co-founder,

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1 Bill Sharpe, had not yet been awarded the Nobel Prize
2 in Economics. But today, Financial Engines is the
3 nation's largest independent investment adviser.
4 Financial Engines launched its first advice service in
5 October 1998 as it set out to accomplish Bill Sharpe's
6 vision -- to provide high-quality, independent
7 investment advice to everyone. There are other
8 significant changes in the financial services industry
9 and also in the role that 401(k) plans play in our
10 society. The Department recognizes the need to respond
11 to these changes by taking another look at the
12 regulation.

13 From our perspective, it is both important
14 and feasible that participants and plans be represented
15 by those willing to act as a fiduciary. We work with
16 eight of the largest retirement plan providers serving
17 the defined contribution market to make our services
18 broadly available. We offer services to plan
19 participants through leading employers, including 129
20 of the Fortune 500, reaching over 7.3 million
21 participants. To meet the needs of different
22 investors, Financial Engines provides both

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1 discretionary investment management through a managed
2 accounts service and non-discretionary investment
3 advice through a non-aligned advice service. We act as
4 fiduciary to the plan participants under both ERISA and
5 the Investment advisers Act. Our managed accounts
6 service also includes income-plus, which provides
7 steady monthly payouts from a 401(k) that can last for
8 life.

9 Today I wanted to discuss several aspects of
10 the proposed regulation. The proposed regulation
11 provides that investment education, information, and
12 materials as described in Interpretive Bulletin 90-61,
13 will not constitute investment advice under ERISA.
14 Investment education is a valuable way to offer help to
15 participants. However, we know that investors are
16 confused about the roles and responsibilities of
17 different financial professionals. Thus, we are
18 concerned that an overly broad exclusion for investment
19 education may not account for certain industry
20 practices and the expectations of participants and
21 beneficiaries when they are provided information and
22 materials that are not generic in nature. Because

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1 participants who receive specific and tailored
2 recommendations likely perceive those recommendations
3 as advice, rather than general education, providers of
4 such specific recommendations should be treated as
5 fiduciaries under ERISA. The Department should specify
6 that the exclusion for investment education will not
7 apply where specific investment recommendations are
8 provided. These modifications would help to provide
9 clarity about what constitutes investment education and
10 help to ensure participants and beneficiaries who take
11 action based on customized recommendations are not left
12 without ERISA's fiduciary protections.

13 The proposed regulation also provides that a
14 person will not be considered a fiduciary with respect
15 to the provision of advice or recommendations if such
16 person can demonstrate that the advice recipient knows,
17 or under the circumstances reasonably should know that
18 the person is providing advice in the capacity of a
19 seller or purchaser of a security or other product
20 whose interests are adverse to that of the plan or
21 participants, and that the person is not undertaking to
22 provide impartial advice. Individual plan participants

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1 should not be expected to know that advice given with
2 respect to securities and other products is not
3 impartial.

4 We recommend that the Department modify the
5 proposed limitation so that the exception does not
6 apply where the recipient of advice pertaining to a
7 security or other product is an individual plan
8 participant. Alternatively, the limitation should more
9 precisely describe the burden that must be met by a
10 seller who seeks to avoid fiduciary status by claiming
11 that an advice recipient should have known that the
12 advice was not impartial.

13 We also note the Department's request for
14 comment on advice regarding plan distributions. It's
15 difficult to distinguish distribution advice from
16 education and information, and several commenters have
17 identified issues of fine-tuning that are worth
18 examining. In other contexts, the Department has
19 recognized that a buyer and seller of products cannot
20 always stand in a fiduciary relationship. This appears
21 to recognize a distinction for the activities that
22 inform plans and participants of what is available to

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1 them. It doesn't necessarily follow that one is
2 adverse by offering services to plans and plan
3 participants. It should be permissible to offer
4 additional services even if a preexisting fiduciary
5 relationship exists. But once there is an agreement to
6 provide a service, whether that agreement is with the
7 plan on behalf of the participant or directly with
8 participants, and if the subject of that agreement is
9 to provide investment advice as defined in the
10 regulation, the service provider should act as a
11 fiduciary.

12 Finally, the Department notes uncertainty
13 both as to the potential costs of the proposal, such as
14 whether service provider costs would increase, and
15 whether the service provider market could shrink
16 because of concerns about higher costs. Financial
17 Engines believes that our history and growth support
18 the conclusion that it is neither onerous nor
19 impossible for service providers to provide high
20 quality investment advice in a fiduciary capacity to
21 large numbers of plans and participants.

22 Financial Engines appreciates the opportunity

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1 to comment on the proposed regulation, and we support
2 the Department's actions in seeking to better protect
3 participants and beneficiaries. We welcome the
4 opportunity to work with the Department and to provide
5 any further assistance that may be useful.

6 MR. LEBOWITZ: Thank you.

7 MS. BORZI: Mr. Stein, you suggested that the
8 seller exemption that we have in the regulation should
9 be limited to sophisticated plan fiduciaries. Do you
10 have some advice as to how you might define that or
11 thoughts?

12 MR. STEIN: What, the investment advice?
13 Well, I used the word "sophisticated" in hopes that
14 that question wouldn't be asked.

15 (Laughter)

16 It does seem --

17 MS. BORZI: I wouldn't even consider myself
18 sophisticated.

19 MR. STEIN: In discussions on the testimony,
20 we thought there was a pretty clear -- and I think some
21 of the comments that you received from small plans
22 reflect this -- that there's a difference between a

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1 fiduciary for a plan sponsored by General Electric
2 who's making decisions and a decision made by my
3 brother who's a doctor and has a small plan for six
4 people. And, you know, it's -- one way of approaching
5 it, and we toyed with talking about this but decided
6 not to, is to have the standard that has to be
7 satisfied by the seller be more specific and include
8 consideration or suitability of the advice to the
9 particular fiduciary, what the fiduciary would fully
10 understand the advice. So that's -- that's I think
11 about as much as I could probably safely say now,
12 although we could think about it some more and

13 MS. BORZI: Yeah. If you think about it some
14 more, that would be useful for us to -- for you to give
15 us that information.

16 Is Prange --

17 MS. PRANGE: Prange.

18 MS. BORZI: Prange, sorry.

19 MS. PRANGE: We like to use every letter.

20 Okay.

21 MS. BORZI: You suggested that the solution
22 to -- to some of thee things, particularly to the sales

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1 exemption, would be to allow a written disclaimer: I
2 am not a fiduciary. Well, (a), I'm not sure that most
3 participants know what that really means; but (b), the
4 -- put aside the current regulation, the statute
5 creates a functional test. So when a court decides
6 whether somebody's a fiduciary or not, when the
7 Department in its investigations and litigation decides
8 whether somebody is a fiduciary or not, the decision is
9 based on what they do, not what they call themselves.
10 So how do you square that with your written disclaimer?
11 When I was in private practice, I used to X out a lot
12 of these written disclaimers in service provider
13 contracts and simply substitute the statutory words.

14 MS. PRANGE: Hm-mmm.

15 MS. BORZI: So how -- how would you square
16 that? How would --

17 MS. PRANGE: It would not be our intention
18 that a disclaimer would supersede the actual
19 performance of the service provider. I'm not -- we're
20 not taking a position that the functional test should
21 be eliminated or that if someone does act and engage in
22 a fiduciary function, that they shouldn't be held to

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1 the standards. Our goal would be to have a disclosure
2 regime that sets a level playing field at the onset of
3 the relationship of what it is, what the intention is
4 of the parties and what the role is intended to be of
5 the service provider. But we agree that if the service
6 provider then goes beyond those guidelines, that
7 intended function, that they should be held to the
8 fiduciary standards.

9 MS. BORZI: Okay. And how would, for
10 instance, a participant know that? I mean, if you're
11 their trusted financial adviser and you give advice
12 which is -- crosses that line, how would the
13 participant know that the line would be crossed?

14 MS. PRANGE: Well, I think in an individual
15 participant situation, one of the issues with service
16 providers such as JP Morgan is in our call centers, we
17 have hundreds of employees who are engaging with plan
18 participants across several plans. So we question
19 first and foremost the building of that trusted
20 relationship by a record-keeper such as our firm. I
21 think that if the individual does reach out and builds
22 that type of a relationship with someone, if there is a

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1 service provider who's offering an advice service or a
2 managed account service where it's intended for that,
3 then there's the expectation. But I think that we need
4 to manage the expectation of plan sponsors and
5 participants in the basic plan information that's
6 delivered to them through the call centers in guiding
7 them to proper decisions that they need to make.

8 MS. BORZI: Well, do your plan sponsors come
9 in through the call centers as well? Don't you have a
10 more personalized relationship with your plan sponsor
11 clients?

12 MS. PRANGE: We do. We have specific
13 relationships that are developed through client
14 advisers, through relationship managers, and in that
15 case as you said earlier, a plan sponsor is different
16 than a participant. They are generally going to be
17 somewhat more sophisticated, although maybe not a
18 sophisticated investor. They are going into the
19 marketplace and seeking services and investment options
20 for their plan, and they need service providers like
21 our firm who can bring information to them on which
22 they can base their fiduciary decisions. But our

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1 position is that bringing that information and helping
2 to educate plan sponsors and support them in those
3 decisions is an appropriate place for a record-keeper
4 such as our firm to sit in. If a participant -- I'm
5 sorry, a plan sponsor -- feels that they are not
6 sophisticated enough to make the decision on their own,
7 we don't disagree that they should hire an investment
8 adviser for that purpose to assist them in making that
9 decision.

10 MS. BORZI: Who will be a fiduciary.

11 MS. PRANGE: Who will be a fiduciary.

12 MS. BORZI: Ms. Tuttle, you get a bye because
13 you actually answered the question I was going to ask
14 you about costs and burdens.

15 MS. TUTTLE: Excellent. Thank you.

16 MS. PRANGE: Good job.

17 MR. DAVIS: Mr. Stein, you said investment
18 advice should not have to be individualized to qualify
19 as sort of a fiduciary act. What specific advice would
20 you give the Department on where to draw the line
21 between investment education and investment advice in
22 that context?

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1 MR. STEIN: Well, in our written comments,
2 what we suggested was that the test really be whether
3 specific investment advice is directed to a particular
4 participant rather than -- what our concern was with
5 individualized investment advice is that if the advice
6 -- if the person giving the advice doesn't really
7 understand the needs of the participant, that would be
8 -- that would not be investment advice if they had --
9 if they weren't aware of the particular needs of the
10 individual with respect to their portfolio, and they
11 were just making recommendations to everyone about a
12 particular security, that that would not be
13 individualized. So what we -- what we suggested was
14 the test really should be whether there was advice
15 concerning a specific investment directed to a
16 participant or beneficiary. And that can be a
17 definition of individualized, we -- we think.

18 MR. DAVIS: Okay. Thank you.

19 And then Ms. Prange, you talked about just
20 the challenges that the reg as proposed would create.
21 But you and Ms. Tuttle seem to disagree on whether the
22 availability of advice would be affected. Was the

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1 basis of your comments that the regulation as proposed
2 would actually reduce the availability of high quality
3 advice? Do you think providers would be
4 disincentivized to provide advice in this context?

5 MS. PRANGE: I don't think that they would be
6 disincented to purposefully provide investment advice,
7 either through an advice product or a managed account
8 product. Our concern is that if the -- if the final
9 regulation is not more specific, that those who provide
10 investment guidance and education, data, may not
11 provide as much or broad of information if the line is
12 not clearly defined. We believe we need to provide in
13 the marketplace the opportunity to provide information
14 and guidance and education to both sponsors and
15 participants alongside fiduciary products like advice
16 and managed accounts.

17 MR. DAVIS: Ms. Tuttle, would you agree with
18 that?

19 MS. TUTTLE: Yes, I think I agree that there
20 is a distinction between investment education and
21 investment advice. And it's not always easy to draw
22 that line crisply. But I think looking at those

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1 concepts of is it directed to the participant; does it
2 take into account participants' own circumstances,
3 would be things that I would look to to say if you're
4 doing that and you're making a specific recommendation,
5 that you are then offering investment advice and should
6 do so as a fiduciary. But it is completely permissible
7 for folks to provide investment research or to
8 otherwise educate the market, and participants may gain
9 access to that. We hope that participants are looking
10 -- reading the Wall Street Journal or otherwise trying
11 to educate themselves about the choices they face. And
12 I would agree that we want to encourage those kinds of
13 activities and allow people to generally offer
14 education about asset classes and risk and return and
15 diversification without fearing that they must be a
16 fiduciary to somebody with whom they may not have a
17 personal or direct relationship.

18 MR. DAVIS: And one more question. In the
19 preamble, the Department talked a lot about the change
20 in age of the marketplace, the increasing need for high
21 quality advice, in particular with respect to
22 participant-directed accounts. What indicators are you

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1 guys seeing with respect to the reliance of
2 participants on advice? Are you seeing greater
3 reliance on advice? Have you seen markers that would
4 suggest that this advice is even more important in the
5 context of the products that you deliver today?

6 MS. TUTTLE: Yeah. I think we have seen
7 several studies do show that participants are both
8 requesting advice, that there is some gaps in the
9 financial literacy of many of Americans. And I think
10 we do see that when advice is offered, it can improve
11 the retirement outlook for many of the investors who
12 are taking advantage of that advice.

13 MR. DAVIS: Ms. Prange, would you agree?

14 MS. PRANGE: I would. And I would add in
15 addition to the participants' uptake on the products
16 available, the plan sponsors embracing the products and
17 using them in a QDIA circumstance has been very
18 encouraging, as well.

19 MR. DAVIS: Thank you.

20 MR. HAUSER: I just have a couple of
21 questions. But one thing that strikes me, and tell me
22 if I am wrong -- it seems to me that all three of you

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1 agree that specific recommendations as to purchasing,
2 holding, selling, lending, whatever ought to be treated
3 as investment advice, assuming at least that the
4 adviser isn't on the opposite side of the transaction
5 from the participant. Is that right?

6 MS. TUTTLE: Yes.

7 MS. PRANGE: Yes.

8 MR. HAUSER: And so -- but there seems to be
9 a disagreement beyond that about what should count --
10 what should count as having kind of the requisite -- I
11 don't know what. Well, there seems to be a
12 disagreement beyond that about what ought to count as
13 advice, whether it needs to be individualized, what
14 individualized might mean. But I'm not sure I exactly
15 appreciate what the scope of that disagreement is. And
16 so maybe, for example, starting with you, Mr. Stein --
17 a number of the commenters have worried that absent an
18 individualized sort of requirement, things like
19 analysts' reports, newsletters, you know, these kind of
20 general documents that aren't really aimed at a
21 particular person for advice in a particular context
22 might get picked up by the reg. Do you think those

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1 sorts of things should get picked up?

2 MR. STEIN: Generally no, and I don't really
3 think they would be picked up. I think a newsletter
4 that doesn't -- that just provides information about
5 various securities and doesn't say "buy this one" is
6 not investment advice. I know a number of the
7 commentators are concerned about those kinds of
8 questions, but I -- you know, I think you can read far
9 too much into these regulations, and at least in my
10 view, courts have not been unusually sympathetic to the
11 fringe kinds of claims that some people fear would be
12 made.

13 MR. HAUSER: Okay. And then Ms. Prange, I
14 assume you agree a hundred percent with that statement.
15 Is that --

16 MR. STEIN: I think that's a joke.

17 (Laughter)

18 But --

19 MS. PRANGE: Perhaps I can say I don't
20 disagree.

21 MR. STEIN: Okay.

22 MS. PRANGE: I think our perspective on it

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1 would be we have hundreds of employees in our call
2 center. We train them; we educate them today, based on
3 96-1 and other guidance on giving participants
4 education and guidance. We clearly don't want, as
5 you've said, them inadvertently crossing a line that
6 now takes our firm into a fiduciary standard, just
7 because they're having a conversation with an
8 individual participant. It would not be our goal that
9 they would be giving individualized, specific
10 recommendations of "invest in Bond Fund A." There may
11 be the opportunity for the development of a
12 distribution product similar to the advice and managed
13 account products that have developed over time that
14 could be a fiduciary service. But it needs to be
15 clearly defined service with the investment advice
16 functions within the service, and not inadvertent
17 through a discussion one time with an individual
18 participant.

19 MR. HAUSER: And so, is the line you're
20 drawing or trying to draw with respect to these call
21 center folks and the like centered on, you know, sort
22 of answering ministerial sorts of questions about what

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1 the plan provides, what options are available to you,
2 as opposed to actually making recommendations about how
3 to invest your money? Is that --

4 MS. PRANGE: That's correct. We would not
5 engage, we do not engage in specific recommendations to
6 participants. We need the opportunity to discuss with
7 them not only the investment options that have been
8 made available in their plan for them to select from
9 and the different characteristics of those, but also
10 the plan provisions, including distributions and upon
11 termination, what options do you have as a form of
12 distribution, including leaving assets in the plan,
13 taking a lump sum distribution, rolling funds over to
14 an IRA provider.

15 MR. HAUSER: But not including
16 recommendations as to, you know, what IRA provider to
17 roll the money into or what investment option the money
18 should be rolled into? Or --

19 MS. PRANGE: Definitely not from a service
20 provider perspective to make a recommendation as to
21 what investment those funds should ultimately end up
22 invested in, whether it be a bond fund or an equity

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1 fund. Discussing with plan participants and helping
2 them to navigate the options for distribution,
3 including how to evaluate where they might go for
4 rollover services, we think should be within the
5 context of education and guidance. Many participants
6 have come to the conclusion that they're going to take
7 a distribution from the plan. They work through the
8 tax implications and the poor decision of taking a lump
9 sum distribution. They evaluate the plan's provisions
10 and the investments that are available there and make a
11 determination that they don't want to remain in the
12 plan and need some opportunity to say, "Where would I
13 even go for an IRA?" You can go to your own financial
14 institution; you can go to other providers in the
15 marketplace for those products.

16 MR. HAUSER: Thanks. And then one more
17 question. And you also testified about advice with
18 respect -- record-keeper sort of advice with respect to
19 the fund line-up on a plan's investment menu. And
20 again, if you could just maybe explain with a little
21 more precision where you think that line ought to be
22 drawn? I mean, for example, if the advice being given

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1 is "You should look at these specific funds," or "This
2 is an especially good fund to be on your menu," would
3 you say that advice also shouldn't count as fiduciary
4 advice? Or are you trying to draw the line somewhere
5 south of that?

6 MS. PRANGE: I think it would be predicated
7 based on the information that the service provider has
8 and on which they make that -- that statement. I'll
9 use recommendation loosely here; right? Generally in
10 our business, the plan sponsor will look to us to look
11 across our platform and provide them information about
12 funds that fall within certain criteria that they have
13 identified. They're looking for a new bond fund, or to
14 add a bond fund. So bringing forward what is available
15 on our platform based on the criteria that the plan
16 sponsor has set or current industry criteria, such as
17 benchmarking, performance, fees, we believe should not
18 fall within a fiduciary definition.

19 MR. PIACENTINI: Mr. Stein, at the beginning
20 of your testimony you said that where advice is given
21 in the presence of conflicts, an effect can be to have
22 lower returns and lower retirement income. So my first

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1 question is, did you mean to apply that observation in
2 plans and IRAs both? Both where the advice is given to
3 individual participants or IRA owners and where it's
4 given to plan fiduciaries?

5 MR. STEIN: Well, again, I think you come to
6 the question about whether a plan fiduciary is
7 sophisticated or not. But I think that the types of
8 advice given by somebody with conflicts can -- can
9 result in lower returns. And, you know, we know that
10 similar funds somehow manage to charge very different
11 fees, and the market doesn't seem to provide sufficient
12 information to at least participants to really be able
13 to measure that very easily.

14 MR. PIACENTINI: I think --

15 MR. STEIN: It's not a perfectly functioning
16 market, I don't think, for these products.

17 MR. PIACENTINI: So I think I heard you say
18 that it can have these effects. Is it your view or
19 your experience that it does have such effects? And
20 are those effects common and large, or not common and
21 not large?

22 MR. STEIN: Well, I think there was -- wasn't

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1 there a GAO report on -- issued, I think it was in last
2 year or 2009, which found that conflicted investment
3 advice can in fact result in lower returns?

4 MR. PIACENTINI: But I guess I'm asking
5 whether you have personal experience or other beyond --
6 the GAO report, I think, was a particular context, more
7 broadly --

8 MR. STEIN: Well, I can give you a personal
9 anecdote involving me. When I was -- when I was a
10 visiting professor at University of Texas, I had --
11 somebody came in to sell a 403(b) annuity to me and it
12 was an insurance company. This was in 1987. And he
13 didn't really explain to me that -- the flat fees and
14 that if I were only going to be at University of Texas
15 for a year, it probably wasn't a very good product.
16 Despite my wife's urging, I've never sold -- or never
17 cashed in the insurance contract. It's \$1,000 in 1987;
18 today it's \$1,030. I think he got a good commission,
19 though.

20 MR. PIACENTINI: And your reference to the
21 GAO study is actually a good transition to my other
22 question for you. I think, if I remember the GAO

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1 study, it found that undisclosed conflicts might have
2 these impacts that they reported. Is it your view that
3 disclosure could correct the potential for this harm?

4 MR. STEIN: Well, it can mitigate it with
5 respect to some participants. But I bought a car three
6 years ago from a car salesman who told me, I get a
7 commission, but the reason I'm in this business is I
8 want you to get the most car for the least amount of
9 money. And unfortunately, I believed him and I'll
10 probably believe the next car salesman that tells me
11 that.

12 MR. PIACENTINI: Thank you.

13 (Laughter)

14 Ms. Prange, your testimony referred in
15 several instances to disclaimers, I guess a form of
16 disclosure, as a positive provision that could be
17 included in a rule. So is it your view that these
18 kinds of disclaimers will -- will change the way people
19 will view information they're getting, whether it's
20 advice -- including will individual -- how will
21 individual participants behave differently because of a
22 disclaimer?

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1 MS. PRANGE: So I believe that in today's
2 disclosure regime, that is what we as an industry and
3 what you as regulators truly believe, with plan sponsor
4 disclosures and participant disclosures on our doorstep
5 -- that we all believe that more disclosure, clear,
6 concise disclosure to the individuals who are making
7 decisions, and leveling the playing field or -- or
8 setting the foundation for the relationship and the
9 roles of each of the parties involved will have an
10 impact on the decisions that are made.

11 MR. PIACENTINI: So I mean, are you drawing a
12 comparison to the rule, for example, that the
13 Department has issued that says that participants
14 should be told about the fees associated with their
15 investment options?

16 MS. PRANGE: That's correct.

17 MR. PIACENTINI: Because I think -- I think
18 I'm asking a slightly different question, which is, you
19 know, a disclosure about a relationship or how to
20 interpret information that's being provided as opposed
21 to just, you know, sort of factual disclosure about a
22 particular option. So you think that the effects would

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1 be the same?

2 MS. PRANGE: I think -- I think what I'm
3 saying is that it's a continuation of that thought
4 process, that we believe that the current disclosures
5 that are coming for plan sponsors and participants
6 related to factual information, along with disclosures
7 and disclaimers about the relationship and the roles of
8 the parties will further enhance each other, and that
9 it will put participants in a position, or plan
10 sponsors in a position to understand the relationships
11 of the parties and the decisions that are to be made by
12 each.

13 MR. PIACENTINI: Thank you.

14 And one question for Ms. Tuttle. You made a
15 reference to the uncertainty that was talked about in
16 the economic assessment of the rule that the Department
17 issued. And you pointed out that -- if I understood
18 correctly; I'm going to paraphrase a little bit -- but
19 good and independent fiduciary advice can be and is
20 available in the marketplace now. So I guess my
21 question is, is it your view that that holds for all of
22 the different kinds of clients that are sort in play

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1 here, from IRA owners, plan participants, plan
2 fiduciaries? Or are there some kinds of advice where
3 that may not be true, where it may be that some other
4 types of existing business models that may not be
5 independent are really the only efficient way? Or did
6 you intend your statement to apply sort of across the
7 board to everything that's in play under this rule?

8 MS. TUTTLE: Yeah. I intended it to apply to
9 the kind of business that we're in. We do not advise
10 plan fiduciaries or plan sponsors. I am aware that
11 there is a very active consultant community there. But
12 we ourselves do not enter into those activities.

13 In terms of IRAs, again, we get lots of
14 questions in our adviser center from participants who
15 are asking about what they should do with their plan --
16 if they want to roll it over, they're ready to take a
17 disbursement, they -- they're looking for help. We
18 also get questions from plan sponsors asking what kind
19 of help we might make available to their employees.
20 We're not yet in that business. So in terms of what's
21 available to IRA participants now, I don't have the
22 degree of familiarity as to whether those existing

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1 structures can provide it. But we can envision, you
2 know, a time when it is possible to provide similarly
3 disinterested, objective advice to participants when
4 they're facing that very complicated decision about
5 rolling over the monies that they've accumulated
6 throughout their working career. There may be many tax
7 complexities. There are complexities around whether
8 instruments such as long-term bond funds that could
9 help them to best utilize the monies they've
10 accumulated would be available through different
11 vehicles that aren't available in an employer-sponsored
12 plan. So I think there is a role there that will be
13 developing and evolving, and we would think that's an
14 area for further study and great care in regulating the
15 ways that that industry can be nurtured and given the
16 same kind of support that the Department has offered to
17 other new products and innovation throughout the
18 decades.

19 MR. PIACENTINI: Thank you.

20 MR. LEBOWITZ: Ms. Prange, I just have one
21 question for you. It's sort of a follow-up. Go back
22 to your -- to your call center and the people you have

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1 working there. And you started to describe a
2 circumstance where people would ask questions about a
3 rollover, about taking a lump sum distribution and want
4 to understand, I guess, what -- what the process is and
5 what they -- what options they have. So how -- how are
6 your call center staff instructed in terms of
7 responding to those specific questions? If an
8 individual calls and said, well, what should I do with
9 it? I have it in these funds; can I just put it into a
10 JP Morgan account? I mean, what -- what do they tell
11 them? How are they trained?

12 MS. PRANGE: They're trained generally to
13 review the tax implications with a participant, of the
14 different types of distribution methods. So you can
15 leave the funds in your plan; you'll still have access
16 to the investments that are currently offered in the
17 plan. Take a distribution; you'll have tax
18 implications there. You can roll it over. You can
19 roll it over to an IRA. If a participant specifically
20 asked whether or not there were JP Morgan IRA products
21 available, they would be referred to another area of
22 our company that offers those types of products to

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1 build a relationship there and establish an IRA. But
2 generally the call center (inaudible) are directed to
3 first and foremost ensure that the participants
4 understand what their distribution options are and the
5 tax consequences associated with it, with a goal of
6 ensuring that they understand the need to protect their
7 retirement assets long-term and to avoid situations
8 where we see participants taking lump sum distributions
9 and wasting the retirement assets that they've built.

10 MR. LEBOWITZ: So there's no specific -- it's
11 up to the participant to ask a question about other JP
12 Morgan services or products? Your people are trained
13 not to say anything about it at all; is that right?

14 MS. PRANGE: Well, they're trained to walk
15 through a dialogue with the participant to -- to ask
16 the participant who is on the path of an IRA rollover,
17 "Do you have a relationship with a financial
18 institution that can provide you those types of
19 services?" Banks often offer those; other mutual fund
20 companies do. A participant who -- who does not have a
21 current financial institution or does not seem to have
22 any direction on where they might go for an IRA might

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1 be told that those products are available at JP Morgan
2 if they have interest in those products. But then it's
3 up to the participant to specifically state that
4 they're interested in those products before they would
5 be referred to someone in one of our broker-dealers
6 that could assist them.

7 MR. LEBOWITZ: I guess -- I guess actually I
8 had one other question for you. As I was listening to
9 your testimony, I wasn't quite sure I understood what
10 your -- what's the right word -- vision is. I mean, if
11 you were constructing the regulation, what would it
12 look like? What -- would it be principally a
13 disclosure regulation? You put a lot of emphasis on
14 clarity and on disclosure, I think. Is that basically
15 it? If you check boxes that I gave people 27 pieces of
16 paper, then that's enough, no matter what? Or does it
17 still leave -- or it struck me that you were still
18 leaving a lot of subjectivity and a lot of ambiguity
19 about the actual relationship that might be created
20 between the individual and -- and the adviser.

21 MS. PRANGE: I don't think that that was our
22 intent. I think that the relationship between the

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1 individual and the adviser is one of our primary
2 concerns, and that it's a -- that it's a mutual
3 understanding of what that relationship is going to be,
4 first and foremost. And that once established, then
5 that the provider clearly discloses when -- when
6 there's an opportunity for a conflict or when they are
7 acting in a sales role as opposed to an advisory role.

8 MR. LEBOWITZ: Okay.

9 Thank you all very much.

10 Next panel: Marc Machiz, Charles Nelson, and
11 Ken Bentsen.

12 (Pause)

13 Can we all settle down, please? Everybody
14 sit down. Thank you.

15 Mr. Machiz?

16 MR. MACHIZ: Mr. Lebowitz, Madam Assistant
17 Secretary and the rest of the panel -- good morning. My
18 name is Marc Machiz. I'm here today to testify on
19 behalf of the National Employment Lawyers Association,
20 NELA. We represent the interests of participants and
21 beneficiaries in plans.

22 So, two trustees on an expense account walk

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1 into a fancy restaurant and scan the menu. The first
2 trustee, a devotee --

3 MR. LEBOWITZ: They would never do that,
4 would they?

5 (Laughter)

6 Go into a fancy restaurant?

7 MR. MACHIZ: No, not a trustee. Well, it's a
8 big plan. They have a lot of money.

9 The first trustee, a devotee of the efficient
10 menu theory of fine dining, closes his eyes and points
11 randomly at the menu and hits a free-range chicken -- a
12 boring but relatively low-cost alternative. The second
13 trustee looks up at the waiter and decides to ask his
14 advice. "What's my best choice?" The waiter looks at
15 him and says, "Got any food allergies?" "No." "For
16 you, sir, the foie gras-encrusted Gila monster special
17 with truffled oysters, I assure you it is magnificent."
18 "But what's it cost?" The waiter scratches his chin,
19 looks puzzled, and says, "Market price. I'd have to
20 check in the kitchen and get back to you. But it's
21 unforgettable. Hard on the goose, silk on the palate."
22 (Laughter) At bottom, the opponents of the proposed

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1 regulation want plans to deal with investment advisers
2 the way our trustees dealt with the restaurant. The
3 trustees will tip the waiter for his advice, but
4 they're not entitled to a disinterested dinner
5 recommendation. The up-sale is not confined to fancy
6 restaurants, though investment pitches are more likely
7 to glaze over the recipient's eyeballs than wet the
8 palate.

9 We're here to express our support for the
10 basic policy choices made by the Department; discuss a
11 few of the concerns raised in the comments; and make a
12 few suggestions to better protect plan participants
13 from poor or conflicted advice.

14 The thrust of the Department's proposed
15 regulation is to require most people making money by
16 recommending investments or managers to plans -- plan
17 fiduciaries, plan participants -- to do so subject to
18 ERISA's fiduciary duties. There are exceptions,
19 importantly, where advice is provided by a principal
20 dealing with a plan or an agent for such a principal.
21 The would-be adviser may disclaim fiduciary status by
22 informing the participant of his advice that he has

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1 interests adverse to the plan and will not undertake to
2 provide impartial advice.

3 NELA thinks the Department's basic policy
4 choice is both common-sense and consistent with the
5 straightforward language of the statute. The task of
6 the Department should always have been to define
7 investment advice so as to distinguish it from mere
8 education, generalized financial journalism, and simple
9 sales or marketing where the parties were clear that
10 they were on opposite sides of the transaction. If
11 someone engaged in a trade adverse to a plan, it is
12 fair to hold him to fiduciary standards unless he
13 declares himself adverse to the plan. Even so, when
14 the recipient of the advice is an individual
15 participant or beneficiary, we question whether a
16 simple declaration of adverse interest should be
17 sufficient to relieve an adviser of fiduciary status.
18 And that's what my colleague, Norm Stein, addressed in
19 the prior panel.

20 Now SIFMA, as I understand it, objects that
21 routinely making broker-dealers fiduciaries will
22 interfere with transactions beneficial to plans by

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1 rendering them prohibited transactions. Whether
2 exceptions should be made to prohibited transaction
3 rules to allow transactions in which the fiduciary
4 adviser or his affiliates have some financial interest
5 is a matter appropriately left to the Department in the
6 exemptions process. These issues will only arise when
7 a person or entity who does have some financial
8 interest in the advice being given will nevertheless be
9 obligated to provide impartial advice. The exemption
10 process was designed for precisely this purpose; we
11 should let it work.

12 Indeed, NELA believes that the Department in
13 some respects did not go far enough to protect plans,
14 plan fiduciaries and participants from poor advice.
15 Under the proposal, persons giving individualized
16 investment advice may nevertheless avoid fiduciary
17 status because they did not actually agree in advance
18 that their investment advice would be individualized
19 and agree that the advice to be provided may be
20 considered in connection with making investment or
21 management decisions. This is probably the most
22 important point I want to make. Fiduciary status

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1 should depend solely on the nature of the advice
2 provided for a fee. plans and plan fiduciaries in the
3 ordinary course will contract for investment advice.
4 Full stop. That's all the contract need say. It
5 should be presumed that the advice may be used to make
6 investment or management decisions. Why else are you
7 contracting for it? Why else would -- simply omitting
8 from the agreement to obtain advice a written
9 requirement or a oral requirement that the advice be
10 individualized or a recital about how the advice might
11 be used should not relieve the adviser of fiduciary
12 responsibility.

13 Ironically, SIFMA and others read the current
14 regulation to permit them to avoid fiduciary status in
15 exactly this way. By omitting some or all of the magic
16 language of the regulation from their formal agreements
17 with plan fiduciaries, they provide themselves with a
18 shield from liability. As they would have it, no mere
19 adviser is a fiduciary except one who agrees as a
20 matter of contract to be a fiduciary. But SIFMA's
21 approach provides no protection at all to participants,
22 plans, or plan fiduciaries that are on the receiving

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1 end of bad investment advice. Instead, this approach
2 protects those advising plans from being found to be a
3 fiduciary.

4 In any event, we question whether the
5 requirement that advice must be individualized makes
6 sense at all when the advice is provided to individual
7 participants and beneficiaries. Again, this was one of
8 the issues addressed by Norm Stein in the Pension
9 Rights Center testimony.

10 Some of those commenting have sought more
11 specifics about what is meant by individualized advice.
12 This is a fair question. We think it means simply
13 advice directed at the recipient. When I call my
14 broker and say, "Bernie" -- and that's Levine, not
15 Madoff -- (laughter) -- "what should I buy?" And he
16 says, "Marc, I think you should buy Cisco," that's
17 individualized advice. It doesn't matter that he's
18 telling all his clients to buy Cisco or only those with
19 a high appetite for risk, or only those clients who
20 like me are bald and fat. He's telling me what to do.
21 Whether or not he has an intellectually respectable
22 reason for giving me that advice should not affect

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1 whether the advice triggers fiduciary status.

2 But if I ask my broker to send me his firm's
3 research on Cisco, and that research contains a buy
4 rating and a price target available to all the firm's
5 clients, that advice is not individualized and arguably
6 should not carry with it fiduciary responsibility, at
7 least when it's provided to plan fiduciaries. Again,
8 the issue of confusion of individual plan participants
9 comes up.

10 While the broker-dealers contend that they
11 should be fiduciaries only when they agree to be
12 fiduciaries, the appraisers insist that their duty to
13 provide independent, professional, disinterested
14 opinions of value is inconsistent with fiduciary
15 status. Frankly, this perspective baffles us. The
16 appraisers appear to believe that being a fiduciary
17 would require them to give dishonest opinions of value
18 that are shaded in favor of their plan client --
19 shaving the valuation when the plan is the buy and
20 pumping it up when the plan is the seller. But plan
21 fiduciaries seek appraisers to provide them with an
22 honest opinion of value -- at least we hope so. Loyalty

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1 in an appraiser consists of providing an honest
2 opinion, not a deliberate distortion. If a plan
3 fiduciary asked a professional appraiser for a
4 dishonest appraisal or to act in a transaction as an
5 advocate of a value different from his honest opinion,
6 the assignment would indeed violate the professional
7 ethics of appraisers. The appraiser should turn the
8 assignment down.

9 The appraisers seem to fear that holding them
10 to a fiduciary standard of care will require them to do
11 more than they must do now and prohibit them from
12 qualifying their appraisals, by, for example, noting
13 that they have not independently verified the company's
14 financial statements in the way that an auditor does.

15 But nothing in ERISA requires a fiduciary who
16 is not a trustee to do more than the job he's hired to
17 do. The Department should make clear that an appraiser
18 may limit the scope of his opinion. Fiduciary status
19 will, however, carry with it co-fiduciary liability. If
20 an appraiser learns of a breach by another fiduciary,
21 he will have a duty to blow the whistle and not stand
22 idly by.

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1 The appraisers also argue that since they're
2 already held to a professional standard of care, making
3 them fiduciaries adds little protections for plans, but
4 does increase costs. The fact is that a plan fiduciary
5 who hires an appraiser will rarely pursue malpractice
6 remedies where he may also be liable in connection with
7 the same transaction as the appraiser. Making
8 appraisers who act in transactions fiduciaries gives
9 the Department, as well as plan participants, an
10 important enforcement tool to assure that appraisers
11 adhere to the high professional standards they already
12 support as a profession.

13 In the proposed regulation, the Department
14 excludes from the advice that gives rise to fiduciary
15 status either marketing or making available platforms
16 from which a fiduciary may designate investment
17 alternatives in those cases where the person marketing
18 or making available the platform disclaims an intent to
19 provide impartial advice. To obtain an exclusion from
20 fiduciary status, such a person should not merely
21 disclaim an intent to provide impartial advice. He
22 should disclose in detail the nature of his financial

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1 incentives to provide the particular choices in the
2 platform. Otherwise, a person says, well, these
3 choices aren't impartial, but why? Where is the hidden
4 -- where is the hidden trap for me? That needs to be
5 disclosed if people are going to get out from being
6 fiduciaries.

7 Moreover, this exclusion makes little sense
8 to us unless the platform in question provides a broad
9 range of choices to the fiduciary that agrees to choose
10 from it. On the other hand, if the platform provider
11 wants to give advice as to which managers or options
12 within a platform should be selected, then it seems to
13 us that that becomes -- that that must be fiduciary,
14 individual advice.

15 And finally, we are concerned that the
16 preamble to the final regulation make clear how much of
17 what is clarified in the regulation is already
18 reflected in the Department's interpretation of the
19 existing regulation. It is clear from reading the
20 comments that some believe that advice with regard to
21 the selection of investment managers is not investment
22 advice within the meaning of the existing regulation.

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1 But the Department has stated repeatedly that such
2 advice can qualify as investment advice under the
3 existing regulation. Likewise, advice given to plan
4 fiduciaries, including advice to fiduciaries of pooled
5 vehicles holding plan assets would be advice to a plan
6 under the current regulation. Similarly, advice paid
7 for by third parties after payment of commissions can
8 be investment advice, as well, under the current
9 regulation. It would be ironic indeed if parties used
10 this clarification -- the clarifications in the new
11 regulation to argue that their advice escapes coverage
12 under the old regulation.

13 We wish the Department well with its efforts
14 to assure that plans, plan fiduciaries, participants,
15 and beneficiaries have available to them impartial and
16 prudent investment advice. It may always be perilous
17 for plans to send their trustees out for a fine meal at
18 a fancy restaurant. But plan and participant
19 investments are far too important to let advisers treat
20 those investments as just one more daily special.

21 Thank you.

22 MR. LEBOWITZ: Mr. Nelson.

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1 MR. NELSON: Good morning. And thank you for
2 the opportunity to testify at this hearing. I think I
3 now understand why I'm in the middle.

4 (Laughter)

5 My name is Charles Nelson. I'm the President
6 of Great- West Retirement Services and Great-West Life
7 and Annuity Insurance Company. WE are the fourth
8 largest retirement plan record-keeper in the United
9 States, providing 401(k), 401(a), 403(b), and 457 plan
10 retirement services to 24,000 plan sponsors, 4.4
11 million retirement participant accounts, and \$138
12 billion in assets.

13 ERISA's fiduciary provisions are the
14 cornerstone of our voluntary employee benefit system,
15 and I commend the Department for holding this hearing
16 as an important first step in a process to fully
17 understand and consider the proposal's effect on
18 participants and plans. Let me first start by saying
19 that my testimony today is not a defense of the status
20 quo. There are legitimate concerns of the current
21 regulation, and I think it is appropriate to review a
22 standard established more than 35 years ago. There are

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1 provisions in the proposal we support. However, we
2 find many more are ambiguous, and we are deeply
3 concerned that others will set the retirement industry
4 back 25 years by dramatically increasing costs to
5 401(k) participants and plan sponsors, eliminating
6 advancements that provide DC plans with greater
7 efficiencies and cost savings through open architecture
8 investment platforms; and substantially curtailing plan
9 distribution, communication, education, and counseling,
10 reducing the availability of information participants
11 need to make informed decisions about their
12 distribution options.

13 We believe that the Department dramatically
14 underestimated, or in the case of IRAs, did not
15 estimate at all the cost of the proposal and its
16 unintended consequences, while overestimating the
17 benefits of the proposal. Our formal comment letter
18 raised many issues for your consideration, but in my
19 limited time this morning I will focus on several
20 particular concerns.

21 We believe the Department's intended policies
22 are not clear from the text of the proposal, preventing

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1 thorough public review and comment. Crucial terms such
2 as the new form of fiduciary management advice are not
3 defined, making it impossible for the regulated
4 community to know with certainty what conduct is
5 intended to be covered. Revising and re-proposing the
6 rule for public review and comment will enable the
7 Department to articulate a clear standard. Rather than
8 speculating on what the rule might mean, commenters
9 will be able to offer more meaningful comments on what
10 the rule would actually do. We believe this is the
11 best way to comply with the requirements of the
12 regulatory process and ensure the rules result in
13 greater protection, not greater litigation.

14 Despite our concerns about the proposal as a
15 whole, we are encouraged that the Department included
16 an exception for operating a platform and for providing
17 information about the available investments. We are
18 pleased the proposal recognizes that offering a
19 platform of investment options is not a fiduciary act
20 under current law and should not be under any new
21 regulation. However, we believe the language in the
22 exception is too narrow. A significant issue is that

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1 the platform must be made available, quote, "without
2 regard to the individualized needs of the plan." If
3 the intent of this language is to limit the exception
4 to true platform providers, we support this intent.
5 Unfortunately, it is all too common to see a DC plan
6 adviser or consultant custom-build a target date or
7 life cycle fund for a plan, but disclaim his or her
8 fiduciary status. These fiduciary service providers
9 should not be able to escape their duty by falsely
10 claiming to be a platform provider. However, the
11 individualized need language is too broad. A
12 legitimate platform operator cannot provide its
13 ordinary services without taking into account the
14 individual and varying needs of its plan clients.

15 We are also concerned that it is not clear
16 what the Department meant by limiting the exception to
17 providing general financial information about platform
18 investments. We offer our plan clients diagnostic
19 tools providing comparisons between options using
20 objective data regarding common fund metrics. Unless
21 the rule clarifies that such tools are considered
22 general financial information, platform providers

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1 likely will not offer them, making it harder and more
2 expensive for plans to select and monitor options,
3 particularly small plan providers or plan sponsors.

4 Similarly, we believe that general financial
5 information should include information platform
6 providers provide related to plan mapping and
7 conversion, such as assistance in determining which
8 platform options are similar to the prior plan
9 investments. Finally, the platform exception should
10 expressly state that the platform operator is complying
11 with the process outlined in the Aetna Advisory Opinion
12 97-16A for removing and replacing investment funds are
13 not providing investment advice.

14 The sales exception is also vital to platform
15 operators. However, we are concerned that the
16 exception as written would not work in practice. First,
17 the proposal should expressly recognize that the sales
18 exception is not limited to a specific point at the
19 beginning of the relationship. Information related to
20 sales is exchanged on an ongoing basis as plans make
21 changes to fund line-ups or implement new design
22 features months or years later. It is this aspect

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1 which will eliminate open architecture fund choices by
2 plan sponsors, as providers will set fund line-ups and
3 not be able to change them without risking becoming an
4 investment fiduciary.

5 Secondly, we do not believe it legally
6 accurate to use the term "adverse" to describe the
7 service provider/plan relationship during a sale.
8 Financial service providers are not engaged in caveat
9 emptor transactions with their clients. Federal and
10 state laws require financial service providers to take
11 into account the needs of their clients under the
12 prevailing duty of care. As a result of these legal
13 duties, a regulated service provider cannot properly be
14 considered adverse to his or her client. We believe
15 the Department's intention can be achieved by using a
16 better-suited phrase such as the adviser has a
17 financial interest, rather than an adverse interest.

18 The exception for certain valuations for
19 reporting and disclosure properly recognizes that not
20 all valuations should be subject to fiduciary status,
21 but it does not go far enough. We recommend exemptions
22 not conditioned on reporting and disclosure,

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1 specifically: First, we urge the Department to clarify
2 that passing through a valuation performed by another
3 is not in itself a fiduciary act. Second, that --
4 clarify that the fair value pricing affected in
5 connection with underlying open-ended registered
6 investment company funds, for example, is also not a
7 fiduciary act. And finally, we believe the proposal
8 needs a general exception for valuations associated
9 with insurance products. The concern in the preamble
10 appears to focus on hard-to-value assets like closely-
11 held employer stock or certain pieces of real estate.
12 By contrast, group annuity insurance products and other
13 insurance investment contracts are readily valued, but
14 are not traded. We don't believe insurance companies
15 and their employees should be fiduciaries for
16 mechanically calculating a value of a contract for the
17 purpose of a participant's minimum distribution
18 requirement.

19 Another important issue is that the proposal
20 may have inadvertently created ambiguity regarding the
21 fiduciary status of bundled service providers. Aetna
22 Advisory Opinion 97-16A expresses the Department's view

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1 that a record-keeper is not a fiduciary to the plan
2 merely because of one of its affiliates is a fiduciary.
3 We urge the Department to clarify in the proposal that
4 a record-keeper in a bundled service arrangement will
5 not be considered a fiduciary itself merely as a result
6 of its affiliation with a person who is a fiduciary.
7 Bundled service providers offer a very valuable and
8 cost-effective service to plans, and without
9 clarification of the paragraph, investment managers who
10 also perform record-keeping will likely stop performing
11 record-keeping. This will result in drastically
12 reduced record-keeping competition, with a
13 corresponding increase in record-keeping prices to
14 plans and participants.

15 Finally, we are concerned about the future of
16 advice to IRA holders and distribution counseling for
17 participants. IRAs are inherently different. They are
18 not ERISA plans. IRAs have no fiduciary-making
19 decisions on behalf of participants, and thus no need
20 for the highly protective structure of ERISA's
21 fiduciary provisions. The Department chose to not
22 apply the interim final 408(b)(2) rules to IRAs due to

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1 concerns about disjointed regulation across retirement
2 products, and should do so again in this proposal.

3 We are also concerned that if a 401(k) plan
4 distribution counseling becomes fiduciary investment
5 advice, it will be even more difficult for participants
6 to get the information they need to make informed
7 decisions. Non-fiduciary service providers provide
8 valuable information to workers, and preventing them
9 from discussing distribution options or providing IRA
10 rollover services would serve to limit the choices of
11 individual workers.

12 Similarly, the Department should use its
13 discretion again to avoid requiring Code 457 plan
14 sponsors which are not covered by ERISA to be subject
15 to these proposed regulations simply because a 457 plan
16 participant seeks to roll over assets to an IRA.

17 We believe the Department has identified some
18 valid concerns with the existing regulation. But we
19 also believe that the proposal as written does not
20 work. We should not create new problems while trying
21 to solve old ones.

22 I appreciate the opportunity to help you work

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1 through this process and happy to answer any questions
2 you may have.

3 MR. LEBOWITZ: Thank you.

4 Mr. Bentsen?

5 MR. BENTSEN: Thank you.

6 Good morning. I'm Ken Bentsen. I'm
7 Executive Vice President for Public Policy and Advocacy
8 at the Securities Industry and Financial Markets
9 Association. We appreciate the Department's decision
10 to hold this hearing on the proposal and hope that our
11 comments are helpful to the Department as it assesses
12 the impact of the proposal on plans and their
13 participants.

14 We believe this regulation is far broader
15 than the aims it seeks to address. It imposes
16 fiduciary status without a relationship to a plan and
17 creates prohibited transactions and co-fiduciary
18 liability on entities who have no understanding with a
19 plan or an IRA that any service at all will be
20 provided.

21 The Department also states that participants
22 and beneficiaries would directly benefit from the

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1 Department's more efficient allocation of enforcement
2 resources by providing greater protections than are
3 available under the current regulation. However, no
4 example or explanation of this benefit is provided that
5 would justify these sweeping changes. We believe there
6 is no evidence that the proposed regulation will be
7 more protective, but a great deal of evidence that
8 these protected accounts will suffer greater cost and
9 fewer choices. New asset-based advisory fees to
10 replace commission spread-based structure; additional
11 transaction cost; elimination of investment options and
12 alternative vehicles; constriction of the dealer
13 market; limits on permissible assets in IRAs; and the
14 elimination of pricing of anything other than publicly
15 traded assets.

16 The Department suggests that the proposed
17 regulation will benefit its enforcement program by
18 helping to resolve difficult factual questions and
19 enforcement challenges by removing the requirements
20 that advice be provided on a regular basis, based on
21 the parties' mutual understanding, and that it serve as
22 the primary basis for plan investment decisions. This

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1 proposed rule would reverse 35 years of case law,
2 enforcement policy, and the understanding of plans and
3 plan service providers without any legislative
4 direction to depart from the Department's
5 contemporaneous understanding of the statute in order
6 to make it easier for the Department to sue service
7 providers. That seems to us to be an inadequate basis
8 for proposing such a dramatic change. And of course,
9 this enforcement rationale cannot apply to our IRAs,
10 over which the Department has no enforcement authority.

11 This rule would appear to be, in fact, in
12 conflict with recent action by Congress. Just six
13 months ago in section 913 of the Dodd-Frank Wall Street
14 Reform and Consumer Protection Act, Congress asked the
15 Securities and Exchange Commission to conduct a study
16 on investment advisers and broker-dealers and the
17 distinctions between them when providing personalized
18 investment advice, and further authorized the SEC to
19 promulgate a rule establishing a uniform standard of
20 care for the provision of such advice. SIFMA strongly
21 supported this provision of the Dodd-Frank Act. The
22 SEC has now presented its study to Congress and

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1 recommended that the Commission adopt such a standard
2 that, based on the SEC study and direction from
3 Congress, would appear to be quite different from the
4 standard being proposed in the DOL's proposed rule.

5 In addition, FINRA has proposed changes to
6 the Know Your Customer and Suitability rules. The
7 preamble of the DOL's proposed regulation notes that
8 the Department does not have the cost data regarding
9 how that conclusion alone would implicate the
10 prohibited transaction rules of ERISA and the code. One
11 would hope that the agencies will coordinate rulemaking
12 so that the change in the standard of conduct would be
13 effective at the same time that this regulation and the
14 changes in the necessary prohibited transaction trading
15 exemptions were effective.

16 Importantly, the section 913 study does not
17 suggest or recommend ERISA-like fiduciary duties with
18 its attendant prohibited transaction, but rather a
19 uniform standard of care that is business model fee-
20 neutral and permits principal trading commission-based
21 arrangements in sale of proprietary products -- all
22 activities that ERISA's prohibited transaction rules

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1 would prohibit for fiduciaries. The SEC 913 study
2 changes the standard of care without requiring all
3 trading practices and products to be reconsidered. The
4 SEC approach is carefully tailored to help retail
5 accounts without increasing their cost, eliminating
6 their choices, and making their trading less efficient.

7 If all brokers who provide market color or
8 investment information are deemed to be fiduciaries
9 regardless of the intentions of the parties, the vast
10 majority of commission-based accounts may move towards
11 fee-based asset arrangements. Securities and currency
12 transactions that were formerly executed with a dealer
13 as principal will be executed on an agency basis
14 against a third party dealer, subjecting the account to
15 an asset-based fee plus commissions and markups. The
16 effect of these changes on the capital markets should
17 be studied by the agencies with jurisdiction over the
18 securities market.

19 The Department's proposals would deem a
20 broker a fiduciary merely because it is complying with
21 industry rules intended to set standards for brokers
22 who are not investment advisers. Without some

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1 clarification, brokers may simply refuse to effect
2 solicited trades for plans if, by calling a client with
3 investment ideas or market color, they back themselves
4 into fiduciary status. Accordingly, any suggestions,
5 array of alternatives or recommendations from a futures
6 merchant such as market or liquidity or time of day of
7 a trade, regardless of whether the plan is represented
8 by its own third party investment manager, may make the
9 futures merchant a fiduciary and its receipt of a
10 commission a prohibited transaction.

11 In addition, we are concerned about the
12 impact on swap transactions. During the debate over
13 the Dodd-Frank Act, Congress considered the question of
14 a counterparty providing a fiduciary duty to plans, and
15 it rejected such an approach because it wanted to be
16 sure that plans could continue to engage in swaps.
17 However, this proposal would make it nearly impossible
18 for plans to engage in swaps, denying plans an
19 important risk management tool used by most major plans
20 and corporations.

21 The Department's cost estimates focus on the
22 cost to service providers and not to the cost to plans

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1 and IRA holders. While we believe the Department
2 greatly underestimated such costs, more importantly we
3 think this emphasis is misplaced. The real question is
4 the cost to plans and their participants and the impact
5 on their retirement savings.

6 And even the list of uncertainties has not
7 once mentioned IRAs. IRAs hold more than \$4.3 trillion
8 of assets as of March 20, '10. The vast majority of
9 these assets are in self-directed accounts. The cost
10 to such account holders would be significant, in our
11 view. Data collected for a study SIFMA commissioned
12 from Oliver Wyman comprised of 33 percent of households
13 and 25 percent of retail investments suggested over 95
14 percent of households with investments hold commission-
15 based accounts, with a strong preference among the
16 small investor segment. These accounts hold \$58
17 billion of fixed income securities purchased through
18 commission-based accounts. If these self-directed non-
19 fiduciary accounts were to be deemed fiduciary accounts
20 as proposed, all fixed income securities would be
21 required to be purchased from broker-dealers
22 unaffiliated with the account's primary broker, at an

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1 additional cost of 23 to 27 basis points each year.

2 While PTE 86-128 permits fiduciaries to select
3 themselves or an affiliate to effect agency trades for
4 a commission, there is no exemption that permits a
5 fiduciary to sell a fixed income security or any other
6 asset on a principal basis to a fiduciary account. The
7 result of that prohibition is that the broker would
8 trade away from his own firm, charging commission to
9 the trade on top of the markup charged by the selling
10 dealer.

11 It's also important to note that a potential
12 effect would be that most of these plans, if not all of
13 these plans, would become -- that would be governed by
14 this new fiduciary standard would shift completely to
15 an advisory fee model, which based on our data
16 indicates a much higher cost. And I would point out
17 that SIFMA represents both brokers and investment
18 advisers, but we also recognize there is a difference
19 in the cost provided for that service.

20 The Department suggests that the cost of
21 complying with the new regulations will be \$10 million
22 in 2011 for existing service providers to analyze their

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1 plan relationships and almost one million each year
2 thereafter for new service providers to do a compliance
3 review. The analysis does not include banks, trust
4 companies, fund administrators, private funds, FX
5 dealers, all of whom sell products to plans and may be
6 fiduciaries under the proposed regulation. The
7 analysis does not include advisers, which we think is
8 mistaken, since the rule imposes additional fiduciary
9 requirements on advisers simply because of the status
10 test for fiduciaries and advisers. The Department's
11 estimates are based on the Form 5500 data and thus
12 ignore the entire IRA universe.

13 The estimates ignore the costs of retooling
14 all of the systems which create a compliance structure
15 for the 4,500 broker-dealers in this country alone,
16 ignoring the insurance agents, banks, and trust
17 companies, consultants, appraisers, record-keepers,
18 each of whom will have similar costs. The estimates
19 also ignore the costs of retraining hundreds of
20 thousands of professionals, of revising every plan
21 service provider contract, of changing how transactions
22 are effected in the principal markets such as fixed

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1 income and currency, and the cost of the scores of
2 exemptions that will be required. The estimates also
3 ignore the additional fees and commissions that plans
4 and IRAs will incur to do all transactions away from
5 the broker-dealer, resulting in both markups and
6 commissions. The estimates ignore the constraints that
7 the regulation will put on dealers who disseminate
8 research or opinions publicly or privately to the plan
9 sponsor or to fiduciaries. The trading cost to plans
10 of dealing only with smaller dealers who are
11 institutional only are critical components of any cost
12 study, in our opinion. Finally, the estimates ignore
13 the cost of the litigation that will ensue because of
14 the lack of certainty or the lack of mutual
15 understanding between parties.

16 On behalf of its members, SIFMA respectfully
17 urges the Department to reconsider its proposed changes
18 to the definition of "fiduciary" regulation, to
19 reassess its economic analysis, and to confer with
20 FINRA, the SEC, and the CFTC on the interaction of
21 these changes with these requirements of Dodd-Frank.
22 Thank you for permitting us to testify today, and we'd

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1 be happy to answer your questions.

2 MS. BORZI: Well, I thank all three of you
3 for your testimony. And in the spirit of the new
4 executive order, in lieu of my asking each of you
5 questions, I'd like each of you to ask your panelists,
6 because the executive order wants comments on comments.
7 So why don't we start with you, Mr. Bentsen. What
8 question would you have for your fellow panelists?

9 MR. BENTSEN: Well, that was a curveball that
10 I thought might be asked, but I can't say I'm
11 completely prepared. But --

12 MS. BORZI: That's the point.

13 (Laughter)

14 For all of you to be unprepared.

15 MR. BENTSEN: Kind of like a dissertation
16 presentation.

17 MS. BORZI: I used to be an academic.

18 MR. BENTSEN: I know, so Well, I think
19 that I would ask Marc, where we're concerned, you
20 raised questions, the issues involving disclosure of
21 publicly available data, and questions related, for
22 instance, to research reports and the like. And that

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1 if that were -- if I were to ask my broker to provide
2 me information or my broker sends me a research report
3 but it's not deemed personal to me, that's not
4 necessarily investment advice. I guess our concern is
5 that the rule is so broadly written and research --
6 analysts' reports, for instance will often have a buy,
7 hold or sell provision on it. How are -- how is -- how
8 are we not to know, if we're doing that through our
9 affiliate and we're providing it to you, that all of a
10 sudden we don't become a fiduciary under this rule,
11 particularly after the fact? And so our concern is
12 things like may consider the provision of advice is so
13 broad that we really don't know if at any time after
14 the fact we're going to be considered a fiduciary and
15 held responsible for advice that wasn't really given
16 directly to that individual.

17 MR. MACHIZ: There's a question in there
18 somewhere, and I intend to find it. The -- oddly
19 enough, your statement is to me is -- parallels very
20 much the question that I was -- that I was looking to
21 ask you, which is why is it that SIFMA, in writing its
22 testimony, seems to assume that almost any interaction

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1 between a broker-dealer and a client, for example you
2 mentioned a call with regard to market color, that the
3 stock has moved. Getting back to my broker Bernie, he
4 calls me and he knows what I own a lot of, and if
5 there's news on a story -- there's a news story that's
6 moved one of those particular stocks, either that I own
7 or I've told him I'm interested in, he calls me up and
8 says, Hey, Marc, did you see, you know, your stock just
9 cut in half because they announced that, you know, some
10 disastrous FDA motion? And I say, Thanks a lot,
11 Bernie. I appreciate the telephone call. But why are
12 calls like this, which are simply intended to provide
13 information, why do you presume that that's what the
14 Department meant by individualized advice? I agree
15 with you: if all that kind of interaction between --
16 that is basically informational and is not, you know,
17 "sell that pig" were deemed to be fiduciary advice, I
18 think your members would indeed have a huge problem.

19 But one thing: (a), I don't believe the
20 Department meant that, and (b), I suspect -- although
21 they won't say that because they're trained not to tell
22 us what they're going to do -- to us today, I suspect

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1 they'd be happy to clarify that the meaning of advice,
2 individualized or otherwise, that they're describing
3 would -- at least when it's provided to plan
4 fiduciaries -- is much narrower than what -- than what
5 I think SIFMA fears that it -- that it is.

6 MR. BENTSEN: Well, then to the Assistant
7 Secretary's point, this may be very instructional to
8 you. Because from our standpoint, this goes -- in our
9 view, this is so overly broad and vague, we don't know.
10 And so we don't have the clarity. And so from our
11 vantage point, that creates huge risks for us in what
12 we provide, and that results in really one of two
13 options, in our view, from the standpoint of members
14 who provide services either to plans or to the IRA
15 market. And that is one, you stop; and two,
16 particularly as it relates to IRAs, you convert them
17 completely to an asset-based account as opposed to --
18 as opposed to a commission-based account. And based
19 upon our data, particularly for smaller IRAs where
20 trades are very limited, the asset-based account is
21 going to cost more.

22 So to our -- in our view, that is contrary to

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1 what the intent -- some of the intent, we would think,
2 behind this rule is, which is to be to the benefit of
3 the -- of the beneficiary, and that would be working
4 against the beneficiary. But to be fair, I think the
5 exchange raises the concern that we have that there is
6 a lack of clarity.

7 MR. MACHIZ: Right. And I guess the question
8 that I would ask you is why -- why is it that SIFMA
9 thinks the way to resolve that lack of clarity is --
10 seems to be to simply allow a broker-dealer to enter
11 into a contract that says we are not going to provide
12 you with individualized advice or advice that will
13 serve as a primary basis, and by having entered into
14 that agreement, assuming that really is the agreement,
15 you say, well, okay, now whatever I say, I have this
16 agreement, so I may provide individualized advice, but
17 I didn't agree to provide it and therefore I'm not a
18 fiduciary. That, I fear, is how I read your testimony.
19 Did I misunderstand it?

20 MR. BENTSEN: No, I think -- I think our view
21 is that disclosure and contractual agreements matter
22 and that they provide a roadmap by which participants

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1 on both sides of a transaction know how to act. This
2 is exactly what the Securities and Exchange Commission
3 is trying to deal with as they are in the process of
4 considering writing a rule. What are the
5 responsibilities of the parties? And from our vantage
6 point, if there's not clarity, then there's tremendous
7 risk. And we don't think there's sufficient clarity in
8 this proposal.

9 MR. MACHIZ: Yeah. I guess I would advert to
10 the -- to the cross-examination that Mr. Lebowitz did
11 of the lady from JP Morgan who insisted that all her
12 call center did was provide information. And as long
13 as she was saying that, I said yeah, provide
14 information -- not a problem, that's what -- that's
15 what call centers are supposed to do. But it turns out
16 that in the course of that interaction they find out
17 that somebody doesn't already have a relationship,
18 oops, that person gets steered to a salesperson,
19 someone else at JP Morgan.

20 So what you agree to do and what you do are
21 not necessarily the same thing. What you say you're
22 doing and what you do may not be the same thing unless

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1 someone takes the trouble to inquire deeply.

2 MR. BENTSEN: Well, I think from our vantage
3 point, and where our members operate, what we agree to
4 do is what the law and regulation says that we're
5 supposed to do, and it's subject to enforcement by --
6 in the case of a broker, it's subject to enforcement by
7 the Securities and Exchange Commission and FINRA. I
8 might point out -- and this in a discussion on section
9 914; we can talk about 913 maybe when we talk about
10 Dodd-Frank, but we talk about Dodd-Frank all the time -
11 - and that --

12 MS. BORZI: As do we.

13 MR. BENTSEN: Well, good.

14 MS. BORZI: And our colleagues in the SEC and
15 the CFTC.

16 MR. BENTSEN: But the point being is that,
17 you know, that our view is you can't divorce this
18 proposal from section 913 and where the SEC is going,
19 and likewise you can't really divorce section 913 from
20 914 and the oversight of advisers and brokers. But
21 that's a discussion for another day.

22 MS. BORZI: Mr. Nelson, you may be in the

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1 middle, but I'm going to give you the last question.

2 MR. NELSON: Well, I really wanted to find a
3 little bit more out about that foie gras, but I'm going
4 to pass over that one and go to a different topic. I've
5 got to --

6 MS. BORZI: It's the one thing I won't order
7 on the menu.

8 MR. NELSON: This one's for Ken. And, you
9 know, I'm just trying to kind of follow, because I
10 think we are somewhat aligned here in that -- would you
11 -- would SIFMA be a proponent of revising and re-
12 proposing the rule for public review and comment rather
13 than proceeding down the current path that we are by
14 the calendar year this year?

15 MR. BENTSEN: Absolutely. Because I think
16 from our standpoint, largely for two reasons. One is
17 that again, the SEC, in our view, is going to move
18 forward with establishing a new uniform standard of
19 care and a uniform fiduciary standard of care for
20 brokers and advisers that will apply to many of the
21 activities -- certainly the IRA market -- encompassed
22 by that. And second of all, we think that the

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1 Department has not done sufficient cost analysis, and I
2 think that's -- I think that's stated as such, as it
3 relates certainly to the IRA market. And we don't
4 think it's done it broadly enough as it relates to the
5 service provider market, as well. So we think that the
6 -- that we would all be better served if this was
7 withdrawn and more study was done. I appreciate the
8 fact, I know the Department, you know, is talking to
9 the Commission. But the Commission and the Department
10 and other Commission all seem to be going different
11 directions, that there could be better coordination,
12 because our members will have to deal with all of these
13 rules.

14 MR. MACHIZ: Do I get to answer that
15 question?

16 MS. BORZI: I just want to point out that
17 it's easy for you to say from the outside that there's
18 no coordination or not enough coordination. But I want
19 to assure you that we are talking with our colleagues,
20 and we have no interest -- none of the three agencies
21 have any interest in making it more difficult for
22 compliance with either Dodd-Frank or ERISA. So I need

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1 to say that on the public record, even though I've said
2 it once before.

3 Thank you all.

4 MR. DAVIS: Mr. Nelson, you talked -- you
5 started your comments by saying that there were some
6 legitimate concerns that the Department was trying to
7 accomplish with this regulatory initiative. Can you
8 just expand on where you have concerns and where you
9 think the Department might be appropriately focused
10 with respect to this initiative?

11 MR. NELSON: Expand on the items that I --
12 that we're agreeing with?

13 MR. DAVIS: Yes.

14 MR. NELSON: There are a number of items that
15 we would agree with. And I think some of the things
16 that have actually even come out in the interim
17 proposed 408(b)(2) regulations on the fee disclosure.
18 We believe fee disclosure will go a long way -- a long
19 way with the contractual requirements associated with
20 those for documenting to clarifying the relationship
21 between interested parties, whether they be fiduciary
22 or non-fiduciary, relative to a plan sponsor. So we

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1 think a number of those items really do help the
2 process. And I think the discussion around sales
3 exemptions, as I stated, is a step in the right
4 direction. But the language just wasn't quite clear
5 enough to really kind of gather the entire process, to
6 gather in that it is not just a point of sale, that
7 it's really an ongoing relationship; and we've got to
8 be able to capture that communication on an ongoing
9 basis under that same umbrella. So a couple of
10 examples.

11 MR. DAVIS: And do you think disclosure as a
12 standard is enough in most cases to eliminate a lot of
13 the concerns that you've seen or that perhaps members
14 of your team have seen?

15 MR. NELSON: Yeah. I actually believe the
16 Department has made tremendous progress with 408(b)(2)
17 especially, also with the follow-up on 404(a) that's
18 coming later this year. So I think much progress has
19 been made and will be made as a lot of agreements
20 between providers and plan sponsors get documented to
21 the degree that is required within those regulations
22 and get communicated to the plan sponsors. We don't

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1 believe that we should start to find a cure for
2 something before we've actually identified whether
3 there's going to be a result -- additional results from
4 the 408(b)(2) or 404(a) that need to be fixed.

5 MR. DAVIS: And Mr. Machiz, have you in your
6 work seen examples of the types of conflicts that the
7 Department is attempting to address that you could
8 share just generically?

9 MR. MACHIZ: When you're talking about the
10 types of conflicts, I mean, we've seen situations where
11 individual people are giving advice that is resulting
12 in tremendous fees to them, that are giving bad advice
13 and that those conflicts are -- the ability to generate
14 those fees create those conflicts. I mean most, you
15 know -- most obviously and most recently, the various
16 people who were -- found themselves recommending to
17 plan fiduciaries that they -- that they invest with Mr.
18 Madoff. You ask, well, why did they do that? Why did
19 they do that notwithstanding that they -- that many of
20 them had to one degree or another figured out that he
21 must be illegitimate, or might be? And the answer is,
22 because it was a beautiful thing to market. He was --

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1 he had this pristine record. And so if you could
2 market Bernie's track record, either directly or
3 indirectly through another fund, you were in a position
4 to earn a huge fee.

5 MR. DAVIS: Mr. Bentsen, you talked about to
6 the extent that brokers would have to migrate from a
7 commission-based model to a fee-based model that in
8 your studies, the costs would go up overall. I'm just
9 -- could you expand a little bit more just specifically
10 why would the costs go up, and would they go up in all
11 situations? Just give us a little bit more
12 specificity.

13 MR. BENTSEN: There are a couple of reasons.
14 One, in our -- commission-based models, obviously, are
15 done on a trade-by-trade basis. So particularly if you
16 have accounts that trade very little, like IRAs, the
17 annual cost is going to be fairly limited. Commission
18 -- asset-based accounts generally run at about a point
19 on an annual basis. I think the Department's own
20 guidance in some cases has been that they could run up
21 to a point and three-quarters on an annual basis. And
22 our study -- the study that we had Oliver Wyman conduct

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1 as part of our submission to the SEC, and I believe we
2 submitted it with our comment letter to the Department
3 as well, they found in certain instances -- we looked
4 at different types of asset trades. So we looked at
5 fixed income securities, for instance. And we found
6 that there was a difference because in an asset-based
7 model, a true fiduciary model, in addition you wouldn't
8 be able to -- you'd have to trade on an agency basis
9 and not a principal basis, that the cost spread of
10 trading fixed income securities on an agency basis
11 versus a principal basis would be 23 to 27 basis points
12 annually. So that's where we derive our view that
13 there's a price differential between a commission-based
14 and an asset-based.

15 Now to be fair, and as I said, we have
16 members -- we represent members that have both
17 registered representatives and registered investment
18 advisers. And in many cases, firms will have dually
19 registered individuals, and they will -- they will
20 provide the service based upon what the client is
21 asking for. But what our study also found is among the
22 households we looked at, the vast majority had some

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1 form of a commission-based account. Customers seem to
2 be choosing that type of account. And it could be that
3 they're choosing it on price; it could be that they're
4 choosing it, that they want -- they like having a self-
5 directed account. But it does have a price
6 implication.

7 MR. DAVIS: And you think the sellers
8 exception as currently drafted in the regulation
9 wouldn't go far enough to preserve some of those
10 existing business models?

11 MR. BENTSEN: We don't believe so. We don't
12 think -- we certainly don't think that it would -- we
13 don't think it would allow a sufficient exemption for
14 principal transactions, and we are confident that it
15 doesn't provide an exemption for swaps business. So
16 that would be more on the plan side. And we're
17 concerned when you consider the rest of the rule and
18 questions of whether someone could subsequently be
19 deemed a fiduciary because of the -- of the -- may
20 consider in some of the other issues that the risk of
21 being ultimately deemed a fiduciary would cause it to
22 be -- cause a transaction, a principal transaction, to

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1 be a prohibited transaction, and the liability
2 associated with that would cause many firms to just
3 back away and say just do it as an asset-based in an
4 agency basis.

5 MR. DAVIS: Thanks.

6 MR. LEBOWITZ: Mr. Bentsen, was there
7 anything in the reg you liked?

8 MR. BENTSEN: We appreciate the fact that --
9 that you had -- that you have -- the process that you
10 have established. We appreciate the fact that you
11 agree to extend the comment period at least to get past
12 the time that the SEC submitted their study. I think
13 that was beneficial to all of us who wanted to comment
14 on seeing where the SEC staff was going. We appreciate
15 the fact that you have a hearing and that you have
16 developed a process which allows us to bring our
17 concerns. We - you know, contrary perhaps to at least
18 some of my fellow panelists -- you know, we think that
19 the current standard as it relates to the businesses
20 that we're looking at has worked. We think that the
21 Department has been taking steps through some of the
22 disclosure recommendations to try and address it. But

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1 beyond that, you know, no, we're not -- we don't find a
2 lot in it as it is currently written that we would be
3 supportive of.

4 MR. LEBOWITZ: You weren't convinced that
5 there are any problems that the current reg does not
6 adequately address?

7 MR. BENTSEN: Well, the current reg, as we
8 read it in the preamble is written to address problems
9 in areas which aren't primarily a focus -- and there
10 are others here to talk about those. But in terms of
11 the IRA market, where we have a serious concern, you
12 know, it doesn't appear to us that that was necessarily
13 the intent in the way that the rule was written. And
14 it seems to us that it also runs head into -- and
15 again, I appreciate the Department's coordination with
16 the other agencies -- but it runs head into a standard
17 that is in the process, we believe, of being
18 established.

19 MR. LEBOWITZ: Mr. Hauser?

20 MR. HAUSER: Maybe if I could start with you,
21 Mr. Nelson. I just had a question about a valuation
22 point you made, which is that you wanted -- you wanted

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1 the regulation to be written in such a way that when
2 your company, and I guess others, are valuing insurance
3 products, they'd be able to pass on the underlying
4 values of those contracts. And you referred to it
5 essentially as involving a mechanical calculation of
6 value. And I guess my question is for the specific
7 products you have in mind, how mechanical is that
8 calculation? I mean, are there hard-to-value assets in
9 there? Are there questions about pricing; are there
10 judgment calls to be made? Or is it truly just a
11 matter of plugging in market prices, adding it up, and
12 discounting based on a disclosed formula or something?

13 MR. NELSON: Interesting question, because in
14 underlying open-ended registered investment company
15 funds, a mutual fund, there are examples of fair value
16 pricing that occur on a very frequent basis that need
17 to occur. Those funds are often wrapped in annuity
18 products, as well, by insurance companies. So you have
19 kind of a compounding feature. Now, many of those
20 products in variable annuities or the fixed annuities
21 would be valued on a daily basis. But they are not, as
22 the regulation stated, necessarily traded, you know, in

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1 an exchange-type format. So that's where a lot of our
2 concern kind of came around in the language, is that it
3 really kind of seemed to fuss with the valued-but-are-
4 not-traded component. So it's -- many of them are
5 valued. There are certainly issues with some of the
6 valuations, as we said with even going beyond insurance
7 company products. But it's the traded component and
8 the language that fussed us.

9 MR. HAUSER: And so what -- I mean, just so I
10 have a sense of it, what kind of products are you
11 talking about in particular?

12 MR. NELSON: It'd be talking about variable
13 annuities, accumulation -- variable and accumulation
14 annuities in retirement plans, which are predominantly
15 used in the smaller plan 401(k) market. There would
16 also be fixed general account annuities, as well, and
17 some separate accounts.

18 MR. HAUSER: Okay. And in connection with
19 the seller's exception that's built into our
20 regulation, there's a suggestion -- I don't know that I
21 have it in front of me, but one of the commenters -- I
22 think AARP suggested that, well, maybe a seller's

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1 exception makes sense, but it ought to have a fairly
2 comprehensive sort of statement of the conflict.
3 Because you made the point that well, you don't think
4 you "adverse" exactly captures what the nature of this
5 relationship is. But AARP has suggested that you ought
6 to be able to get the seller's exception if you're on
7 the other side of the transaction. And then it's
8 coupled with comprehensive disclosure of the fees and
9 conflicts; a statement of the conflict; full disclosure
10 of the sources and amount of fees; and then a clear and
11 unequivocal acknowledgment that there is a conflict.
12 Would that kind of -- if we were to write a regulation
13 that required that level of disclosure as part of this
14 seller's exception, and said if you have that
15 disclosure, you're good to go and you're not a
16 fiduciary, either as a safe harbor or just as a
17 mandate, would that be something you'd be willing to
18 endorse?

19 MR. NELSON: Well, I think that's something
20 we should look at. I think the more that you have on
21 an ongoing basis and understand that are exchanging
22 information, that it's not a point in time

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1 relationship, and that certainly disclosing -- if a
2 record-keeper has an affiliate that has a fund and how
3 much revenue comes from that fund I think are all
4 perfectly and appropriate things that need to be
5 communicated in that type of a process and should, when
6 you do those types of things, should certainly not make
7 you a fiduciary.

8 MR. HAUSER: Maybe turning to Mr. Bentsen, I
9 guess where I'd like to start is with the IRA market,
10 because it seems to me that's obviously a very big part
11 of the concerns expressed by SIFMA in its comments. And
12 as I read SIFMA's comments as well as a number of the
13 other comments, I get a sense that there is a
14 perception, at least in the comments, that the effect
15 of the Department's regulation in this space would be
16 to preclude commission-based sort of arrangements and
17 to completely up-end current fee arrangements. I guess
18 in that connection my question is, the regulation as
19 drafted, and obviously it can be expanded or narrowed,
20 but -- and we are listening to people's concern -- but
21 the regulation as drafted has a seller's exception,
22 which is designed to enable people who are truly

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1 counterparties to be counterparties, not fiduciaries.
2 There is 86-128, a class exemption, which covers
3 security transactions and permits commissions to be
4 taken and has virtually no conditions with respect to
5 IRAs at present. There is 84-24, which covers
6 commission-based arrangements and annuities and mutual
7 funds. There is at least theoretically going to be a
8 408(g) sort of exception. How -- and the Department
9 has, as Mr. Machiz noted, broad authority under the
10 class exemption procedures to grant exemptions where
11 they're administratively feasible and in the interests
12 of participants and beneficiaries and protective of
13 their interests. And so presumably if there's a
14 particular fee practice that on balance is beneficial
15 to participants, that in the sense that they would in
16 fact have worse performance because of additional fees
17 or the like would be something we could look at and
18 grant an exemption for. Given all those things, I
19 guess my question is one, how extensive is the problem?
20 What exactly is the universe of transactions in which
21 you think really commission-based arrangements are just
22 going to be rendered impossible? And second, why isn't

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1 the Department's -- you know, it seems to me implicit
2 in your -- the comments is a view that the Department
3 simply shouldn't even have the authority in this
4 context to impose conditions on arrangements such as
5 principal transactions involving these folks and the
6 like, because we -- I mean, we certainly can grant
7 exemptions in this context for fee-based transactions
8 that are reasonable, but it might come at the cost of
9 conditions.

10 MR. BENTSEN: Well, I think -- you know, I
11 think even in how you laid that out underscores both
12 the complexity and the lack of clarity that the market
13 approaches this. So -- and the point that you make
14 that if there are problems, that we could -- you know,
15 that we could fix these problems through -- either
16 through adjusting this rule or subsequent rulemaking.
17 But absent that, our concern is, is we look at the
18 market today and we look at the way the rule is
19 constructed, that either directly not allowed or
20 indirectly because of concerns that other activity
21 would trigger a fiduciary status and then affect a
22 principal trade related to this creates a concern for

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1 us.

2 So I would -- I think we would appreciate the
3 fact that you recognize that we've raised a concern
4 about it, and hopefully others have raised a concern
5 about this, and that there may be ways to fix it.

6 MR. HAUSER: Right. Well, the problem, I
7 guess, with asking an overly complex question is we
8 don't quite get focused. But at least with respect to
9 84-24 and 86-128, those are class exemptions that
10 already exist. And the seller's exception is laid out
11 in the reg, and it may or not may be broad enough, but
12 these provisions already permit a huge amount of
13 commission-based arrangements to move forward, don't
14 they?

15 MR. BENTSEN: I mean, our view again is that
16 the way we read -- with what's in place now and the way
17 that we read -- the way that we read the proposed rule
18 is that it would -- it would greatly constrict the
19 ability to move forward under the current structure in
20 being able to do commission-based with principal
21 transactions for the IRA market. Now I'd be happy to
22 come back to you for the record taking into

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1 consideration the other items and maybe piece that
2 together in more detail for you, why those provisions
3 don't give us the sense of relief that you seem to
4 think we should have.

5 MR. HAUSER: Okay. And I'd appreciate that.
6 And I guess with respect to principal transactions, and
7 I think the other area you mentioned in your comments
8 were fixed income securities, also I think primarily
9 probably principal transactions, were at issue. I
10 mean, those are areas where there are pretty direct
11 conflicts of interest between broker-dealers and their
12 customers, aren't they? I mean at least in the sense
13 that there isn't, to the extent that you're selling a
14 product yourself in a market that's thinly traded and
15 there's not a readily available market price, there's a
16 potential for you to take advantage of the customer.
17 And the question I have is one, would you concede that
18 that's true; and two, if that is true, why shouldn't we
19 be in a position to create exemptions that place some
20 conditions on those kind of dealings between your
21 members and relatively unsophisticated investors?

22 MR. BENTSEN: Well first, I would not concede

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1 that that's true. And second of all --

2 MR. HAUSER: Okay.

3 MR. BENTSEN: -- I would make the point that
4 across the broad retail market, not just the IRA market
5 but the broad retail market, that market holds a
6 tremendous amount of fixed income securities, both
7 taxable and tax-exempt. And obviously in this
8 instance, tax-exempt would not be applicable. And this
9 is an issue that the SEC in the broader market has
10 dealt with, and an issue that the SEC is trying to deal
11 with as they're trying to establish a uniform standard
12 of care of how you deal with potential conflicts in
13 terms of principal trading. But at the same time, our
14 data has shown, as we discussed earlier, that customers
15 receive the benefit in terms of the cost as a result of
16 being able to engage in principal transactions. And we
17 would argue that Congress, in considering Dodd-Frank,
18 made it clear that they did not want to preclude the
19 ability for principal transactions with retail
20 customers, and in fact the way we read where the SEC
21 staff at least has recommended that they would be
22 moving in that direction as well, that that could be

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1 addressed more through a disclosure regime.

2 MR. HAUSER: Well, I guess following -- so in
3 a disclosure regime, this is just a question I've
4 wondered about maybe -- maybe anybody on the panel can
5 answer it, but starting with you. If you're a
6 relatively unsophisticated investor and you're dealing
7 with a broker-dealer who may call himself a financial
8 adviser or a financial planner, and you're advised of
9 the conflict, what is it you do with that information?
10 How do you -- how do you use the disclosure of the
11 conflict to then protect yourself from advice that
12 scares you into investments that are actually
13 disadvantageous to you?

14 MR. BENTSEN: Well, I think that's a question
15 that -- you know, I think that's a question that people
16 confront, you know, whether it's in the investment or
17 any other part -- or any other part of their daily
18 lives, of -- and, you know, we have operated our
19 markets very much on the basis of a disclosure regime
20 and in agreements between two parties. And so, you
21 know, what's the alternative to that of not having --
22 not having a disclosure regime? It's having a purely

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1 discretionary account where you're giving all your
2 assets to one individual and, you know, creating goals
3 with them and then having them do it but you limit your
4 choice. Investors seem to choose, based upon the data
5 we've looked at, overwhelmingly that they want to have
6 in many cases self-directed accounts, which are
7 commission-based accounts. So I think you have to
8 balance that with the types of regulations that you're
9 -- you know, that you're trying to put in place.

10 MR. HAUSER: Right. I suspect investors,
11 though, often assume that the person they're talking
12 to, you know, has their best interests at heart and
13 would in fact be accountable if the advice, you know,
14 was biased, was steered to support a bias and the like.
15 And I guess I just -- it strikes me that from, you
16 know, most investors' standpoint, certainly most
17 unsophisticated investors, the difficulty they have is
18 that on one side of the transaction you have somebody
19 who, you know, spends some significant amount of time
20 acquiring financial expertise. The participant doesn't
21 have that expertise, nor do they necessarily know
22 exactly how a conflict is going to play into what

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1 recommendations they're getting. And the mere fact
2 that there was disclosure of that conflict may actually
3 encourage them to believe that this guy really does
4 have my interests at heart -- look how honest he was,
5 he told me about the conflict. And I'm just wondering,
6 how does conflict alone get past that, and why isn't,
7 you know, putting some conditions on the ability of
8 parties to interact in this conflicted way not a good
9 thing?

10 MR. BENTSEN: Well -- sorry, go ahead.

11 MR. NELSON: There are already conditions and
12 restrictions. Most all have our securities license
13 with FINRA. They would have a six, seven, or a 63.
14 They would also be subject to state insurance if
15 they're selling an insurance product. And all of those
16 have, you know, suitability requirements, so if you're
17 going to sign someone up, you've got to go through the
18 suitability.

19 MR. HAUSER: Hm-mmm.

20 MR. NELSON: And in the insurance regulations
21 you have the similar types of things there. So there's
22 multiple layers already. I don't think we need another

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1 layer on top of that.

2 MR. HAUSER: Okay. And just one last set of
3 questions for Mr. Bentsen. And that's just that in the
4 comment you -- or that SIFMA provided to us, you
5 included a Powerpoint with some financial data. And I
6 guess my first question is, can we have the study
7 that's behind that Powerpoint? Would you be willing to
8 furnish that to us?

9 MR. BENTSEN: This is the Oliver Wyman study?

10 MR. HAUSER: That's the -- yes.

11 MR. BENTSEN: It's actually part of the
12 public record with the -- with the SEC 913.

13 MR. HAUSER: Okay. That'd be terrific if you
14 could pass that on to us. And does the part that's a
15 part of the public record explain in particular how the
16 particular SIFMA members were chosen for the survey?

17 MR. BENTSEN: It has a section that explains
18 the methodology that was used.

19 MR. HAUSER: Okay. Thank you. And the same
20 goes -- I think at the tail end of the Powerpoint,
21 there's a set of data points about the likely sort of
22 compliance costs. Are the methodologies for that laid

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1 out, as well?

2 MR. BENTSEN: I believe so.

3 MR. HAUSER: But is --

4 MR. BENTSEN: I'll look and check and get
5 back to you if it's not.

6 MR. HAUSER: Okay. Appreciate it.

7 MR. PIACENTINI: I think I want to preface my
8 couple of questions by saying that in asking them, I am
9 thinking about IRAs as well as plans, so please
10 interpret them that way.

11 And so the first question picks up on
12 something that Tim was just talking about. So I think
13 probably everybody -- maybe everybody would agree that
14 there is sort of an asymmetry in the client/adviser
15 relationship a lot of the time. Maybe not really big
16 plan fiduciary as the advisee, but in a small plan or
17 IRA and so forth, the adviser is the expert; the client
18 is relying on the expert. Is that something we all
19 agree on?

20 MR. BENTSEN: I mean, I think our view is
21 that the -- that the client is buying -- you know, is
22 choosing to buy a service from -- from a financial

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1 adviser who may be a registered representative, may be
2 a registered investment adviser, and they're choosing
3 the type of service that they want to buy.

4 MR. PIACENTINI: Right. But I guess my
5 question is a little different. I'm just suggesting
6 that as they're choosing this service, that part of
7 that relationship is that they are relying on this
8 person as the one who knows a lot about this topic and
9 that they themselves don't. Almost like when you go to
10 your doctor. If you're not medically trained, they're
11 the expert, and they're -- you're going to rely on
12 them. Is that -- do we share that view?

13 MR. BENTSEN: Well, I think -- I think we
14 share the view, and the reason of why we think that
15 there should be a uniform standard of care between
16 investment advisers and brokers, and hence why -- not
17 because of us, but Congress itself determined that that
18 was necessary and authorized the SEC to do so.

19 MR. PIACENTINI: All right. So then let me
20 maybe shift a little bit and ask you in the
21 hypothetical. So if it's true that there is this
22 asymmetry and that the adviser, whatever their business

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1 model is -- and you talked about business model
2 neutrality -- whatever their business model is, that
3 they have a much better understanding both of the
4 subject material on which they're advising, the basis
5 for and the merits of the advice that they're
6 providing, and the presence of potential conflicts of
7 interest and what the implications of those conflicts
8 might be. So if it's the case that they know more
9 about all those things than the client, then should I
10 interpret, or why should I interpret, what turns out to
11 be the dominant model as one that's necessarily more
12 favorable to consumers? Why in an asymmetric market
13 like that would it necessarily come to pass that the
14 business model that's most common would be the one
15 that's the most favorable to consumers?

16 MR. BENTSEN: I mean, that's your
17 hypothetical question, so I think you have to look at
18 the data and determine, you know -- what we're looking
19 at is the empirical data and what investors are
20 choosing.

21 MR. PIACENTINI: Right. And I can see that
22 that's the most common business model.

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1 MR. BENTSEN: And it would appear that it's
2 also being chosen based upon price.

3 MR. PIACENTINI: Right. I'm not sure -- the
4 statistics that are in the Wyman report are one thing.
5 But I think it's pretty clear that that's a very
6 common, probably dominant business model. I'm not
7 questioning that.

8 Does anybody else want to weigh in?

9 MR. MACHIZ: I'm not sure I have a direct
10 answer to your question. But there's a -- underlying a
11 lot of the conversation that's come before is the
12 notion that these transactions are going to -- that's
13 coming from SIFMA is that these transactions are going
14 to be unworkable. And I'm not sure -- somewhere about
15 ten minutes ago the conversation left the planet on
16 which I was living, because we have granted that there
17 is and perhaps to be expanded a principal exception
18 that's going to allow these brokers to say, hey, I'm
19 selling you stuff. I'm on the other side of this
20 transaction. Maybe the word "adverse" will have to be
21 changed, although I would caution against changing it
22 in a way that gives people comfort and makes them think

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1 there isn't really a conflict. So the premise that the
2 world can't operate as it operates now with
3 commissions, I'm not convinced. I'm not -- you know,
4 I'm missing -- I lose it at first principles.

5 MR. PIACENTINI: Okay. So maybe, if I can
6 place myself back on earth, my motivation here is in
7 thinking about the costs and benefits of different
8 kinds of arrangements or in rules that might encourage
9 or discourage one arrangement over another to one
10 degree or another. And I'm very appreciative of the
11 information that SIFMA and others have provided that
12 help us think more than we already have about some of
13 the kinds of costs. So I guess I'll just limit myself
14 to one another follow-up sort of along those lines, and
15 it's to one dimension of the cost consideration that I
16 don't think the SIFMA comment and some of the others
17 went into as much. And that has to do with whether --
18 and again, this goes to business model neutrality --
19 but whether there really is any difference in the
20 results that will be achieved by the consumer depending
21 on the presence of conflicts and what provisions are or
22 are not in place to mitigate or make transparent those

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1 conflicts. Because there is some academic and other
2 research -- the GAO study was mentioned. There are
3 other things, including some that are cited in our
4 proposal, that suggest that people who are engaging in
5 markets where these conflicts exist sometimes end up
6 with poorer performance than those who don't, and that
7 we ought to take that into consideration as well.

8 So any reactions to that?

9 MR. NELSON: Well, I think we live in a world
10 that is full of business relation conflicts, and that
11 in our everyday life, we're engaging in a variety of
12 transactions, whether it's for a product or a service.
13 And I don't think this is really all that different,
14 and I actually have faith in the American consumer here
15 and -- as well as the distributors of products, both
16 advisers and consultants, that with good disclosure on
17 what their fees might be and contractual arrangements
18 around what their services are being provided, that a
19 consumer can make an informed decision. I do get
20 obviously very concerned when we try to, I would say,
21 maybe overreach a bit on the regulation and limit the
22 consumer's ability to make a decision, an informed

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1 decision, because we've restricted providers of service
2 so much.

3 MR. LEBOWITZ: I want to thank the panel and
4 also thank the people coming behind them, because we've
5 run a little late and violated my own rule. We may
6 have some additional questions for this panel and
7 certainly maybe for some of the other panels to come.
8 And so we may be presenting questions to them in
9 writing, and those questions and responses will be
10 included in the public record.

11 MR. MACHIZ: And I have copies of my
12 testimony, which I didn't get a chance to hand out.

13 MR. LEBOWITZ: Thank you.

14 (Pause)

15 The next panel: David Cerner, Ross Bremen
16 and Kent Mason.

17 (Pause)

18 For those who are staying, if you'd take your
19 seats and we're going to move on now. Thank you.

20 Mr. Certner?

21 Could we have some order here, please? Would
22 people please sit down? Thank you.

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1 Mr. Certner.

2 MR. CERTNER: Thank you, members of the
3 panel. I am David Certner, the legislative counsel and
4 legislative policy director at AARP. And we thank you
5 for the opportunity to discuss the important issues
6 surrounding who is and who is not a fiduciary under
7 ERISA.

8 AARP has consistently asserted that
9 investment advice must be subject to ERISA's fiduciary
10 rules, based on sound investment principles and
11 protected from conflicts of interest. The recent
12 financial turmoil and scandals underscore the
13 imperative that such advice is independent and non-
14 conflicted and that the standards governing industry
15 practice involved in rendering investment advice are
16 fair, clear, and easy to understand.

17 Since ERISA's enactment in the '75 regulation
18 defining fiduciary, it's pretty clear that retirement
19 plans and investments have changed dramatically. As a
20 result, there is no longer any justification, if every
21 there was one, for the current regulations non-
22 statutory based interpretation of "fiduciary." With

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1 the shift from DB plans to the self-directed DC plans,
2 investment advice is now given to individuals who may
3 have poor general literacy, with 43 percent of adults
4 with a high school or higher degree falling into a
5 basic or below-basic literacy levels. And as we know,
6 financial literacy, certainly as illustrated by the
7 recent FINRA study, is even lower.

8 Not only has the emphasis shifted to
9 individual investment advice and 401(k) plans, but the
10 variety and complexity of investments available has
11 radically changed. For example, there were no such
12 things as collateral debt obligations or target date
13 funds back in '75.

14 And finally, I think we've seen that numerous
15 Supreme Court decisions have left many participants who
16 have been wronged actually without a remedy,
17 effectively leaving unregulated the many entities that
18 deal with the plans. Given all of these changes and
19 others in the benefits industry, we think that doing
20 nothing would simply leave plans and their participants
21 and beneficiaries unprotected.

22 AARP has also consistently asserted that

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1 retirement plan money, which receives a tax incentive
2 and must meet certain tax qualification requirements,
3 deserves a higher level of protection than other types
4 of investments. And therefore the Department should
5 continue to coordinate with the SEC, as you've noted.
6 But we urge that the Department not delay its
7 regulation. While SEC action in this area is obviously
8 important, the two agencies are dealing with
9 overlapping but also sometimes different problems. So
10 in short, we strongly support the Department's decision
11 to update the current definition of fiduciary to better
12 protect the interests of the plans and the participants
13 and beneficiaries.

14 AARP submits that the regulation should
15 clearly and succinctly state a general rule of the
16 standards under which an entity will be considered a
17 fiduciary. Quite simply, if an entity informs a
18 fiduciary, such as a trustee, or a participant that the
19 fiduciary or participant should purchase a certain
20 investment and the entity is receiving a payment,
21 either directly or indirectly, through the plan for
22 providing that advice, such as a commission, then the

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1 entity is a fiduciary. This is true regardless of
2 whether, among other things, there's a preexisting
3 arrangement; whether or not of the frequency of the
4 advice; whether there's understanding that the advice
5 will serve as the primary basis for the fiduciary or
6 participant decision; whether or how the advice is
7 individualized; what the risk tolerance of the
8 fiduciary or the participant is; or the composition of
9 the portfolio. In fact, we think this is a fairly
10 simple rule. If there's advice and there's payment
11 involved, then there's a fiduciary standard.

12 Entities that are providing the advice
13 concerning proxy voting, selection of investment
14 managers, portfolio asset allocations, selection of the
15 investments from a 401(k) platform, among other
16 activities should also be considered fiduciaries, and
17 that these activities are no different than persons
18 recommending the purchase of a specific investment. The
19 bottom line is that these activities relate to the
20 value of the investments.

21 We would note that if the Department decided
22 to keep the exemption to the definition of fiduciary

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1 based on whether the recipient of the advice knows that
2 they are receiving advice which may be adverse to them,
3 then the participants and the beneficiary should be
4 excluded from any such exemption. This broad exemption
5 would dilute the value of the remainder of the proposed
6 rule as well as the PPA's investment advice provisions.
7 Most importantly, it leaves participants and
8 beneficiaries, many of whom, as noted, have a
9 significant lack of financial sophistication, quite
10 unprotected.

11 We do agree, however, that mere research or
12 rating of investments, without more, does not make the
13 research or rating entity a fiduciary. Nor should
14 entities that simply provide investment education which
15 discusses broad concepts, such as asset allocation,
16 diversification, and risk tolerance be considered
17 fiduciaries.

18 We talk about appraisals in fairness
19 opinions. Private and government enforcement actions
20 concerning appraisals and fairness opinions have been,
21 in our opinion, inconsistent and generally inadequate
22 to protect the retirement security of participants and

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1 beneficiaries. There has been more than one case where
2 these evaluations have been abusively manipulated to
3 reach a certain result or price.

4 The similarities between valuations and
5 appraisals with other investment advice is most
6 apparent where a business is valued or appraised for
7 sale or purchase. Like other investment advice, the
8 purchase or sale of the company will be based on the
9 valuation or appraisal. Valuations and appraisals are
10 also performed annually to determine the value of
11 benefits should a participant terminate employment and
12 request a distribution from an ESOP. Although many
13 commentators have argued that these valuations should
14 not be considered fiduciary actions in their
15 determination of benefit amounts, we would note that a
16 court would most likely review the appraiser's
17 valuation under an abuse of discretion standard and
18 thereby would, quite frankly, limit any liability to
19 the appraiser. And as a result, we support the
20 inclusion of valuations and appraisals as fiduciary
21 actions because of their impact on the value of the
22 plan and its benefits.

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1 The Department also asked for comments on
2 whether advice concerning distributions should be
3 covered under its fiduciary definition. AARP believes
4 that the answer really turns on both where the plan
5 assets lie and whether the entity providing advice has
6 a plan relationship with the participant. In other
7 words, is there a potential conflict? As an example,
8 if a participant asks the current provider whether to
9 take a distribution, at what time, in what form, and
10 where and how to invest these plan assets, then the
11 provider is providing investment advice to an
12 individual and should be considered a fiduciary. I
13 mean, in contrast, once the plan assets have been
14 distributed and completely removed from the retirement
15 plan, the individual is no longer a plan participant.
16 But decisions concerning plan distributions themselves
17 are critical to achieving the plan objective of
18 providing retirement security, and decisions made at
19 that time are often effectively irreversible, due to
20 tax consequences and other transaction costs.

21 In conclusion, we look forward to our
22 continuing work with the DOL to ensure that plans and

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1 participants have the full protections under ERISA.

2 Thank you.

3 MR. LEBOWITZ: Thank you.

4 Mr. Bremen?

5 MR. BREMEN: Good morning, and thank you for
6 your time today. My name is Ross Bremen, and I'm a
7 partner in NEPC's defined contribution practice. NEPC
8 is one of the largest consulting firms in the country.
9 We service over 290 plan sponsors and about \$350
10 billion in assets. We're independent, and we represent
11 the interests of plan sponsors and plan participants.
12 We're not investment managers and we are not folks that
13 offer investment products.

14 I should also point out that we're not
15 attorneys, so our comments reflect our experiences as
16 practitioners as opposed to a legal review of the
17 issues.

18 The Department has stated that the types and
19 complexities of investment products available to plans
20 have increased, and thus there is a need to reexamine
21 advisory relationships. The Department has also
22 expressed a concern that when advisers are not deemed

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1 to be fiduciaries, they may not disclose conflicts to
2 fiduciaries that expect impartiality. We share these
3 concerns.

4 Today more than ever, plan sponsors regularly
5 ask service providers if they're willing to accept
6 fiduciary status, if they'll serve as a co-fiduciary,
7 or if they manage assets. And while they ask these
8 questions and they get responses, they may not know how
9 to interpret or evaluate the answers. As proposed
10 today, three different answers may have the same
11 meaning. Alternatively, the same answer, that a party
12 is a fiduciary, may have different meanings.

13 While discretionary managers charge higher
14 fees and seem to accept a higher degree of fiduciary
15 responsibility, the proposed regulations seem to hold
16 all fiduciary advisers to a similar standard. In cases
17 where the same services are being provided, it's our
18 view that organizations should not be able to claim
19 different levels of fiduciary responsibility for those
20 same services. We believe that plan fiduciaries need
21 advice that helps them meet their duty, and while we do
22 think that providers should be able to limit the

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1 activities in which they have responsibility, we do not
2 believe providers should somehow be allowed to disclose
3 away or contract away what are clear fiduciary
4 obligations. Ultimately we believe it's critical that
5 plan sponsors, who have a duty to their participants,
6 have a clear understanding of what protections are
7 afforded to them when hiring a service provider.

8 We support the Department's effort to foster
9 greater clarity, consistency, and transparency. To
10 help fiduciaries achieve necessary levels of
11 understanding, we would ask the Department to focus in
12 three areas.

13 First, clarify the status of a discretionary
14 versus a non-discretionary fiduciary. Second, further
15 specify the definition of advice. Third, reconsider
16 whether the platform and sales exemptions are the
17 appropriate exceptions to the rule.

18 First, clarify the status of a discretionary
19 versus a non-discretionary fiduciary. plan fiduciaries
20 are responsible for prudent investment of retirement
21 plan assets. For pension plans, this means that asset
22 allocation decisions need to be made and investment

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1 managers need to be selected. Investment committees
2 approach this task in very different ways. Some
3 outsource discretionary management to third parties,
4 while others hire non-discretionary advisers for
5 advice. plan fiduciaries know they must make prudent
6 decisions and are not permitted to fully transfer their
7 obligation to a third party.

8 It's our opinion that under the current
9 system, plan sponsors do not know if greater
10 protections are afforded when discretionary managers
11 are hired. While discretionary managers knowingly
12 assume control of decision making and accordingly
13 charge higher fees, many plan sponsors believe that
14 they themselves are ultimately responsible for all
15 decisions whether or not the party assumes greater
16 control or not, and choose to work with a non-
17 discretionary adviser.

18 We believe that service providers who operate
19 in a similar capacity -- in differing capacities should
20 not be held to the same fiduciary standard. For
21 example, a defined contribution record-keeper who
22 happens to assist with a single action, such as a share

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1 class selection, is not exerting as much control or
2 providing as much advice as an adviser who advises on
3 most investment activities or a manager that has
4 control of all activities. The fact that a plan
5 sponsor may pay significantly higher fees for a
6 discretionary manager suggests that the industry shares
7 our belief and attributes different levels of
8 responsibility to these advisers. Intuitively, while
9 it might seem clear that these different entities are
10 not equivalent in terms of the role they play, under
11 the current system the parties, even specific
12 individuals, could each be held liable for losses
13 sustained by the plan as a result of rule violations.
14 We ask that the Department help fiduciaries in the
15 marketplace understand to what extent control matters.

16 Second, further specify the definition of
17 advice. We understand why the Department has put forth
18 a more inclusive proposal. It's our belief that advice
19 is more often fiduciary in nature than service
20 providers may claim. Many commenters have asked that
21 various activities be classified as non-fiduciary in
22 nature. If the Department finds reason to comply with

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1 these requests, it's our belief that the Department
2 will need to be very specific with regard to what
3 constitutes non-fiduciary advice. In some cases
4 service providers provide responses to plan fiduciaries
5 based on objective criteria set forth by the plan
6 fiduciary or an independent third party. In such
7 cases, it's our opinion that the service providers are
8 not taking on a fiduciary obligation. However, in many
9 other instances some level of subjectivity is
10 introduced by the service provider. If a fund is being
11 mapped on a like-to-like basis, there must be some
12 assessment of what "like" means and whether the
13 managers are sufficiently similar to pursue such an
14 approach. When preferred manager lists are maintained
15 by service providers, some level of subjective input is
16 required, regardless of whether the screening or
17 narrowing of the universe is plan-specific or not. When
18 managers are reviewed, in addition to performance
19 comparisons, there are often assessments made as to
20 whether the options continue to be appropriate, and
21 service providers are often determining which
22 information to provide, thus introducing some level of

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1 subjectivity. When service providers are providing
2 subjective advice, we believe they're taking on a
3 fiduciary role.

4 Third, reconsider if the sales and platform
5 exemptions are the appropriate exceptions to the rule.
6 Once again, we reiterate our view that advice is more
7 often fiduciary in nature than many service providers
8 may claim. And this is true even in instances where
9 clear conflicts of interest may exist. The proposed
10 regulations provide both a platform exemption and an
11 exemptions for individuals selling a security. In the
12 case of the platform exemption, the Department suggests
13 that in some instances the service provider is offering
14 investments in which the provider has a financial
15 relationship, while in others the plan fiduciary is
16 relying on the service provider to provide impartial
17 investment advice. From our perspective, this raises a
18 fundamental question. How does a plan fiduciary know
19 where the platform ends and the impartial advice
20 begins? Some platforms could include hundreds of
21 options, all with financial relationships, and the
22 service provider might help the fiduciary choose among

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1 them. Is this fiduciary advice? In another instance
2 at the other extreme, a platform might include only a
3 handful of investment options. And while the plan
4 fiduciary might acknowledge that there is a financial
5 arrangement with the investment managers in this
6 limited platform, he/she might still be relying on the
7 service provider to provide a series of options that
8 meet ERISA standards.

9 The other exemption in the proposal relates
10 to the selling of securities. Some comment letters
11 have suggested that the language might be broadened to
12 include the sale of services. The idea would be
13 similar to the platform exemption in that there would
14 be an understanding on the part of the plan fiduciary
15 that natural conflicts would exist, and as such, there
16 should be no expectation of impartial advice. Today
17 it's common for service providers to be required to
18 provide hypothetical line-ups and other potential forms
19 of advice and new business processes, so there's a
20 clear logic to this whole line of thinking. And we
21 will only ask that the Department be very careful in
22 approaching clarifying language. In our view, the sale

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1 continues, or it could continue, on an ongoing basis.
2 If there is a need for assistance with share class
3 selection of a particular vehicle or need to change
4 funds in the future, given the indirect forms of
5 compensation service providers receive, the service
6 provider in a sense is continuously selling securities
7 in which it has a financial interest.

8 We applaud the Department for tackling this
9 very challenging definition of a fiduciary issue. We
10 appreciate the complexities of the issue. On the one
11 hand, a broader definition would foster greater
12 disclosure of conflicts and more accountability to plan
13 fiduciaries. On the other, service providers may
14 choose to avoid providing some levels of service or
15 charge plan fiduciaries higher fees to compensate them
16 for perceived risks. If a more narrow definition is
17 pursued, the challenge will be to define the line in
18 the sand very clearly so that it's clear to plan
19 fiduciaries when they're working with a fiduciary and
20 when they're not. In our view, as many commenters have
21 indicated in their written submissions, plan
22 fiduciaries rely on the data provided to them by

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1 service providers, and not all plan fiduciaries make
2 use of independent third parties for advice. Even if
3 they do, today not all third parties communicate the
4 same level of fiduciary standing.

5 It's critical that plan fiduciaries have
6 advice to them that helps them meet their fiduciary
7 duty. Ultimately if it does turn out that service
8 providers need to assume greater levels of fiduciary
9 responsibility, it might actually be the best outcome
10 for plan fiduciaries and plan participants if they get
11 improved levels, necessary levels, conflict-free levels
12 of advice.

13 Thank you for your time this morning.

14 MR. LEBOWITZ: Thank you.

15 Mr. Mason?

16 MR. MASON: Good morning. My name is Kent
17 Mason. I'm a partner in the law firm of Davis &
18 Harman, though I'm thinking of moonlighting at Marc
19 Machiz's restaurant later, but

20 (Laughter)

21 I'm speaking here today on behalf of the
22 American Benefits Council, and we thank the Department

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1 for holding this hearing and very much appreciate the
2 opportunity to testify.

3 I think we understand the Department's desire
4 to update and improve the definition of fiduciary.
5 However, I think in this first cut of this proposed
6 regulation, we have concerns that the proposal cuts too
7 broadly and could have some adverse effect on, I think
8 one of the earlier speakers distinguished between
9 advice, and not necessarily inhibiting advice, but
10 inhibiting investment education and information. And
11 I'm going to walk through eight specific issues, sort
12 of a, you know, the pension version of a Letterman Top
13 Ten minus two. But obviously much funnier.

14 The first, the "may be considered" threshold
15 seems too low to us. Let's just take an example. I've
16 got a participant who sought out an adviser. They've
17 gone to the adviser; they got their fund line-up;
18 they're sort of settled on it, and they run into --
19 that particular participant runs into an H.R. person
20 who works for their company. And says, "Gee, you know,
21 I've been fretting about this. Do you think this line-
22 up makes sense? Is it similar to what you see for

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1 other people in my situation?" And the H.R. person
2 says, "Hey, you know, I'm not an expert, but it does
3 look similar to what other people are doing. It seems
4 to make sense." That may be considered. That, under
5 our reading of the regulation, that's fiduciary advice.
6 That's not what fiduciary advice is all about. In
7 other words, fiduciary advice, fiduciary standard under
8 ERISA, is the highest standard on -- highest fiduciary
9 standard under the law. and it shouldn't be triggered
10 by casual sort of discussions in the hall. It should
11 only be triggered by a mutual understanding that the
12 advice will play at least a significant role in
13 investment decisions of the recipient. That's issue
14 one.

15 Issue two. We've had a lot of plan sponsors
16 reach out to us and say, wait a second, you know.

17 Here's our situation. We have a plan
18 committee of senior executives who make all the
19 decisions with respect to the plan, including big-
20 picture investment decisions: what investment manager
21 to pick, et cetera. But underneath those senior
22 executives is a whole crew of middle-level employees

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1 who sort of frame the issues for them, sort of do the
2 research, talk to the investment managers. And all of
3 that research, all of that sort of -- those
4 recommendations, all those middle managers would be
5 fiduciaries under this regulation. And that would be --
6 finding people to sort of serve in that role is
7 problematic. Getting fiduciary insurance for those
8 people -- problematic. Cost of that fiduciary
9 insurance -- frightening. These are not the decision
10 makers. These are middle level people that help the
11 senior guys frame the issues. We've got to get them
12 out of the definition. We have plan sponsors very
13 concerned about that.

14 The seller exception: I think with the
15 deletion of the primary basis and the regular basis
16 rule, it puts enormous pressure on the distinction
17 between selling and advising. Because every time I
18 sell, I'm going to say to you, "Hey, this is a good
19 deal for you." That's what selling's about. So I'm
20 making a recommendation. And so I think Alan at one
21 point said, "Is there anything you like?" I think the
22 introduction of the seller exception was a major step

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1 forward, and I really think it sort of -- we applaud
2 the department for that. I think it just needs to be
3 expanded and clarified. Let me sort of walk through
4 three examples which illustrate our perspective.

5 First scenario: Mutual fund family is going
6 out selling its target date fund. Seems clearly
7 covered, selling a product. Scenario two: Another
8 mutual fund family is selling its model portfolio
9 services to compete with target date funds. They're
10 basically selling the same thing. One is covered; one
11 is clearly not, because the second one's a service. No
12 coverage. They're selling the same thing. Third
13 scenario, which I've heard some people say is covered,
14 some people say it's not covered. An adviser with a
15 clear and disclosed commercial relationship to the
16 first mutual fund family sort of sells that mutual fund
17 family's target date fund. Clearly sort of being
18 compensated for this. They're not the principal
19 selling; they're sort of somewhat third party selling
20 with a commercial relationship with the manufacturer of
21 the product. Covered or not covered? The answer is,
22 all three are exactly the same situation. All three

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1 are selling and should all three be covered by the
2 seller exception.

3 Fourth issue: plan menu. I'm going to come
4 at this a little bit differently. I want to come at
5 this I'm a service provider, and I go to a hardware
6 store owner with 12 employees. And I say, "Hey, you
7 know, you're getting up there in age. You really ought
8 to be putting in a plan." And I say, "Here are the 300
9 options -- investment options that we offer. And by
10 the way, here's this phone book full of data,
11 historical data on all 300. And by the way, when you
12 go through that phone book, good luck, because you have
13 fiduciary duty to make the right choices. And your
14 only alternative to going through the phone book with
15 fiduciary duty is to pay that guy down the street X
16 thousand dollars to make that choice for you." Well, I
17 mean I can tell you, from dealing with these things for
18 many, many years, that hardware store owner's not going
19 to have a plan. Because they're not going through that
20 phone book and they're not paying that guy down the
21 street X thousand dollars. So we -- it's essential
22 that we give the providers some tools to assist. It

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1 doesn't mean they give necessarily sort of "this is
2 exactly what you should do." But in our written
3 comment, we sort of give a whole lot of things, some of
4 which, I think, the woman this morning from JP Morgan
5 sort of alluded to that are very important in helping
6 that hardware store owner go through and make
7 selections.

8 Fifth issue, and this is something, Phyllis,
9 you've touched on a couple of times and I just want to
10 reiterate the importance, which is coordination
11 consistent with the executive order. But coordination
12 with other agencies, you know, in our mind I think we
13 want to emphasize that it is -- and again I want to use
14 your words, just because I'm agreeing with you -- it is
15 not coordination in the sense of telling each other
16 what you're doing, but actually I think you were saying
17 harmonizing the rules. And we can't overemphasize
18 that. And let me -- I want to talk about two examples
19 here.

20 One -- and again, you alluded to this, and
21 this is the CFTC -- under the law, under the rules, the
22 CFTC would actually require swap dealers who are

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1 entering into a swap with a plan to perform functions
2 that would make them fiduciaries. And because they're
3 the other side of the transaction, if they're a
4 fiduciary, it's a prohibited transaction. So the net
5 effect is no more swaps with plans. There needs to be
6 a categorical rule under these regulations that says
7 anything required by the business conduct standards of
8 the opposing party does not make the opposing party a
9 fiduciary. Otherwise, swaps are shut down.

10 The SEC issue: As everybody knows, the SEC
11 is conducting a study of the fiduciary status of
12 broker-dealers. I think our point here again -- it's
13 coordination on a single standard. The SEC staff has
14 just come out with a study saying having dual standards
15 is confusing and harmful to participants. So if there
16 is a dual standard, one by the SEC and one by the DOL,
17 that is, in the view of the SEC study, harmful and
18 confusing to participants.

19 Seventh issue, and again, people have talked
20 about this a lot so I'm just going to be very, very
21 brief. In some cases under the regulation,
22 individualized advice is not required, such as a firm

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1 newsletter, a brokerage firm newsletter could be
2 fiduciary advice. I think that's been well discussed
3 by other speakers, and I'll just leave it there. But
4 we don't view the brokerage firm newsletters as
5 fiduciary advice.

6 And the last thing I want to hit is the
7 management of securities. We sort of read the preamble
8 in terms of the issues you wanted to address, and I
9 think we perfectly understand those issues that you
10 want to address. I think our concern is that term is
11 very broad and somewhat frightening. And let me give
12 you an example.

13 I've got a new trustee, for example, and I'm
14 negotiating a trustee agreement with that trustee.
15 Well, the trustee manages plan assets. So advice with
16 respect to structuring that trust agreement, that's
17 advice with respect to the management of plan assets.
18 So every company personnel who participates in that
19 negotiation -- contract people, ERISA people,
20 securities people -- all those people are fiduciaries.
21 And the scariest part is, so are the people on the
22 other side. The people on the other side are also plan

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1 fiduciaries, because in negotiations, you're all been
2 saying, "Here's a good provision for you." If you say
3 that once as a member of the other side -- I'm going to
4 have to take ten more seconds -- if you say that once,
5 you become a fiduciary, and there is no seller
6 exception. Because the seller exception doesn't apply
7 to services. It only applies to products. So every
8 trust agreement would be an automatic prohibited
9 transaction. You need to narrow -- in our view, you
10 need to narrow that definition of what management is to
11 get the sort of well-intended targets you were looking
12 for.

13 I thank you very much for giving me the extra
14 few seconds, and I'd be pleased to answer any
15 questions, though I'm scared of Phyllis.

16 (Laughter)

17 MS. BORZI: Believe me, I'm going to try to
18 get us back on time, because I surely don't want people
19 to miss their lunch.

20 Mr. Bremen, have you had the kind of
21 experience that I had when I was in the private sector?
22 I understand your distinction between discretionary --

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1 I think I do -- I understand between individuals
2 involved and what did you call them, discretionary -- I
3 thought you called them fiduciaries. But that's -- I
4 don't know -- but it seems to me a non-discretionary
5 fiduciary is an oxymoron. Could you tell me what you
6 meant by that?

7 MR. BREMEN: Sure. So a discretionary
8 manager is a investment manager who had control of the
9 decisions. They have the ability to analyze data and
10 then pull the trigger. So I think that part of it is
11 pretty clear.

12 The non-discretionary fiduciary is the
13 adviser who has no control. They have the ability to
14 present recommendations to some other party; ultimately
15 that other party has control. And so they could say
16 no; they could say yes. And so ultimately if you're an
17 adviser and the -- the party with control doesn't take
18 your advice and something goes wrong, does that adviser
19 have the same amount of responsibility as the
20 discretionary manager who has control of all decisions?

21 MS. BORZI: Okay. I think I understand that
22 better.

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1 MR. BREMEN: Yes.

2 MS. BORZI: In your experience as a
3 practitioner, have you ever had the kind of experience
4 that I had when I was in private practice where a
5 service provider would approach our clients, represent
6 that he or she was accepting fiduciary responsibility,
7 perhaps even put it in the written agreement that they
8 agreed to be a fiduciary, and then something went
9 wrong. And the Department would come to investigate or
10 they'd get sued by participants, and then the service
11 provider basically walked away from the written
12 representation that they were a fiduciary and hid
13 behind the five-part test to claim they weren't a
14 fiduciary?

15 MR. BREMEN: So --

16 MS. BORZI: Have you ever had that
17 experience?

18 MR. BREMEN: No. I have not been part of a
19 situation like that. No, but I think -- I think the --

20 MS. BORZI: But what if somebody --

21 MR. BREMEN: Yeah, I --

22 MS. BORZI: -- somebody agrees to be a

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1 fiduciary, even puts it in writing. Do you think they
2 should be able to walk away from that?

3 MR. BREMEN: So I -- so no, I think the
4 challenge is that sometimes there can be differences
5 when it comes to interpreting what the contract said or
6 what the arrangement was. So clearly for a firm like
7 ours where we assume fiduciary responsibility, there
8 could conceivably be cases where we feel we're not a
9 fiduciary. And so I think I gave the example or I
10 mentioned that we believe people can limit the amount
11 of exposure they have because they might agree to be a
12 fiduciary, you know, for a variety of activities, but
13 maybe not some other activity where they have no
14 oversight. So I think the devil's in the details.

15 MS. BORZI: So, but -- so then you really do
16 agree with Ms. Prange, who said that you could
17 basically disclaim fiduciary duty in some areas?

18 MR. BREMEN: Well, so my belief is that
19 you're not -- you should be able to not be accountable
20 for certain activities if you're not performing those
21 functions. If you --

22 MS. BORZI: Agreed, if you're not performing

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1 the functions you shouldn't be accountable. But if you
2 agree to perform X, Y and Z --

3 MR. BREMEN: And then you go beyond and you
4 are, in fact, performing those functions?

5 MS. BORZI: Right. Even though you say I've
6 only -- I'm only a fiduciary with respect to X, Y and
7 Z.

8 MR. BREMEN: Well, then, it feels to me in a
9 clear situation like that that you're providing your
10 services as part of your broader arrangement.

11 MS. BORZI: Okay. I think the other two of
12 you I'll give a bye. Kent, I can see, is relieved.

13 (Laughter)

14 But that's because I have other colleagues --

15 MR. DAVIS: And actually that's -- that's my
16 first question, actually, Mr. Mason. The -- I wasn't
17 clear about your comments. You had eight points that
18 you wanted to address with respect to the reg, and a
19 lot of them seemed to be drafting issues. I just
20 wanted to know -- does ABC accept the basic premise of
21 the reg that the marketplace has become a lot more
22 complicated and, you know, with respect to these advice

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1 arrangements, that there would be value in revisiting
2 the definition of fiduciary in the context of the
3 current environment?

4 MR. MASON: I don't think we have any sort of
5 opposition at all to sort of the revisiting. In other
6 words, it is a different environment. I think that the
7 sort of the point of sort of the improving and updating
8 the regulation is not something that we have any
9 opposition to. I think -- I mean, I think this is a
10 very healthy dialogue here, because, you know, are
11 there sort of things that could be improved about the
12 current reg? Absolutely. And I think as I mentioned
13 sort of earlier during my comments, I think the
14 introduction of a seller exception is an important
15 movement forward. Because I think a lot of this turns
16 on disclosure, and the idea that somebody could
17 communicate to a participant or a plan without full
18 disclosure of sort of their role, I think we think is
19 not the right thing. So I think that sort of moving
20 forward in a direction where sort of their disclosure
21 can clarify the relationship between the two people --
22 I don't want to call them adviser/advisee -- but

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1 between the receiver of information and the giver of
2 information I think is a great step forward. And I
3 think we have a lot of concerns about the current reg,
4 but the process we think is an excellent one. I mean,
5 the hearing here and sort of the extension of the
6 comment period and the -- you know, we look forward to
7 the dialogue on this.

8 MR. DAVIS: Mr. Bremen? Is that the way to
9 pronounce it?

10 MR. BREMEN: Yes.

11 MR. DAVIS: Sorry if I mispronounced. Can
12 you talk a little bit more about plan distributions and
13 what you're seeing in that space? Do you think -- we
14 asked for comment in this area in the reg. Could you
15 just talk a little bit about what you're seeing there?
16 Do you think there'd be some value in extending this
17 conversation of investment advice to plan
18 distributions, and how those conversations are
19 happening?

20 MR. BREMEN: Sure. So it's clearly a huge
21 issue. If you can't keep participants in a plan where
22 they get the benefit of all the good work that goes

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1 into the plan -- the low fees, the good investments,
2 and so forth -- plan participants need some strong
3 vehicle that they can use to ensure that they make it
4 to the finish line. And some -- some plans will
5 actually force participants out if they're age 65 and
6 they're inactive.

7 So there needs to be assistance for those
8 folks. Historically speaking, any number of service
9 providers have contracted with, say, a single service
10 provider, an insurance company, to provide an annuity
11 solution. There are some other services out there.
12 Kelli Hueler has a product which is a platform where
13 you have multiple insurance companies that are
14 competing. And then there are even other products out
15 there. Because this is such an important issue and
16 because participants really are unable to make a
17 decision on their own, it stands to reason that they
18 require some sort of assistance. So it -- without
19 being the expert in this particular area, it seems
20 reasonable to me that parties that push them towards
21 one product or another, you know, are giving those
22 individuals advice and should be held accountable for

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1 the decision to guide them one way or another.

2 MR. DAVIS: Then you also made a statement
3 earlier about advice being more fiduciary in nature
4 than a lot of service providers want to admit. Could
5 you expand on what you meant by that? Are there
6 examples that you want to share?

7 MR. BREMEN: Sure. So in the defined
8 contribution world, for example, there are so many
9 activities, whether you're picking a share class,
10 whether you're picking a fund line-up, whether you're
11 helping -- which would be the initial managers you
12 select. If you replace fund managers with other
13 managers, that's what we would refer to as a search. If
14 you help with a mapping, you take one manager out and
15 you migrate those assets to another fund -- you know,
16 all of these activities we would say are fiduciary in
17 nature, because you are selecting the securities the
18 participants are going to be able to invest in. Today
19 as you look across the spectrum of advisers, if you
20 will, it could very well be the record-keeper who is
21 providing assistance, and they may claim not to be a
22 fiduciary. You may have investment consultants that

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1 provide the service that may or may not claim to be a
2 fiduciary. And then along the spectrum you have, you
3 know, other parties that may provide that service, and
4 they may claim to be a fiduciary, and then you may
5 still further have the discretionary folks that come in
6 in one way or another. So at least today, you have all
7 of these different parties providing the same service,
8 and yet very clearly some are saying that they're
9 fiduciaries and others are not.

10 MR. DAVIS: Finally, Mr. Certner. Previous
11 testimony has suggested, at least some have suggested,
12 that the reg as currently proposed will actually reduce
13 the availability of high quality advice, that you see
14 providers decide not to offer it for various reasons.
15 Are those concerns that you share, based on just the
16 things that you see with your members?

17 MR. CERTNER: Well, obviously the environment
18 has changed over the last ten years, where I think
19 there's a greater understanding about the needs in
20 defined contribution plans. I think the marketplace in
21 that respect has been responding in trying to provide
22 different levels of first, education and then advice to

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1 individuals. But -- and from our perspective, we
2 obviously want to encourage advice. But it seems to us
3 a false choice if the choice is between, you know, sort
4 of no advice and bad advice. I mean, we should be able
5 to encourage good independent, non-conflicted advice
6 and encourage the market to move in that direction, not
7 simply to settle for this notion of well, the only
8 advice we can provide is from people who have
9 conflicts. I mean, that just doesn't make sense to us.
10 I think the market, I think, has responded over the
11 last decade, and I think with greater encouragement and
12 clearer rules, we can continue to do that.

13 MR. DAVIS: Thank you.

14 MR. LEBOWITZ: So Kent, just maybe you can
15 take a crack at Phyllis' question, you know, the
16 circumstance being an adviser enters into an agreement
17 which says -- in which it says, "I will act in a
18 fiduciary capacity," and then subsequently we come
19 along, open investigation, assert that there was a
20 breach of that fiduciary responsibility. And so the
21 adviser should be stuck with that, right, no matter
22 what? They shouldn't be able to say, well, now let's

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1 take a look at the five-part test or however many parts
2 are left to the test?

3 MR. MASON: I mean, guess my reaction to that
4 is if I as a, sort of a plan or a plan participant do
5 the adviser on the other side who steps up to the plate
6 and says, I am a fiduciary, I guess I have -- it causes
7 me to put my trust in that person to sort of represent
8 me and sort of pursuant to the standards under ERISA.
9 And I think consistent with, I think, your -- the first
10 of your status requirements -- if I acknowledge that
11 I'm a fiduciary with respect to my actions. I mean,
12 that to me -- you know, that to me sort of says, I as a
13 participant or a plan have the right to rely on you as
14 a fiduciary, and the fact that you try and wriggle out
15 later by sort of arguing well, I said it, but maybe I
16 didn't sort of completely live up to it -- I'm not sure
17 we'd have a lot of sympathy there.

18 MR. LEBOWITZ: Okay. So that's what you mean
19 by mutual understanding?

20 MR. MASON: Yeah. I mean, I think that --
21 you know, I think my example sort of on the other end
22 is sort of things that nobody would dream of that their

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1 fiduciary relationship has started up. But where it is
2 clear that there is a fiduciary relationship that
3 started up, I don't think we're having any sympathy for
4 the people who sort of say no, I sort of want to sort
5 of take advantage of the fact that even though my
6 participant viewed me as a fiduciary, I -- it's not
7 convenient to sort of live up to that.

8 MR. HAUSER: Just a couple of quick questions
9 for you, Mr. Mason. The -- I guess for the most part,
10 I don't know if you would take this as reassuring or
11 not, but for the most part it seems to me your eight-
12 point list did go to drafting sorts of issues. You
13 know, the reality of it is that, at least as I read the
14 comments, it seemed to me there's a bit of a tendency
15 to aggressively and broadly read the sweep of the
16 fiduciary provisions and to read the exceptions
17 extraordinarily narrowly, which is kind of the opposite
18 of what plaintiffs normally do. But anyway, that's the
19 level a lot of the comments have proceeded on, and it
20 strikes me, for example, I mean just to use one
21 example, whether or not we achieved it with the
22 language, there's no intention at the Department to

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1 prohibit swap dealers from being able to act adversely
2 to plans, when it's clear that they're on the opposite
3 side of the transaction. And we don't really see any
4 inconsistency at all between the two statutory regimes
5 here. So that's pretty plainly just a drafting
6 question, at best.

7 But so the two questions I have, though, are
8 one, I think the last example you gave had to do with
9 somebody who was giving legal, and I suppose there
10 might be other services, but they're giving legal
11 services and they really are just giving legal
12 services. But is your point of view that the rule
13 ought to be that as long as they're giving legal
14 services, for example, that that shouldn't be covered
15 by the exception? Or -- and it's only when they cross
16 the line and actually start giving financial advice
17 that they might be potentially liable as advisers for a
18 fee? Or do you just think that certain classes of
19 people like attorneys, accountants and the like should
20 just get a pass, regardless of whether or not they do
21 cross the line and start giving kind of conventional
22 financial advice?

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1 MR. MASON: Yeah. I mean, can I answer also
2 your sort of implicit question from where you're
3 outset? Because I actually completely agree with what
4 you said about a lot of this is drafting. And I think
5 that a lot -- because of how central this issue is,
6 who's a fiduciary, that there's a lot of angst. And I
7 think we're feeling it. I'm sure if you're reading
8 comment letters, you're feeling it, too. And so I -- I
9 was talking to one person at the Department, and I said
10 you know, I think two-thirds of our comments, we would
11 all sort of sit down and agree with. It's just sort of
12 a matter of really putting it -- clarifying it, you
13 know, sort of really starkly in the regulations. So I
14 -- I really do agree with your point, Tim, you know.

15 On your question, I don't think -- I think
16 there are really two issues on that sort of trust
17 agreement issue, but let me answer your specific
18 question. If a lawyer sort of gives legal advice, as
19 for example, "This would be a prohibited transaction.
20 To enter into this swap would be a prohibited
21 transaction. Therefore, I advise against it," that to
22 me is -- you know, could be conceived as legal advice

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1 under here. In fact, under my sort of angst theory,
2 that would be fiduciary advice under the reg. But you
3 know, I don't think that was really intended, and I put
4 that in sort of a drafting thing, that if it's pure
5 legal advice, it's not fiduciary advice. If they do
6 cross the line and say, gee, you know, I give you some
7 legal advice, but I, you know, "I'm pretty darned good
8 with investments, too," and start saying and "and this
9 is what I do here and this is what I do here," and
10 there's a clear sort of relationship that grows in
11 terms of sort of adviser/advisee, well, then, they've
12 just crossed the line. And so the fact that they're a
13 lawyer doesn't mean they're insulated from sort of --
14 from these rules. It just means that when they're
15 acting as such, that they are -- that these rules are
16 not implicated. If they cross the line and establish
17 an adviser/advisee relationship where there's a mutual
18 understanding that the lawyer's advice is going to be
19 given -- have a significant role in investment
20 decisions, then there absolutely should be a fiduciary.

21 I do think also that this trust agreement
22 issue is broader. It's not just legal. You know,

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1 there are also negotiation points. So with someone
2 who's a non-lawyer just says I want this provision to
3 be different from that provision, from the way it's
4 drafted, they would also be -- they would also be a
5 fiduciary under the sort of angst theory of this -- of
6 this reg. And so I don't think it's a pure legal
7 advice point that I was making.

8 MR. HAUSER: And -- and so you brought up
9 this point about the mutual agreement again in that
10 answer. And I guess a question I have is, well, what -
11 - how -- what does it take in your view to have the
12 kind of mutual agreement, you know, that should be
13 respected? It seems to me there's -- some of the
14 comments from the industry groups talked about the
15 problem of the unwitting fiduciary. But there's also
16 the problem of the kind of unwitting advice recipient
17 who thinks he's dealing with somebody who's a financial
18 adviser and who's in a position of trust who maybe
19 calls himself a financial planner or a financial
20 analyst or a financial adviser, but you know, buried
21 somewhere in the document is -- the documentation is
22 something that says essentially, while I'm giving you

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1 advice, you know, you should never just rely on my
2 advice, but rather should consult other professionals
3 and sources. Is that good enough? What kind of
4 disclosure should count, and how do we protect people
5 from thinking they have somebody who stands in a
6 position with respect to them when they really don't?

7 MR. MASON: And I -- actually I think that's
8 a great question. I'm not sure I have a sort of a
9 perfect answer. I mean, in some sense we're all sort
10 of groping for that, because I don't see it under the
11 regulation, either. In other words -- in other words,
12 we sort of established this threshold, and the
13 threshold -- and I think this is sort of a function of
14 the proposed reg -- is sort of casting the net so
15 broadly that basically anybody who says something about
16 investments is a fiduciary. You know, because it may
17 be considered. And so I'm sort of at loss, like who is
18 really my fiduciary in this situation? Who do I really
19 -- who can I really trust? And you're sort of saying
20 well, if we back off of that and we put this
21 significant role concept into place, how is it that the
22 participants are going to understand who's on their

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1 side and who's against them? And I don't have a
2 perfect answer, but I think our recommendation would be
3 do it as much as possible through disclosure. In other
4 words, if I don't want to be the primary basis of the
5 sort of significant role in your decision making, I
6 would say I disclaim fiduciary status. I have some
7 financial interests which may sort of lead me in one
8 direction as opposed to another. And you should seek
9 other advice if you sort of -- if you want to sort of
10 get someone who doesn't have a financial interest.

11 That -- and again, sort of going back to a
12 question Phyllis would have asked earlier, that would
13 never be dispositive. If I disclaim that and I act
14 differently, I'm still a fiduciary. But at least I'm
15 putting the participant on notice that I'm not sort of
16 taking on that mantle.

17 I don't know if that's a full answer to your
18 question, Tim, but I think it's a hard question, and
19 I'd like to think about it some more. But I would like
20 to do it through disclosure as opposed to -- I worry
21 that what we've done is we've cast the net too broadly
22 and we're going to inhibit sort of basic -- sort of

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1 exchange of information.

2 MR. HAUSER: Maybe to Joe, why don't you go
3 ahead? I'll come back if there's time.

4 MR. PIACENTINI: I don't have a question.

5 MR. HAUSER: Then I'm back.

6 (Laughter)

7 I mean, I guess the question I have that I
8 asked of the last panel, too, is I understand the
9 desire to make this a disclosure regime. Which of
10 course isn't generally what ERISA is. I mean, ERISA
11 has disclosure features, but it also requires that if
12 you're a fiduciary, you act in unconflicted ways. And
13 I think part of the premise for that is there are
14 certain situations, at least, where people can't
15 effectively guard against the conflicts. So I kind of
16 have the same question for you. I'm an unsophisticated
17 investor. I don't have years of training in finance.
18 I am not going to be able to intelligently invest my
19 assets without guidance. I've come to you for
20 guidance, and you tell me, "I may have a financial
21 interest in some of the products that I recommend to
22 you. Now," you know, putting your arm around me,

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1 "let's talk about how I can plan your financial future
2 so you're secure in your old age." What is it I do
3 with the information about the conflict? How do I
4 protect myself?

5 MR. MASON: Well, I'm not sure I'll call him
6 co-counsel yet, but you can answer.

7 MR. BREMEN: So I think the -- certainly
8 disclosure is a great first start. But I think as we
9 said, that we don't think that you can disclose away
10 fiduciary responsibility, which I think is what you're
11 suggesting. And so just because somebody discloses --
12 someone claims to be a fiduciary, they disclose that
13 they have conflicts, if those conflicts are significant
14 and sort of impair the ability to give good advice, the
15 Department should have the ability to pursue what are
16 sort of horrendous, you know, heinous activities if an
17 investment consultant discloses conflicts.

18 Say that we -- say that an investment
19 consultant discloses that -- and this is not something
20 that we do, but say that an investment consultant
21 receives compensation from an investment manager for
22 some sort of activity that it engages in. And the plan

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1 fiduciary still hires that investment consultant, and
2 then it comes to light that because of the relationship
3 with these different investment managers -- they
4 receive compensation for managers going to a conference
5 or whatever, it somehow led the -- it impaired the
6 investment consultant's ability to give unbiased
7 advice. It seems the Department should have the
8 ability to pursue action in a case like that. I think
9 that certainly disclosure is a great first step, but
10 disclosure in itself shouldn't mean that it puts
11 everybody in the fair and clear of what would be termed
12 fiduciary violations

13 MR. HAUSER: And Mr. Mason, do you agree with
14 your co-counsel's answer and we'll call it a day?

15 MALE: Maybe not.

16 MR. MASON: I enjoyed it. I mean, gives more
17 time to think and all that sort of thing.

18 (Laughter)

19 You know, it's interesting, because you're
20 saying ERISA's a disclosure regime, and I understand
21 that. I think when you -- when you move away from
22 regular basis and primary basis, and I'm not trying to

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1 second-guess that one way or the other, you -- and this
2 is what I mentioned in the testimony. You put enormous
3 pressure on this distinction between selling and
4 advising. That's what sellers do. Sellers recommend.
5 They advise. That's their business. That's their job,
6 is to say, "This is great for you." And so what you're
7 really doing by taking away those two requirements --
8 and again, I'm not -- I'm just saying you've shifted
9 the world so that you have to become a disclosure
10 regime, which you recognize by creating the seller
11 exception. So -- so we're not really now -- you know,
12 once we sort of take away the primary basis and regular
13 basis, we have to become a disclosure regime by --
14 otherwise nobody could sell anything. And so I -- and
15 so I think to me, what I'm saying is if we're across
16 that line, we need to sort of look at how to
17 communicate it effectively. And do I want it to be on
18 page 27 of a 27-page document? I mean, that's not
19 communication. That's not a disclosure. In other
20 words, effective disclosure is what we're looking for.
21 I'm selling you something.

22 MS. BORZI: So in that case, really what

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1 you're saying is you have to say, "I'm selling you
2 something. This is good for you, but man, it's even
3 better for me." Isn't that the kind of disclosure? If
4 you're going to make money and a substantial amount of
5 money by directing the participant to X rather than Y,
6 isn't that the kind of disclosure you have to make?

7 MR. MASON: Well, I don't want to say it's
8 sort of better for me. This is -- if you come with my
9 fund, look at the great -- the history we've had. We've
10 done very well for our investors. And what you --

11 MS. BORZI: Look at what my salary was last
12 year. I've done very well for myself.

13 MR. MASON: Yes. Yes. And then say, "I
14 don't make money when you go over there."

15 MS. BORZI: Yeah.

16 MR. MASON: "I make money when you come here,
17 and you should know that when you're talking to me."
18 And I don't think we have any sort of problem with that
19 kind of disclosure --

20 MS. BORZI: We've got a model notice, Tim.

21 (Laughter)

22 MR. MASON: No, but seriously --

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1 MR. LEBOWITZ: There's an element of this
2 that requires an understanding on the part of the
3 recipient of this disclosure, of this material, as to
4 what you're saying; right?

5 MR. MASON: Yeah.

6 MR. LEBOWITZ: It could be on the first page;
7 it doesn't have to be on the 27th page --

8 MR. MASON: Well, I --

9 MR. LEBOWITZ: -- and still be
10 incomprehensible.

11 MR. MASON: Well, you know, I mean I -- I
12 guess Phyllis is -- you're being facetious, but maybe -
13 -

14 MS. BORZI: Moi?

15 MR. MASON: -- only half facetious. Moi,
16 right. You know, I think the dialogue here in terms of
17 sort of crafting something that is clear and effective
18 is something that we're -- it's in all of our
19 interests. And I actually mean that very -- don't --
20 don't look at me that way.

21 (Laughter)

22 But you know, I do think, and so I think we

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1 can achieve this. And I think that we get to a good
2 result.

3 MR. HAUSER: I'm not sure which way I was
4 looking at you -- (laughter) -- but did -- but would
5 you -- you know, AARP has suggested one circumstance,
6 and maybe more broadly. I mean, are there some
7 circumstances where really the sale, the seller's
8 exception ought to be more restrictive than it is
9 because the sale is really ancillary to what is
10 fundamentally an advice relationship? That the
11 relationship, the participant, the beneficiary, the IRA
12 holder has is primarily with somebody who's giving them
13 advice on how to invest, and occasionally the investor
14 crosses over a line to sell them something, too. I
15 mean, should there be a carve-out for that sort of
16 situation?

17 MR. MASON: Well, I mean, I guess I'm having
18 a little trouble sort of envisioning your facts, you
19 know, in a sense that if I'm sort of -- I'm normally
20 indifferent with respect to the advice. In other
21 words, I have sort of -- I'm a flat fee. But in
22 certain respects, I could benefit. I mean, I -- and I

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1 think we would want to work on some sort of
2 particularized sort of disclosure to say, "Here I don't
3 have any financial interest in your decision. Over
4 here, I have a distinct financial interest in your
5 decision, and you should know about that."

6 MR. HAUSER: Yeah.

7 MR. MASON: But the world is built on this. I
8 sort of listened to Norman this morning and sort of
9 saying, he sort of believed the car dealer when he was
10 sort of saying it was a good deal for him. We all have
11 to sort of -- that's what the whole rest of the world
12 is built on sort of listening to the sales pitches and
13 sort of distinguishing. And -- and sort of listening
14 to different sales pitches and sort of seeing who's
15 going to sort of give me the sort of the straightest
16 answer and the best product. So I mean, I don't know
17 why --

18 MR. CERTNER: I'd just like to add one thing
19 to that, though. Because this is a little bit
20 different context than people just going out in the
21 world and making a purchase. You're in the plan, so
22 you're in a closed universe. And so the adviser that's

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1 been put before you is a probably a closed one that's
2 been selected by the employer. And an individual
3 generally tends to trust their employer. And so this
4 person that's being put in front of him is already
5 coming with a different kind of aura as an adviser,
6 regardless of some kind of -- the disclosure regimen
7 than just somebody going out in the world and shopping
8 among people. So I think it's a very different
9 environment here, and I think there's a much higher
10 duty that's required.

11 MR. LEBOWITZ: Thank you very much.

12 We will break for lunch and try to get back
13 on schedule. So we'll reconvene at 1:15. Thank you.

14 (AFTERNOON SESSION)

15 MR. LEBOWITZ: We can reconvene. The first
16 panel this afternoon is Karin Feldman, Jim McCarthy,
17 and Steve Saxon. Ms. Feldman?

18 MS. FELDMAN: Good afternoon. I am Karin
19 Feldman, the Benefits and Social Insurance Policy
20 Specialist at the AFL-CIO, and I thank you for the
21 opportunity to present the views of the AFL-CIO and
22 it's more than 50 affiliates representing over 12

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1 million working men and women across the country. We
2 appreciate the opportunity to testify at the hearing
3 today on the Department's proposed rule defining an
4 individual who will be considered a fiduciary, as the
5 result of providing investment advice to a plan or a
6 plan participant. The AFL-CIO supports the
7 Department's decision to update the rule issued more
8 than 35 years ago, and we appreciate its taking the
9 initiative in doing so.

10 In our view, the proposed expansion of the
11 scope of advice and recommendations that may constitute
12 investment advice is appropriate. We appreciate the
13 specific inclusion of advice or recommendations with
14 respect to the management of securities or other
15 property, as there should be no question that the
16 selection of individuals to manage plan investments
17 falls within the scope of investment advice. That has
18 been the Department's view for many years, and
19 providing explicit regulatory guidance will be helpful
20 to plan fiduciaries.

21 Perhaps the most significant change or the
22 one that has definitely gotten the most attention are

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1 the modifications of the current five-part test for
2 determining whether someone is a fiduciary rendering
3 investment advice. The elimination of the existing
4 requirements that advice be provided on a regular
5 basis, and that it be the primary basis for investment
6 decisions appropriately recognizes that fiduciary
7 status should not depend on these fine distinctions.
8 The proposed rule, in our view, more closely reflects
9 the expectations of plan fiduciaries when they retain
10 investment advice providers, and we believe it will
11 better protect plans and plan participants.

12 We also wanted to take this opportunity to
13 respond to the Department's request for comments on
14 whether the provision of investment advice should
15 include advice about taking a plan distribution. The
16 AFL-CIO urges the Department to reconsider the
17 conclusion it reached in Advisory Opinion 2005-23A, and
18 include recommendations relating to plan distributions
19 as investment advice. The recommendation to take a
20 distribution and invest the proceeds of that
21 distribution outside the pension plan reflect, if you
22 will, an adviser's opinion about the investment and

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1 distribution options under the plan compared to those
2 that might be available in the market. The decision to
3 take a distribution will impact a participant's future
4 retirement security. It could affect future investment
5 returns and the fees charged on any investment. It
6 could affect the availability of payment options,
7 including lifetime income options, and the benefit
8 amount paid under any such option. It could affect the
9 availability of benefits from related plans, such as
10 retiree health care or death benefits. So the ultimate
11 decision to take a distribution is an extraordinarily
12 significant one for a participant, and we believe
13 treating those who make recommendations with respect to
14 that distribution, as fiduciaries, will afford
15 additional protection to participants as they make this
16 critical decision. We think it is especially important
17 that participants be made aware of any financial
18 interest that advisers may have in making investment
19 recommendations, although we are not certain that
20 simple disclosure will be enough.

21 We have two concerns with respect to the
22 proposed rule that we hope are clarified. One of them

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1 was discussed at length perhaps at the last panel; the
2 breadth of the seller's exception set forth in proposed
3 paragraph C(2)(i). While it's even debatable whether
4 this exclusion is appropriate with respect to plan
5 fiduciaries, in our view, it is certainly not
6 appropriate for plan participants. In our view,
7 individuals providing advice to plan participants
8 should and must always be fiduciaries, and they should
9 and must be truly independent advisers. The simple
10 offer of a disclaimer will not be understood, and we
11 don't think, in any event, it goes far enough, because,
12 as has been pointed out, it's unclear what a
13 participant ought to do when faced with that
14 disclaimer. We also have some concerns that the
15 proposed limitation, as applied to participants,
16 undermines the already inadequate protections for
17 conflicted advice afforded by the statutory investment
18 advise prohibited transaction exemption, in sections
19 408(b)(14) and 408(g) of the statute, and as the
20 members of the Panel well know, much more than
21 disclosure is required under that statutory regime.

22 Our other concern, which was also touched on

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1 during the last panel, is the breadth of the proposed
2 rule and its unintentional potential to treat
3 professionals, who provide services to the plan
4 fiduciaries within the scope of their professions, to
5 treat them as providing investment advice. We do agree
6 that it probably could be addressed simply with
7 modifications to the language or clarifying comments,
8 and we also agree that, if a professional steps across
9 the line, then, consistent with the Department's long-
10 held view about whether professionals, like attorneys,
11 accountants and actuaries could be fiduciaries, it
12 really depends on the actions that they take and what
13 they do, and it should be no different in this
14 instance.

15 And so we appreciate the opportunity to
16 testify this afternoon, and look forward to attempting
17 to answer your questions.

18 MR. LEBOWITZ: Thank you. Mr. McCarthy?

19 MR. McCARTHY: Good afternoon. My name is
20 Jim McCarthy, and I am a Managing Director of Morgan
21 Stanley Smith Barney, in charge of retirement services
22 for our corporate and individual clients. Unlike Kent

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1 Mason, I brought with me co-counsel, who I knew I would
2 agree with. Bill Ryan, seated to my right, is an
3 Executive Director of Morgan Stanley's Legal Compliance
4 Department, responsible for ERISA and tax-qualified
5 issues. Together we would like to thank the Department
6 for the opportunity to address you today to comment on
7 the proposed regulation regarding investment advice and
8 that prong dealing with the fiduciary standards under
9 ERISA.

10 As we described in our comment letter, we
11 believe the Department should re-propose an amended
12 regulation, or, at a minimum, defer the proposed
13 regulation for further study for the following reasons.

14 First, as the Department notes, simultaneous
15 regulatory efforts addressing market conduct and
16 fiduciary status have been undertaken by the SEC and
17 the CFTC that's been copiously talked about today. As
18 we read them, the proposed regulation has significant -
19 - has certain specific conflicts in many more places
20 where it is not at all clear to us how these competing
21 frameworks would interact.

22 Second, it is conceded by the Department that

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1 several types of implementation costs of the proposed
2 regulation are currently labeled simply unknown.
3 Additionally, given the number and complexity of the
4 technology systems involved, the effective date, while
5 currently specifically indeterminate, is at 180 days
6 post-publication, calibrated at a point that we believe
7 is physically impossible to achieve. We have some
8 historical data on actual implementation costs and
9 timelines versus prior Department estimates that we
10 think will be helpful for the Department in assessing
11 this claim.

12 Third, as both the Department and other
13 commentators have noted, we believe that the impact
14 analysis of the proposed regulation has not adequately
15 considered the market impact, both economic and in
16 terms of client choice. The sea change would have
17 unplanned plan participants and IRA holders. I will
18 spend the majority of my later time addressing this
19 issue. First, I will ask Bill to focus on -- just a
20 few minutes on the impacts on our institutional and
21 asset management business, keeping the aggregate
22 remarks within our 10 minutes.

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1 MR. RYAN: Well thank you, Jim, and good
2 afternoon, everyone. I'd like to spend a minute or two
3 discussing -- and I really am going to keep it to a
4 minute or two -- discussing what the regulation may
5 inadvertently do with respect to the availability of
6 plans and plan asset funds to do business with brokers
7 and other counter-parties, and this is both as a
8 broker, as a counter-party, we would say this, and also
9 as an investment manager, since we have both
10 businesses.

11 Now I think we have talked about the CFTC
12 comments in our comment letter. We also talked about
13 the SEC, section 913 Rule. We are just going to focus
14 on five points in particular, and notice it's three
15 less than Kent Mason, in talking about how the CFTC
16 rules and this proposed regulation interact. As you
17 already probably are painfully aware, the CFTC Business
18 Conduct Rules require swap dealers to provide counter-
19 party or a prospective counter-party with detailed
20 information on the material risks of the swap, the swap
21 scenario analyses, designed in consultation with the
22 counter-party and daily marks and evaluations.

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1 I am not going to try to give a full
2 description of these, but in terms of the five points
3 in particular we would like to focus the Department's
4 attention on.

5 First, under the proposed regulation, if you
6 are in fact registered as an investment adviser and
7 providing advice for a fee you, are in fact presumed to
8 be a fiduciary. Most counter-parties in the
9 institutional trading market are, in fact, dual-
10 registered as both broker dealers and investment
11 advisers. Under that standard it would generally mean
12 that the broker dealer is presumed to be a fiduciary
13 simply by fact of its registration, and these are all
14 principal transactions where we are the counter-party,
15 our financial interests are diverging from the plans,
16 so the prohibitive transaction concern that we have is
17 real.

18 Second, if the valuation of daily marks
19 required by Dodd-Frank for swaps, which, even if
20 negotiated between us and the fiduciary, may include
21 non-public information is now under the regulation
22 presumed to be fiduciary; that means, in order to

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1 comply with one federal requirement, Dodd-Frank, in
2 providing the information, we may violate ERISA in
3 actually entering into the transactions at all since
4 that simple provision of information could be deemed
5 and should in fact be considered to be part of a
6 fiduciary relationship.

7 Third, under the current proposal, if all
8 that is required for investment advice under ERISA to
9 be fiduciary is that the communications may be
10 considered as part of a transaction -- and also, when
11 you put that next to the fact that the CFTC rules
12 actually require that you provide this information so
13 it can be considered by the counter-party, we are again
14 concerned about our ability to do the transactions at
15 all.

16 Fourth, if we are required to, under Dodd-
17 Frank, to make sure the plan representative has
18 sufficient knowledge or information, and we do that by
19 questioning, we again are concerned about whether or
20 not those questions rise to a fiduciary status.

21 And finally, since the presumption under the
22 regulation that all these actions are the fiduciary,

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1 even if we disclaim in writing fiduciary using the
2 seller's exemption, we are not clear that the scope
3 covers any of the subsequent and required oral
4 conversations described above. As the Department has
5 indicated, this can in fact be modified orally.

6 So whatever comes out of the process, we and
7 others, we believe, need a clear statement from both
8 the regulators, in coordination, that trying to adhere
9 to one set of regulations doesn't in fact cause us to
10 violate another.

11 Jim?

12 MR. McCARTHY: Thank you, Bill. First, a bit
13 of context about our retail business. Through Morgan
14 Stanley Smith Barney, Morgan Stanley serves as the
15 broker, custodian and investment adviser for over 3.2
16 million accounts, of which approximately 2.7 million
17 are IRAs and 500,000 are plans. The value of these
18 \$400 billion dollars. We offer a wide range of
19 products and services, such as: plan documents and
20 serving as custodian; brokerage accounts offering the
21 full range of products; equity fixed income notes;
22 other products for which we serve as an underwriter or

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1 an agent; mutual funds, both proprietary and not; ETS
2 bank products, et cetera. Most of this business is
3 generally priced on a commission or spread basis. We
4 offer relationships with a wide variety of 401(k) plan
5 recordkeepers and investment providers where we assist
6 in vendor selection and participant education, again,
7 as a broker; investment advisory services for assets,
8 both custody with us and at other institutions, with
9 firm acts and investment advisers under the adviser
10 Act, and from retirement clients, as an acknowledged
11 fiduciary under ERISA.

12 In reviewing the Department's proposed
13 regulation, we are primarily concerned about and would
14 like to emphasize the following three points.

15 First, we believe the Department may not have
16 fully appreciated the effective interplay of these
17 rules with the other regulatory initiatives. Both
18 Secretary Solis and the Chairman of the SEC, Mary
19 Schapiro, have acknowledged the importance of
20 coordinating; however, it is clear that the critical
21 objectives in implementing any new fiduciary retail
22 standards cited in the SEC study do not appear to be

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1 dealt with anywhere in the proposed regulation. These
2 include the preservation of customer choice, the
3 importance of retaining different delivery markets for
4 products and services, differential pricing for such
5 products and principal trading.

6 Second, we believe the cost estimates, as to
7 both the cost of implementation as well as the client
8 costs, have been seriously understated. As an example
9 we would offer our own experience to date in complying
10 with the Department's various disclosure projects,
11 notably, the Form 5500 and the upcoming 408(b)(2)
12 disclosure requirements. For the 5500, we would note
13 that the cost estimate proposed by the Department was
14 slightly north of \$15 million dollars for the entire
15 service industry, with approximately a two percent
16 market share in the private defined contribution and
17 private defined benefit markets. Morgan Stanley alone
18 has spent, to date, in excess of \$17 million dollars in
19 internal and external costs in complying with these
20 requirements.

21 For 408(b)(2), the construction of various
22 disclosure reports and website offerings to make

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1 available and indirect compensation was estimated
2 industry-wide of \$59 million. Our spending, not yet
3 complete, is already in the millions. Regrettably a
4 significant portion of this work may, in fact, turn out
5 to have been throw away work, as the imposition of the
6 broader fiduciary status of the proposed regulation
7 will cause certain exemptions to be unavailable, and
8 thus redefine what narrow subset of compensation costs
9 will be permissible going forward. I would emphasize
10 that the enumerated costs of the fiduciary proposal,
11 which we view as the most complex and far-reaching of
12 the three, is currently \$2 million dollars.

13 Third, and most importantly, given the way
14 the regulation has been drafted, we believe that the
15 vast majority of our accounts will need to be treated
16 as ERISA fiduciary accounts. We believe that the
17 impact of this would be no principal trading; which, in
18 the fixed income market, removes a key member of the
19 competitive set; limits access to certain investments
20 the clients want and dictates agency trading, which is
21 frequently more expensive for the retail client to
22 execute; little or no access to underwriting or

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1 syndicates in which we act as a lead underwriter, thus
2 impairing the capital raising capacity of corporations
3 and governments, and again depriving clients of desired
4 investments; and no holding of property that does not
5 have an independent market or valuation agent; shifting
6 many of these accounts billed from a commission basis
7 to an all-in advisory fee, which is ironic, in that the
8 SEC and FINRA sanctioned firms that bill clients for
9 accounts that don't transact frequently. In addition
10 to the loss of choice and the likelihood of additional
11 out-of-pocket expense, we believe that the regulations
12 will result in an overall less competitive, higher
13 priced environment. There will be very high costs of
14 re-engineering and ongoing compliance, which will force
15 certain providers from the market, and we believe there
16 will be greater and greater amounts of operational and
17 stress risk capital, which will need to be allocated to
18 these businesses. As everyone learned in the financial
19 crisis, capital is not free. The capital needs will be
20 driven by our regulators -- I'm going to take another
21 15 to 20 seconds, if that's okay -- our regulators --
22 ERISA is a prescriptive statute with a default that

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1 says everything is a violation. This will narrow the
2 number of exemptions available. Under LaRue, since
3 2008, you have a vast multiplication in the number of
4 people who can bring suit, and we know that this
5 operational and risk capital, right; those costs will
6 have to be socialized across the marketplace.

7 So with that I will conclude my remarks.
8 Thank you for the opportunity to testify. We stand
9 ready to answer any questions you may have.

10 MR. LEBOWITZ: Thank you. Mr. Saxon?

11 MR. SAXON: Thank you. I am Steve Saxon, I
12 am a partner in a law firm in Washington, D.C., here
13 today on behalf of a number of plan service providers
14 offering a variety of services from investment
15 consulting, recordkeeping, insurance and investment
16 management. We appreciate the opportunity to be here,
17 and I'm going to highlight just a few of the comments
18 that are in our written submission.

19 Our initial concern is that the proposal
20 applies the fiduciary definition to persons providing
21 investment advice to plans, as defined by the Internal
22 Revenue Code. This expansion should not be adapted for

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1 two reasons. First, it provides no additional
2 protection for plans outside of the protections already
3 offered under the Code, although the Code contains
4 provisions generally paralleling risks as prohibited
5 transactions rules, the Code does not otherwise
6 establish standards of conduct for fiduciaries, nor
7 does the Code permit plans or participants to bring
8 suit for breaches of fiduciary duty or prohibited
9 transactions. Secondly, the Department should
10 coordinate with the SEC expanding the fiduciary
11 definition. Under Dodd-Frank, the SEC was directed to
12 study the standards of care that should apply to broker
13 dealers registered under the Securities Exchange Act of
14 1934. The SEC released a study only in January, and it
15 makes recommendations with respect to a number of
16 issues central to the proposed regulation; for example,
17 the study recommends a uniform standard of conduct for
18 brokers and investment advisers. Accordingly, we urge
19 the Department to review this study and coordinate with
20 the SEC on the proper standard of conduct applicable to
21 broker dealers and investment advisers before
22 finalizing the proposal.

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1 Next I would like to talk about Deseret. The
2 final regulation should affirm the Department's
3 Advisory Opinion, the 2005-23A addressed to Deseret
4 Mutual Benefit Administrators. In this guidance the
5 Department opined that advising a plan participant to
6 take a permissible plan distribution, even when
7 combined with a recommendation as to how the
8 distribution should be invested, does not constitute
9 investment advice, because it does not involve a
10 recommendation or advice concerning a particular
11 investment of the plan. This position was taken by the
12 Department a mere five years ago. We request that the
13 Department not re-write its requirements related to
14 distribution-related discussions with participants. If
15 financial institutions are going to be deemed to be
16 fiduciaries when they provide distribution consulting
17 services, they will simply stop providing those
18 services or participants will be left without
19 information relating to the consequences of plan
20 distributions.

21 Distribution consulting typically involves a
22 participant who has already made the decision to

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1 liquidate his or her individual account balance in the
2 plan. In these cases the participant is not seeking
3 the adviser's opinion about whether doing so is
4 prudent; he or she is seeking advice on the appropriate
5 investments to make following the distribution. In
6 such cases, advice on the distribution proceeds no
7 longer relates to the assets of the plan, and therefore
8 cannot constitute fiduciary activity with respect to
9 the plan. This is particularly important to discourage
10 leakage. In a recent report the GAO found that the
11 substantial majority of leakage from retirement plans
12 was in the form of cash-outs at a job change. The
13 report found that providing information to participants
14 about the long-term effects of these cash-outs would
15 reduce leakage. If the Department changes its existing
16 positions set out in the Deseret opinion, it would
17 essentially remove distribution consulting from the
18 marketplace. This would make it far more likely that
19 this source of information would not reach the
20 participants, and thus exacerbate the leakage problem.

21 Next, I would like to address the status
22 issue. We think the Department should eliminate the

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1 status of a person as a relevant factor under the
2 proposal. With few exceptions, a person's status has
3 never been a basis on which to conclude that the person
4 is a fiduciary with respect to a plan. By structuring
5 the proposed regulation in this way, the Department has
6 established an approach that is incompatible with one
7 of the major tenants of ERISA, that fiduciary status is
8 determined by function. The Department should instead
9 require ongoing services in an explicit and mutual
10 agreement between the parties in order for a person to
11 be deemed to be an investment advice fiduciary. A
12 second problem with the status element of the proposed
13 regulation is that it is unclear how the Department
14 intends a person's status in one context to affect the
15 person's interactions with the plan in a different
16 context. It is well-established under the law that a
17 person may provide both fiduciary, non-fiduciary
18 services to a single plan; in other words, a single
19 organization or person can wear two hats, one a
20 fiduciary hat, the other a non-fiduciary hat. The
21 scope of fiduciary status under ERISA has always been
22 limited by the understanding that a person is a

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1 fiduciary only to the extent that he or she performs
2 certain functions. The functional test has been
3 acknowledged repeatedly by the Supreme Court in such
4 cases as Peagram and Mertens. The Department relied on
5 this same concept in the Aetna Advisory Opinion, the
6 1997 opinion that they issued to me, where
7 recordkeeping activities were deemed non-fiduciary even
8 though an affiliate managed the essence of the plan.
9 Although we do not believe it was the Department's
10 intent to do so, the proposed regulation could be read
11 as a significant departure from this longstanding
12 approach. We request that the Department clarify this
13 issue.

14 Next I would like to talk about some of the
15 limitations. With regards to the limitations proposed
16 by the fiduciary definition, the final regulation
17 should broaden the scope of limitations to make clear
18 that ordinary, routine sales activities are non-
19 fiduciary. In the context of marketing or making a
20 menu of funds available, our experience has been that
21 plan fiduciaries frequently request a sample or model
22 investment line-up from a prospective recordkeeper.

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1 These services provide useful information to plan
2 fiduciaries and, in many cases, the plan fiduciaries
3 will not consider a prospective service provider that
4 refuses to provide these services. Therefore, our
5 group requests that the Department either clarify that
6 this limitation would accommodate such a request, or
7 broaden the limitation so that it does. These basic
8 sales presentations are necessary to the proper
9 functioning of plans and should not be discouraged by
10 the threat of fiduciary liability.

11 The final regulation should also clarify the
12 types and frequency of disclosures that plan service
13 providers must make in order to comply with the
14 limitations provided under the proposed regulation. The
15 proposed regulation requires that a person acting as a
16 seller must disclose that the person who is providing
17 advice has interests which are adverse to the interest
18 of the plan, and that the plan is not undertaking to
19 provide impartial investment advice. This requirement
20 forces the service provider to choose between two
21 options; accept fiduciary status or brand itself a
22 conflicted adviser. In any business built on

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1 relationships, sellers and buyers both benefit when the
2 buyer feels as though he has received good value.
3 Automatically characterizing the seller relationship as
4 adverse is inaccurate and inappropriate. It would be
5 far more useful for the seller to note that it is not
6 giving advice, but merely proposing a sale, if
7 accompanied by a disclosure simply stating that the
8 seller receives compensation on the products that are
9 sold and that the compensation received may vary by
10 type of products sold, then this would give the
11 recipient better information to form his or her opinion
12 on whether to purchase the product or service being
13 sold.

14 Finally, I would like to address valuation
15 issues. I must say that most of what was contained in
16 the proposed regulation was not unexpected to me, but
17 the Department's position on valuation was a surprise.
18 To the extent that the Department is concerned about
19 valuation, it should study the issue in light of the
20 recent comments received, and if necessary, should
21 engage in a separate rulemaking process specifically
22 addressing valuation issues. The group is concerned

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1 that imposing fiduciary status on persons providing an
2 appraisal fairness opinion or information as to the
3 value of securities of property is overly broad and
4 counter-productive. By way of example we are concerned
5 that custodians will either charge a lot more or exit
6 the business if deemed to be fiduciaries. In any
7 event, the limitation related to reporting a disclosure
8 should not be -- it should not operate to broaden the
9 scope of fiduciary status. As written, this limitation
10 is confusing, because it operates to expand rather than
11 limit the scope of the fiduciary definition. The sub-
12 section implies that preparing valuation reports for
13 other than reporting and disclosure is a fiduciary act.
14 To say that every statement not made for reporting and
15 disclosure purposes that reflects the value of plan
16 investment constitutes advice would be incredible, and
17 we believe, unjustified under the proposed regulation.
18 The Department needs to fix this.

19 In addition, we are concerned that by
20 characterizing the preparation of a valuation statement
21 as a fiduciary activity, the proposed regulation
22 inadvertently includes a number of activities that

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1 simply should not be fiduciary in nature. This would
2 cause many parties -- I have about 10 seconds left --
3 this would cause many parties, such as appraisers and
4 sub-custodians, to become ERISA fiduciaries to plans
5 where those parties have no direct contractual
6 arrangements with ERISA plans, or even an ability to
7 identify the ERISA plans to which they owe fiduciary
8 duties.

9 I'll end it there. Thank you very much.

10 MR. LEBOWITZ: Thank you.

11 MS. BORZI: Mr. Saxon, let me start with you.

12 Could you tell us who is in your group that you
13 represent? Neither of the comments, the written
14 comments, nor --

15 MR. SAXON: Yeah. I'll send you a whole list
16 of credits.

17 MS. BORZI: Okay, great. We'd just like --

18 MR. SAXON: It's investment consultants,
19 investment managers, banks, insurance companies --

20 MS. BORZI: Well, we would like to know who
21 they are.

22 MR. SAXON: I'll send you a list.

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1 MS. BORZI: Okay, great. Let me ask you one
2 more question, and that is, you, as well as many of our
3 other industry witnesses, have used the term
4 coordination; you keep telling us we need to coordinate
5 with the SEC and the CFTC. What exactly do you mean,
6 because one of the other witnesses said talking isn't
7 enough; so what exactly do you mean by coordinating?

8 MR. SAXON: I actually think that you
9 probably will coordinate. I think that you will
10 designate staff in your department to talk to the folks
11 over at the SEC, to jointly meet and get an
12 understanding of what their concerns, what their
13 purposes are, --

14 MS. BORZI: Mmm-hmm (in the affirmative).

15 MR. SAXON: -- how they are going to affect
16 their mission.

17 MS. BORZI: Well you are not suggesting we --
18 I mean, ERISA and Dodd-Frank are two very different
19 statutes, very different purposes, very different
20 structures, and to the extent that there is some
21 intersection, it has to do with the types of entities
22 that provide services to ERISA plans and IRA-holders;

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1 so you are not suggesting in this advocacy of
2 coordination that we defer to these other agencies?

3 MR. SAXON: No. I have always been on the
4 side of the DOL in that regards, so . . . for 31 years.
5 But, what I am saying is that if you have an
6 understanding of where they are going and the changes
7 that they are going to make and how those changes are
8 going to impact how broker dealers and investment
9 advisers operate and that will impact their business,
10 then you need to take that into account so that we
11 don't have one federal agency saying that you must do
12 this, you must disclose this, and we have another
13 federal agency saying something that's quite different,
14 or even probably more likely they are going to set up -
15 - they will just set up a disclosure regimen, and we
16 need to understand where they are going with respect to
17 their disclosure so that we can set up ours in a way
18 that compliments what they are doing, so they are not
19 working at cross purposes.

20 MS. BORZI: So the word I prefer to use is
21 harmonize, because it seems to me that illustrates,
22 first of all, the nature of the discussions we have

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1 had, certainly with the SEC even before the regulation
2 was proposed, because we sent it to the SEC and got
3 their comments and input, before we even sent it
4 forward within the Department or to OMB, because we
5 were trying to be sure that we were harmonizing their
6 regime and our regime. But, the reason I ask you this
7 question about are you -- when you use the word
8 coordinate are you really talking about deferral, is
9 because Mr. McCarthy said something that some of our
10 other witnesses said as well, which is: you want
11 assurances that compliance with one law will make you
12 compliant with another law; so that suggests to me -- I
13 mean that isn't the way laws work in general.

14 MR. RYAN: Madam Secretary, if I could?

15 MS. BORZI: Sure, absolutely. Could you
16 explain that to me?

17 MR. RYAN: Of course. I think Morgan
18 Stanley's concern with respect to the CFTC Rules, in
19 particular, is that the specific legal duties that are
20 required from an entity, as we sort of enumerated,
21 appear to, in fact, be exactly within the scope of what
22 the Department thinks is fiduciary advice. So if that,

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1 if we are wrong in that, we are more than happy to be
2 wrong on that, but what we were looking for, at least
3 in the CFTC context, was some clear assurance by the
4 Department that complying with the Business Conduct
5 Rules itself did not implicate negatively on -- by the
6 provision of information marks, et cetera, our ability
7 to serve as a counter-party.

8 MR. McCARTHY: We weren't looking for a pass
9 --

10 MR. RYAN: No.

11 MR. McCARTHY: -- by complying with the CFTC
12 versus the DOL; we just don't want to be in a position
13 of serving one and causing a problem with the other.

14 MR. RYAN: Right.

15 MS. BORZI: Yeah. I can understand that.
16 Again, that's why we refer this to a process of
17 harmonization rather than one agency basically strong-
18 arming the other, because it's certainly clear to me,
19 and feel free to disagree if you do, that the fiduciary
20 duties under ERISA are much higher -- the highest
21 standard that we know in the legal world, which is not
22 to denigrate the legal standards in the other statutes,

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1 but when you are a fiduciary with respect to a plan
2 under ERISA, it's a higher standard than some of these
3 other statutes.

4 MR. RYAN: Agreed.

5 MS. BORZI: And so I get a little concerned
6 when -- I am with you completely, which is the reason
7 that we have been working with these other agencies;
8 that we don't want to put the regulated community in a
9 position where compliance with one law puts them out of
10 compliance with another, but people regularly -- there
11 are regularly multiplicity of laws that a single entity
12 is subject to, and I am not sure where there is any
13 guarantee that the multiple laws that you are subject
14 to, whether they be federal laws or state laws, are
15 exactly the same.

16 MR. McCARTHY: But --

17 MS. BORZI: So our goal is to harmonize, but
18 I just want you to understand that harmonization does
19 not mean that we are simply going to roll over and play
20 dead. I hear people say, well you need to wait to see
21 what the FCC is doing or the CFTC, because you can't
22 move forward under your statutory authority until we

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1 see what they do. That suggests to me that what you
2 are suggesting to us is that our efforts are inferior
3 to those other agencies' efforts, and I hope that's not
4 what you are saying, but please tell me if that is what
5 you are saying?

6 MR. RYAN: It is clearly not what we are
7 saying.

8 MR. McCARTHY: Yeah. Can I take that?

9 MR. RYAN: Feel free.

10 MR. McCARTHY: So I think there are two
11 points, right?

12 MS. BORZI: Mmm-hmm (in the affirmative).

13 MR. McCARTHY: One is not what we are saying,
14 right, but as the --

15 MS. BORZI: I didn't want to put words in
16 your mouth; that's why I gave you the opportunity to
17 open it up.

18 MR. McCARTHY: No. No. But, as the
19 operators of businesses, right, that need to comply
20 with various regulators, we do -- we have two
21 interests, right? One, in making sure that the cost
22 benefit, right; that the solutions aren't proposed,

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1 right, against problems that are either nonexistent or
2 less severe than we perceived them to be, and that's
3 what these public forums talk about, right; like, what
4 is the severity of the solution versus the size of the
5 problem? And you have asked some very pointed
6 questions about what people have experienced, you know,
7 in practical everyday life.

8 The second thing is, just as a practical
9 matter, from a timing standpoint, it's about, you know,
10 can you exercise your statutory authority; but it is
11 the practical implication of saying to a systems
12 community, listen, you need to go program these things
13 and it's got to be done in six months, and you book up
14 their time, right, and there are only so many surgeons
15 that can be around the body at one time, and then
16 another regulator drops out of the sky and says here is
17 another set of requirements that has to be done in a
18 different timeframe, right? Some of these things
19 become physically impossible, right? So we are
20 definitively sensitive to the implementation
21 practicality.

22 MS. BORZI: And I am completely sympathetic

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1 to those arguments. We don't -- there is no mileage in
2 it for us, to drive up plan costs needlessly, because
3 all that does ultimately is take money from benefits.

4 MR. McCARTHY: Right, the social costs.

5 MS. BORZI: So we don't start with the idea
6 that we are unmindful of costs, but it's possible, just
7 possible that the cost benefit analysis that we do
8 might vary from the cost benefit analysis that you do.
9 But, the point of this dialogue is so that everybody
10 understands what people perceive the costs and the
11 benefits to be. So I really appreciate your comments.

12 MR. McCARTHY: If I can make one suggestion?

13 MS. BORZI: Sure.

14 MR. McCARTHY: So, in the Federal Impact
15 Statement that's included in all these rulemakings,
16 there is a discussion of the methodology by which the
17 cost benefits -- there are surveys and there are
18 profiles and there are outside entities that presume
19 that -- I am not sure, right? And it may happen that I
20 just didn't get the letter, but I am not sure that
21 there is a process whereby people say, listen, our
22 initial estimate on this was X; and then two years

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1 later, when the project is done, we go out and survey
2 the community and figure out the order of magnitude,
3 like, how good were we at estimating, because I would
4 tell you my experience is that the gap is large, right?

5 MS. BORZI: It's always large, because what
6 you are doing is measuring behavior. I mean all of you
7 and many of the witnesses on our other panel have said
8 advice will dry up, you know; this will cost a
9 gazillion dollars. Well, you know, that's -- you are
10 estimating what the behavior will be.

11 MR. McCARTHY: No, no. I am saying I can
12 show you \$17 million dollars worth of checks we wrote
13 in regard to the 5500 against a \$15 million industry-
14 wide estimate, right? I can show you those canceled
15 checks, right?

16 MS. BORZI: Sure.

17 MR. McCARTHY: So, in terms of just refining
18 this process, right, I would --

19 MS. BORZI: It's a continual refinement of
20 the process.

21 MR. McCARTHY: Right.

22 MS. BORZI: that's why, when we put out a

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1 regulation, you are asked to comment not just on the
2 substance of the regulation, but on the regulatory
3 impact analysis, because, as I said at the beginning,
4 we want to get it right and we want to get it right not
5 just on the substance, but we want to have a genuine,
6 and to the best we can, accurate estimation of what
7 this is going to cost. But, that's why we need to work
8 together, and if you have got that kind of information,
9 that's helpful to us.

10 MR. McCARTHY: Great.

11 MS. BORZI: Michael?

12 MR. DAVIS: Yeah. That's actually what I
13 wanted to ask about, just costs. Mr. McCarthy, you
14 talked about the costs that your firm experienced for
15 the Form 5500. You said there were millions spent on
16 408(b)(2). I just want to get a sense, as you think
17 about this regulation and then maybe also back to
18 408(b)(2), how would you categorize those different
19 costs? Is that systems? Is that training? Can you
20 break it down into more specific categories so we can
21 understand it better?

22 MR. McCARTHY: Sure. Just in terms of the

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1 5500, right, I'll be within a 10 percent kind of
2 tolerance accurate. So we spent \$17 million dollars in
3 terms of systems, right, including systems consultants
4 to write requirements and so forth. We spent \$7 or \$8
5 million dollars. Now, just -- I want to, in the
6 interest of full disclosure, that's two very large
7 platforms, because we had acquired Smith Barney, right,
8 in a joint venture with Citigroup, so we had two large
9 broker-dealer platforms to do the same work on, right?
10 And the way this works is you would anticipate is we
11 have spent probably \$10 million on the first platform
12 and \$7 on the second, because we were more efficient
13 and so forth. But, we have spent, as I said, \$7 or \$8
14 million dollars on systems work and systems
15 consultants. We spent another \$2.5 or \$3 million
16 dollars on temp staff, right, to organize the data and
17 get all the -- to review all the sources of fees and
18 revenues and so forth, right, because there is a giant
19 reconciliation that has to be done. We have to take
20 all of this data and kind of match it up. And then the
21 last part of the spend was -- what did we spend,
22 probably a quarter of a million or half a million

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1 dollars on legal --

2 MR. RYAN: It was worth every penny.

3 MR. McCARTHY: Yes. And then the last part
4 of the spend is, yeah, we had to put in 26 or 28
5 additional operational people to operate the system,
6 right, that didn't exist before that now exists. So
7 when it's all said and done, right, it equals \$17
8 million dollars, and we can break it out more precisely
9 for you.

10 MR. DAVIS: But, as you think about the
11 current regulatory initiatives we are talking about
12 today, definition of fiduciary, and you talk about
13 costs and the cost burden, where do you think the cost
14 burden would be created most specifically; would that
15 be a change of business model within the systems again;
16 would that be . . .

17 MR. McCARTHY: It's a really good question
18 because -- so ERISA is prescriptive, right, which means
19 you have to look at everything to make sure you are not
20 violating a law, right? Because you live in the sea of
21 no until you can get to the island of yes. And, from
22 that perspective, you have to examine every process

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1 flow, right? How do you process a mutual fund? How do
2 you process an equity ticket? How do you process a
3 structured investment rate? How do you charge fees,
4 and so forth? So all of those things need to be kind
5 of tracked through. So that is a large amount of
6 chasing the wiring, right; some of which is five years
7 old and some of which is 35 years old. You have to
8 chase the wiring through the entire house to figure out
9 where everything goes, and what are the points of --
10 where, you know, unshielded things are together and
11 they may short, right? I am staying with that
12 metaphor. So from that perspective, right, we will
13 spend just -- my guess is we'll spend \$4 to \$8 million
14 dollars with PWC or something -- I am not awarding a
15 bid right now, but with some, you know, kind of systems
16 consultancy, right, to help us with that, right?
17 Because your choices are either maintaining a lot of
18 staff or flexing up using consultants. We will spend
19 probably \$2 to \$4 million dollars in terms of actual
20 systems programming time. The big issue for us, right,
21 is not going to be -- and that's a big -- so that's a
22 big number, right? My guess is, you know, all in out-

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1 of-pocket costs, \$10 to \$12 million dollars. The
2 bigger issue is there are a whole bunch of things that
3 we do today that we are going to have to do very
4 differently, and that means that whether it's revenue
5 that stops happening, right, or has to be redone in a
6 different way or disclosure. We have 4.5 million
7 retail clients, so one of the things that was in that
8 operational expense that I talked about was we had to
9 send a lot of mailings to clients, right? We had to --
10 you know, and every time you have to mail something
11 three million times it's expensive, right, not good for
12 the planet; so, from that perspective. So I would say
13 mostly it's about assessment and it's about the build,
14 right? Those are the costs that you would recognize.
15 There is a lot of business practice rework that will
16 come out of this where people will say, hey, we used to
17 do it this way, now we need to do it this way. A lot
18 of the -- as I said before and I think other people
19 have said it, a lot of business will move to flat fee
20 wrapped accounts, right? It's just -- it's going to be
21 the nature of you either have to stop doing something,
22 or you have to price it very differently.

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1 MS. BORZI: Well again you are assuming that
2 commissions are not . . .

3 MR. McCARTHY: No. I am not assuming that
4 commissions don't matter, right, but if you are doing a
5 business that you either have to tear it down and
6 rebuild the whole thing, right, it may be easier to
7 convince the client, right, and the client is not --
8 they are not all lambs, right? You know some of them
9 are tigers. It might be easier to convince the client,
10 to say, listen, effectively we were charging you 45 or
11 105 basic points or whatever it is, right; why don't we
12 just wrap this together, remove the conflicts, right,
13 and go forward? So there will be a lot of transition
14 as far as that goes.

15 MS. BORZI: And some product transitions?

16 MR. McCARTHY: Right, and some product
17 transitions. Right. And I haven't talked it -- I
18 haven't even thought about what happens on the
19 institutional platform.

20 MR. RYAN: That's right. And I think, at
21 least from that side, some of the products and
22 services, people have gone -- I have linked to that

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1 principal trading and fixed income and structured notes
2 and underwriting. So, if you think of all of these
3 accounts on the retail space as in fact fiduciary,
4 which is generally where we are presuming, not only are
5 we putting in a wrapped construct, because we think it
6 actually is less likely to be a problem, but we are
7 also excluding certain products, because they can't be
8 offset in terms of the few structures that's put forth
9 in Frost. They can't -- there are no effective ways to
10 necessarily deal with this outside of an open- end
11 mutual fund product. We tend to believe that these are
12 fairly easy -- well easier anyway, to locate, describe
13 and candidly offset. So even within the retail
14 construct it's not only just moving them two products,
15 but it's also, in our view, limiting the types of
16 products that they will be in. And, we know from
17 internal surveys that they are in a lot of these
18 (inaudible) counseling candidly a brokerage IRA sitting
19 next to advisory IRAs with the same client because they
20 wanted certain products that weren't available in the
21 advisory space.

22 On the institutional side, truthfully, the

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1 harmonization point is well-taken. It is literally --
2 literally though our concern is the cost, and it is the
3 exposure that we have as an institution financially for
4 a risk-based analysis in trying to comply with the
5 prohibited transaction rules.

6 MR. DAVIS: Thank you.

7 MR. LEBOWITZ: Mr. Saxon, your testimony in
8 connection with the status, you said that status
9 shouldn't be a relevant factor; that it should be an
10 analysis, but status should require ongoing services
11 and -- and an explicit mutual agreement, arrangement or
12 understanding. So let's go back to this morning's
13 discussion that we had with Kent Mason and others about
14 the circumstance where an adviser and the client sign
15 an agreement, and the agreement establishes a
16 relationship that says -- where the adviser says I am
17 going to be a fiduciary and that's what the plan/client
18 expects. And then later on the adviser says, well,
19 maybe I really wasn't a fiduciary. I may have told you
20 I was, or maybe they tell it to use -- maybe I told
21 them I was, but I didn't really mean it or I didn't
22 really do the things that your current five-part test

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1 requires. So is that what you are saying; you want
2 that to continue, right? You want to be able to walk
3 away from your commitment to your clients when you tell
4 them you are a fiduciary, and then say well maybe not,
5 particularly if you lost money as a result of my
6 advice?

7 MR. SAXON: Here is where I am coming from,
8 and I apologize -- I would like to address your
9 disclaimer point at the same time -- that if you have a
10 contract where you acknowledge fiduciary status, it
11 gets a little bit more complicated than this, but let's
12 assume that it's an investment management-type contract
13 where none of us would -- where you are picking
14 securities, and then the person later on tries to take
15 the position that they weren't recommending securities
16 at all; the facts would be that they were picking
17 securities, and I don't have a problem whatsoever with
18 calling them a fiduciary. I do think though that it's
19 more complicated because sometimes you have contracts
20 where you have the same institution providing
21 investment advisory services alongside a, say a
22 recordkeeping or an administrative component, and what

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1 I want to be crystal clear about is that while we can
2 acknowledge fiduciary status with respect to the
3 aspects of the contract where we fit within 3(21) of
4 ERISA, where we have traditionally taken the view that
5 our recordkeeping administrative services are non-
6 fiduciary, we have a problem with taking the position
7 that because you are a fiduciary under one aspect of
8 the contract, you become a fiduciary with respect to
9 everything that occurs in the contract. This --

10 MS. BORZI: Well that wasn't what we were
11 suggesting.

12 MR. SAXON: Okay. That's good. The
13 disclaimer point, I actually have it -- I have
14 litigation in the Federal District Court with respect
15 to this kind of issue. If someone disclaims fiduciary
16 status, in my mind, it becomes a facts and
17 circumstances test. Unfortunately, you probably have
18 an acknowledgement from a plan sponsor that they signed
19 a piece of paper saying, given all the things that you
20 are doing as a service provider, I acknowledge that you
21 are not a fiduciary even though they might be, they
22 might be providing all kinds of investment advice where

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1 we would all agree that you are a fiduciary. In those
2 cases, I don't have a problem in holding that person,
3 notwithstanding the disclaimer. It might have been
4 imprudent for the plan sponsor to enter into that
5 contract --

6 MS. BORZI: Or maybe he wouldn't even know?

7 MR. SAXON: -- but I would apply the
8 functional test and say, look, if you are providing
9 advice and there is an understanding that the plan
10 sponsor is relying on that advice, and there is an
11 understanding that they are relying on that advice,
12 then you are a fiduciary, and I am comfortable with
13 that notwithstanding the language in the contract. I
14 have another case where we have an investment
15 consultant that had a disclaimer in their contract, and
16 they sat before a trustees meeting year after year on a
17 quarterly basis and made recommendations, not just in
18 front of the trustees, but they made recommendations in
19 front of the outside accountant and the third-party
20 administrator, and everybody heard that person make
21 specific recommendations that you need to be in this
22 particular fund, and then when the fund went south they

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1 took the position that they were not a fiduciary. I
2 don't have a problem with bringing a lawsuit against
3 them to the extent that their actions were imprudent.

4 MR. HAUSER: I just, again, for you, Mr.
5 Saxon, just two line drawing sorts of questions. The
6 first is, I wasn't sure what you were saying with
7 respect to recordkeepers and other folks' advice as to
8 what goes on a fund line-up. Under what circumstances
9 would you think that kind of advice ought to be
10 fiduciary, and under what circumstances would you say
11 it shouldn't be treated as fiduciary advice?

12 MR. SAXON: Yeah. That's a very tough
13 question. I think the simple answer is that where you
14 provide a generic line-up or a menu, even though you
15 have ratcheted down the number of funds from say 1,000
16 funds to 100 funds, if you are doing that without any
17 particular plan in mind, you are doing that because you
18 are applying various performance screens to get the
19 very best funds available. The issue is where you are
20 sitting down with the plan sponsor and you offer --
21 let's say you offer three or four funds in a particular
22 asset category, and you -- I would still say that you

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1 are in a non-fiduciary position where you are still
2 providing information on three or four funds, and even
3 if it's, you know, qualifying-type information; this
4 one does this better; this manager has been around a
5 long time; these guys are good in down market, the
6 problem would surface where the plan sponsor says to
7 you, okay, tell me which of these funds I absolutely --
8 which of these funds is best for me given that you know
9 all about everything that I am doing? And in that, you
10 know, -- and they have been working with them for a
11 long time, then I think that, at that point, you are
12 risking crossing the line. Does that help you?

13 MR. HAUSER: Well, I am not sure. But,
14 should it matter who is coming -- when you talked about
15 performance screens, should it matter where the
16 performance screens are coming from; whether it's you
17 selecting the sorts of screens that you think that the
18 plan ought to be applying, or whether it's kind of the
19 converse --

20 MR. SAXON: I really don't --

21 MR. HAUSER: -- and the plan is saying, here
22 are the benchmarks, find the entities that (inaudible)

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1 these?

2 MR. SAXON: The screens that will involve --
3 some screens involve analysis against other managers in
4 a particular peer group; others compare against various
5 kinds of benchmarks. What you are suggesting is that
6 because I apply some of my own technical skills on a
7 subjective basis that I have crossed a line. I don't
8 think that should be the key element. I think the key
9 element should be the understanding between the
10 recipient of the advice and the reliance of that and
11 the understanding that they have that this -- I am
12 relying in making this decision based on what you are
13 telling me; rather than the kind of screen that I
14 develop and how -- and what objectivity or subjectivity
15 I have in the screen.

16 MR. HAUSER: But the way you described it
17 there, it's not necessarily a mutual understanding as
18 to the person's legal status, but rather as to the
19 level of reliance in making a particular fund choice,
20 is that right?

21 MR. SAXON: Right. Yeah.

22 MR. HAUSER: Okay. And then the second

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1 question I had, just a similar line-drawing question; I
2 appreciate that you were surprised by the inclusion of
3 valuation firms in the regulation, but even the five-
4 part, you know, test regulation specifically includes
5 advice as to the value of the asset as one of the
6 categories covered in advice; so is there no -- under
7 what circumstances would you think advice as to the
8 value of an asset should be fiduciary, if any?

9 MR. SAXON: Right. You know, it's funny that
10 you ask that question that way, because I -- we were
11 prepping for this yesterday and I said to my guys, I
12 said, look, if you look at the existing regulation it
13 talks about valuation, and they said to tell to tell
14 you -- so I am going to pass this along to you -- that
15 you have never looked at valuation advice as fiduciary
16 advice before, so this is the first time you are doing
17 it -- but, I have to concede, you look at the
18 regulation, the regulation says what it says, but here
19 is the problem. The problem is that you have a number
20 of appraisal and valuation firms out there that, unlike
21 almost anybody else that we are talking about today in
22 the retirement services space, these folks, they don't

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1 understand ERISA; they have never thought of themselves
2 as being ERISA fiduciaries; they have trouble
3 understanding the concept of the highest standard that
4 Madam Secretary was talking about; and they, more
5 likely than anybody else, will exit this business or
6 find some other way to provide services because they
7 are not organized. They don't have the insurance. They
8 don't have expertise to serve as ERISA fiduciaries.
9 But, here is the -- if there is a concept of a solution
10 it would be the following; that wherever you have a
11 valuation provider that's providing that information to
12 some other fiduciary who is making that decision, like
13 a trustee, -- so I am a trustee and I need some expert
14 advice with respect to this property that I am either
15 purchasing or selling, so I go out and I get a
16 valuation firm. The firm doesn't know -- they might
17 even know that they are doing this with respect to a
18 plan; they just know that a financial institution has
19 called them and they have this property, they want them
20 to do -- in accordance with all of their appraisal
21 standards that apply, the MAI standards that they are
22 going to value this property, they are providing that

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1 information to the fiduciary. If you look at the way
2 the Department has dealt with this in the exemption
3 process for years and years, that fiduciary takes that
4 valuation as one element of their overall decision-
5 making process. They can rely on it. If the valuation
6 provider did a bad job, then they can sue them for
7 breach of contract. But, I think that you still -- in
8 terms of the protections that the participants have,
9 you still have, in the solution that I have given, you
10 still have a fiduciary on the hook for making that
11 decision and relying on that valuation, and they have
12 to ask the right questions; they have to get the right
13 kind of reputable valuation firm in there, et cetera,
14 to make that decision.

15 MR. LEBOWITZ: That's current law, isn't it?
16 That's no different from the current?

17 MR. SAXON: Well sometimes the current law,
18 you don't always have -- you don't always have a
19 reputable fiduciary between making that decision, but,
20 yeah, both, pretty much it is.

21 MR. LEBOWITZ: Well, I mean, in terms of --
22 in terms of the target of a lawsuit it's going to be

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1 the decision-maker?

2 MR. SAXON: Yes.

3 MR. LEBOWITZ: But, the decision-maker is
4 unarmed really? The only information the decision-
5 maker has is from the valuation firm; has no capacity
6 to second-guess it?

7 MR. SAXON: Well they, under ERISA, they have
8 to ask questions.

9 MR. LEBOWITZ: So they need a second
10 valuation?

11 MR. SAXON: They have to go beyond -- well
12 sometimes they do get --

13 MR. LEBOWITZ: So they need a second
14 valuation to judge the first one, --

15 MR. SAXON: No, but you have to sit down and
16 --

17 MR. LEBOWITZ: -- and then maybe a third one
18 to judge the second one?

19 MS. BORZI: And then they are all out of the
20 test, the five-part test?

21 MR. SAXON: First of all, as you know, you
22 have to make a prudent decision on selecting the

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1 valuation firm to make sure that they have the right
2 kind of qualifications and experience. You would look
3 at -- you would tear apart the valuation if they, for
4 example, they had a -- if they had a list of
5 comparables that were somewhere between 98 and 100, but
6 they selected a value of 110 for this particular asset,
7 you would have to ask them well why; everybody else is
8 between 98 and 100?

9 MR. LEBOWITZ: Yeah. I mean I think there is
10 a reason why fiduciary, plan fiduciary decision-makers
11 hire a valuation firm to advise them, because they are
12 not capable of tearing apart the valuation. That's not
13 what they do. They do whatever their business is.
14 That's what they do.

15 MR. SAXON: But, I mean, I'd like to flip it
16 around, because I have been -- I have sat across from
17 you guys for so many years where you have told me that
18 that fiduciary has a responsibility to ask questions.

19 MR. LEBOWITZ: Because that's the inevitable
20 consequence of the current regulation; that's where it
21 leads us. It doesn't lead us to the individual whom we
22 think is really the culpable party, or at least being

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1 able to include the individuals whom we think are
2 culpable in the fiduciary breach into, you know, into a
3 legal action.

4 MR. SAXON: Well, we disagree on that one.

5 MR. LEBOWITZ: We have to move on too. Joe?

6 MR. PIACENTINI: Okay. I'll limit myself to
7 just one question, and it's for Mr. McCarthy. I think
8 it was in response to a question from Mr. Davis that
9 you talked about what you called business practice re-
10 work, and you said something about how an account that
11 was, you know, where the revenue was generated one way,
12 how that might be able to be restated as an equivalent
13 flat fee, or something to that effect? Did I
14 understand that correctly, or can you elaborate a
15 little bit on that?

16 MR. MCCARTHY: Yeah. I wouldn't say
17 restated, right; I would say restated, right. So you
18 would go to an account, right, that traded with X
19 frequency at Y revenue rate, which produced Z total
20 revenue, and you would say, listen, we are doing
21 business, but because you have a tendency to buy fixed
22 income from us and structured notes, right, those two

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1 things are potentially verboten under the new regime;
2 so, in order for us to remove that conflict, right, we
3 should enter into an agreement where you give us Z
4 revenue and you can buy anything, right, whether it's a
5 money market fund or a structured product or whatever,
6 and at the end of the day, right, we take all of the
7 product versus product financial incentive, right, one
8 way or another out of it, right, because you basically
9 levelize all the choices. Now, when I talk about that,
10 right, that is entirely dependent on where the
11 Department comes out on the issue of where levelization
12 happens, right? Today I would say very proudly that we
13 have a regime where, you know, we sold our proprietary
14 retail asset management business, right, so we don't
15 have a retail asset management business, but, you know,
16 whether it's -- whatever the product is within the
17 category, compensation is leveled. Now, I can't tell
18 you that we figured out a way to say, hey, here is an
19 annuity, right, that produces revenue of 200 bases
20 points versus a mutual fund that produces revenue of
21 bases points, because those two things are two
22 fundamentally different structures, and when people try

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1 to equate them and say, well you have an incentive to
2 do this, it also does a different thing for the client,
3 right? It has an entirely different cost structure,
4 not just as a result of the expense of distribution,
5 but the expense of the underlying construct, the hedges
6 and so forth, right? So one of the things that we are
7 concerned about, right, is how we address to a client
8 the fact that -- client situations are complicated,
9 right, and the solutions generally will tend to be a
10 quill (ph), right? It's not going to be all of one
11 thing or all of another. So from a -- we deal with
12 asset allocation all the time. We have a generation in
13 and nearing retirement that is precariously saved, at
14 best, and so we have to think about not just asset
15 allocation, right; we have to think about product
16 allocation, in terms of how much of it is market
17 correlated versus how much of it is guaranteed and so
18 forth and put those things together, and all of them,
19 right, we are frequently not the manufacturer, but all
20 of them have different kind of economic dynamics,
21 right? We are concerned, right, about how we have to -
22 - we are in a highly regulated business, so we already

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1 disclose all this to the client, right? The question
2 is how we have to characterize the interplay between
3 those different things, right? And that's one of the
4 things they are waiting with -- to figure out where
5 this goes. Does that help?

6 MR. PIACENTINI: Thank you.

7 MR. LEBOWITZ: Thank you. The next panel is
8 Ted Novy, Marla Kreindler, and Theresa Atanasio. Mr.
9 Novy?

10 MR. NOVY: Thank you. Good afternoon. My
11 name is Ted Novy, and I am an attorney in Aon Hewitt's
12 Legal Department. I lead its retirement outsourcing
13 team. I want to thank you and the Department today for
14 the opportunity to testify at these proceedings. Aon
15 Hewitt has extensive experience in both designing and
16 administering retirement plans for mid- and large-sized
17 employers. We are the largest independent provider of
18 administrative services for retirement plans serving
19 more than 11 million plan participants. With
20 Americans' retirement income needs in mind, we support
21 the Department for moving to update the definition of
22 fiduciary. In particular, my testimony today will

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1 address the question that the Department posed in the
2 preamble; namely, whether and to what extent investment
3 advice should encompass recommendations related to
4 taking a plan distribution? Aon Hewitt recommends that
5 the Department answer this question in the affirmative;
6 namely, that the final regulation should include
7 recommendations to participants to take plan
8 distributions from their plan accounts. As the
9 Department well knows, many Americans face serious
10 challenges and risks with respect to their retirement
11 concerning inflation, longevity, and market
12 fluctuation. It's no wonder that many Americans are
13 looking for assistance with their retirement
14 challenges; however, too few are equipped to manage
15 their retirement challenges alone, so they rely upon
16 others for assistance. Within the mid-sized and large-
17 sized qualified plan environment, many participants
18 receive access to unbiased advice, guidance and
19 education. The individual retail market also provides
20 a host of options to address these retirement needs,
21 but those choices can be overwhelming to even an
22 informed consumer. Furthermore, when participants from

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1 a qualified plan to an individual retail market, they
2 may experience higher fees, which can erode their
3 retirement savings. Also, confused participants are at
4 a greater risk of purchasing products that are
5 inappropriate for their needs, or making decisions
6 based on biased guidance. In some cases there may be
7 benefits to the retirement market, the retail market,
8 that make the move outside the plan worthwhile, but
9 participants must be fully informed about the
10 advantages and the disadvantages.

11 As we discussed in our comment letter, we
12 believe that the Department should include in the
13 definition of investment advice recommendations to take
14 a plan distribution for two primary reasons. The first
15 is that the participant's decision to take a plan
16 distribution is comprised of two significant decisions
17 affecting the participant's plan assets; namely,
18 whether to liquidate current investments, and how to
19 manage the distribution of funds. Secondly, we also
20 wish to suggest that the failure to include
21 distribution advice under the final regulation may
22 result in an unintended consequence; that is, it may

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1 create a bias towards a recommendation from an adviser
2 for a participant to take a distribution so that the
3 adviser is not an ERISA fiduciary, and may provide
4 advice with respect to investments, in which the
5 adviser has a financial interest.

6 From a participant's perspective, the
7 decision to take a plan distribution is comprised of
8 two smaller, but significant decisions. The first is
9 the participant must decide whether to liquidate
10 current investments. Investment decisions to buy or
11 sell a particular plan investment are at the core of
12 the participant's management of his or her account.
13 This is true whether the sale of the investment is
14 merely as a prelude to investing in another plan
15 investment option, or as a precursor to a plan
16 distribution. Furthermore, the decision becomes even
17 more complicated when the distribution recommendation
18 is with respect to less than a total distribution of
19 the participant's account. The participant is forced
20 to make a decision concerning which investments to
21 retain in the plan and which investments to liquidate
22 and distribute with respect to the distribution advice.

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1 In other words, the participants must decide on the
2 suitability of the investments that stay and those
3 investments that liquidated and the funds that go.

4 Second, a participant must decide how to
5 manage the distribution of funds from his or her plan
6 account; that includes the time, tax year, the manner,
7 the form, and the future custody of the plan
8 distribution. The decision of where to invest assets
9 outside the plan and to whom to entrust with the
10 custody of those assets is a significant decision. A
11 participant must make this decision, however, prior to
12 the actual distribution while the funds remain in the
13 plan and therefore are plan assets. When the adviser
14 provides advice with respect to either of these
15 decisions, or both, the assets in question remain or
16 are already in the plan; that is, they are still in the
17 plan. Together these two important and inter-related
18 decisions regarding the investment of plan assets can
19 play a significant role in the participant's future
20 retirement savings.

21 In Advisory Opinion 2005-23(a), the
22 Department determined that a recommendation to take a

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1 distribution did not constitute an investment advice
2 because the assets would be invested outside the plan.
3 However, at the time the adviser provided that
4 distribution recommendation, the assets in question
5 were still within the plan; therefore, differentiating
6 between a recommendation to invest in plan options or
7 to invest in options outside the plan create an
8 inconsistency in the application of ERISA fiduciary
9 rules. Or, maybe to phrase the question in this way;
10 why should the advice to liquidate an investment
11 position and take a distribution be treated any
12 differently than the decision to liquidate an
13 investment position and re-invest in a different plan
14 option. This inconsistent position appears to create a
15 potential bias, as I mentioned, towards a
16 recommendation to take a distribution so that the
17 adviser is not subject to fiduciary standard, standard
18 funds of ERISA, and also recommend potentially an
19 investment in which the adviser has a financial
20 interest. We suggest -- that is, Aon Hewitt suggests,
21 that while a participant has assets invested in the
22 plan, any recommendation is a recommendation as to the

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1 management of the participant's securities in the plan.
2 Such advice should therefore constitute investment
3 advice under ERISA.

4 With my remaining time I would like to
5 discuss the costs and benefits related to a more
6 inclusive definition of investment advice. By
7 extending the regulation to include recommendations to
8 take a distribution, we believe the associated costs
9 would be minimal, and the benefits to the participants
10 and beneficiaries would greatly outweigh those costs.
11 We also anticipate that these recommendations with
12 respect to the management of plan assets, if applied
13 consistently, would result in more participants
14 remaining in the plan and not being subject to steerage
15 or inappropriate advice. Retention of assets within
16 the plan provides a participant or beneficiary with a
17 number of rights and protections, including spousal
18 protections that they may not receive outside of the
19 plan. Examples of those benefits and
20 protections are: they benefit from the protective
21 oversight of a plan fiduciary, who must exercise his or
22 her fiduciary duty with respect to the plan; they also

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1 have access to unbiased advice and decision-making
2 tools, and these tools are normally priced at a
3 significant discount compared to individual investment
4 advice that's available in the retail market; there is
5 also a more specialized and tailored plan
6 communications; they would receive fee disclosure, and
7 they would also benefit from the leverage buying power
8 that employer plans can bring to bear. Recommendations
9 to participants and beneficiaries to take a
10 distribution from the qualified plan should be
11 considered in the context of these potential advantages
12 and dollars. Including such recommendations in the
13 definition of investment advice will result in a more
14 balanced and unbiased recommendation considering all
15 options available to the plan participant. That said,
16 we do not believe that the provision of general
17 education and information about the advantages or the
18 details surrounding a distribution should invoke
19 fiduciary status.

20 In closing, we support the Department's goal
21 of updating the rule for changes in the financial
22 industry, and the expectations of plan participants and

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1 beneficiaries. As I have explained, we believe that
2 the goals can best be achieved, in part, by expanding
3 the definition of investment advice to include
4 recommendations to a participant to take a plan
5 distribution. We appreciate the opportunity to share
6 our thoughts with the Department. Thank you.

7 MR. LEBOWITZ: Thank you.

8 MS. KREINDLER: Thank you. Good afternoon.
9 Thank you for the opportunity to testify at this
10 important hearing. My name is Marla Kreindler, and I am
11 a partner with Winston and Strawn. I am pleased to
12 testify today on behalf of DCIIA, the Defined
13 Contribution Institutional Investment Association.

14 Formed last year, DCIIA is dedicated to
15 enhancing the retirement security of American workers
16 through Defined Contribution plans. Our members are
17 leaders in the defined contribution community and
18 include institutional investment managers, consultants,
19 recordkeepers, and others that support our core
20 beliefs. Winston and Strawn is proud to serve as
21 counsel to DCIIA.

22 To start, we support your commitment to

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1 protect D.C. plans through regulatory initiatives, and
2 thank you for the opportunity to offer our
3 perspectives. In today's testimony, I'll address some
4 of the topics that we included in our comment letter,
5 including recommended revisions and clarifications to
6 the proposed rule, our views on advice regarding
7 distributions, and also our recommendations to
8 withdraw, and, as appropriate, re-propose the rules and
9 provide sufficient time for transition for these
10 important changes.

11 Turning to our comments to the proposed rule,
12 we support efforts to clearly provide for when a person
13 acts as a fiduciary, and also certainly support
14 fiduciary best practices. At the same time, we believe
15 changes to these fundamental rules should be carefully
16 considered and revised so as not to create unintended
17 consequences or be over-broad. For example, we ask
18 that you consider retaining the requirements that
19 advice be individualized to the needs of the plan, and
20 that the advice be provided as part of a mutual
21 understanding that the advice form the primary basis in
22 the plan's decision-making. Of course, if primary

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1 basis were viewed as too limiting, we suggest then, you
2 know, a reasonable solution such that there will at
3 least be a mutual understanding that the advice would
4 constitute a significant factor in the plan's decision-
5 making. Otherwise, we are concerned that these changes
6 could result in significant uncertainty and cause the
7 providers of generic advice to become ERISA
8 fiduciaries. Importantly, we also believe these
9 conditions should apply; so meaning, primary basis and
10 individualized advice and significant factor, at least
11 to registered investment advisers, ERISA fiduciaries
12 and affiliates of registered investment advisers and
13 fiduciaries to have the benefit of speaking and
14 testifying a little later. To answer the question, we
15 are not objecting to when someone acknowledges that
16 they are a fiduciary to being held to the fiduciary
17 standards, but the point is, is that when someone is
18 only an investment adviser or a fiduciary for other
19 reasons, or an affiliate of such a person, that they
20 shouldn't be swept into these rules. So we also
21 suggest that the types of advice covered by the
22 proposed rule, it basically be revised to ensure that

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1 only investment advice and not other types of advice be
2 covered. Advice provided by brokers, accountants,
3 lawyers could be swept into the definition of fiduciary
4 advice, and we advise that the precedence, some of
5 which were cited in the preamble to the exceptions
6 under the Investment adviser's Act, which specifically
7 excludes advice provided by brokers, lawyers,
8 accountants and others, under appropriate
9 circumstances, would be something that could be used as
10 a model for this purpose.

11 Regarding the exceptions, you know, again, we
12 commend you for including exceptions in the proposed
13 rules for sellers or counter-parties, and for
14 investment platform providers. We believe these
15 exceptions are helpful, but, you know, again, suggest
16 that they be revised. For the counter-party or seller
17 exception, we encourage you not to limit the exception
18 to the purchase and sale of securities or property. For
19 example, D.C. plans routinely contract for and conduct
20 RFPs for services. Those responding should not be
21 concerned that their RFP responses would become
22 fiduciary advice. The exception should also apply to

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1 other types of plan transactions that may not
2 technically be purchases and sales, such as extensions
3 of credit and finance transactions. As well, we
4 believe that the requirement that a party to be adverse
5 may unnecessarily exclude transactions with parties
6 whose interest are more aligned and less conflicted.
7 And, as others have said, the exception could apply to
8 a broker, but here the key is that if -- the way that
9 the proposed regulation was drafted, that the
10 individualized advice, mutual understanding and primary
11 basis threshold conditions are not required and are not
12 met, so you have someone that is operating where none
13 of those requirements or conditions are met. So there
14 is not individualized advice, not a mutual
15 understanding, no primary basis, then we believe that
16 the broker certainly in that situation should be able
17 to not be a fiduciary when providing information,
18 including about all fees and expenses, and conflicts of
19 interest to the plan.

20 On a drafting note, we also suggest that the
21 exception be clarified to include not only the initial
22 transaction in question, but modifications and

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1 amendments to the transaction.

2 For the investment platform provider
3 exception, we ask that you clarify the accepted ways in
4 which the information and guidance may be used. In our
5 experience, plans look to platform providers to assist
6 them with narrowing the large number of options that
7 may be available in different ways, as we have heard
8 today. Sometimes plans seek advice through an
9 investment manager or consultant; other times, platform
10 providers may engage independent third-parties to
11 construct a narrow list of funds that may be focused on
12 -- that is not focused on the individualized needs of
13 the plan. In other cases, plan fiduciaries directly
14 request specific information and data to help them meet
15 their fiduciary responsibilities. Narrowing is
16 performed to identify specified significant factors,
17 such as investment performance, cost, manager tenure,
18 et cetera. When these narrowing services are based on
19 objective or third-party criteria, we believe these
20 services alone need not make a platform provider a
21 fiduciary.

22 We also respectfully request that you

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1 consider adding an additional limitation for when
2 sophisticated parties agree that the provider of advice
3 is not a fiduciary. In our experience, there will be
4 circumstances when a sophisticated plan fiduciary may
5 wish to receive advice that is more limited in scope
6 and not fiduciary in nature. Sophisticated parties for
7 this purpose could include investment managers or other
8 professional fiduciary advisers. It could also include
9 other persons that are sophisticated in these matters.
10 In these cases where the plan is represented by an
11 independent fiduciary sophisticated in these matters,
12 it is clearly disclosed and understood that the
13 services are not intended to be fiduciary, and the
14 advice is impartial and not conflicted, as the outcome
15 of the plan's investment decision. We believe an
16 additional exception should be warranted.

17 Regarding distributions, we would like to
18 take a minute to address your request for comments.
19 Participants who are nearing retirement have a great
20 need for financial help, but can also be vulnerable to
21 the negative effects of poor conflicted advice. We
22 believe that you should provide guidelines that clearly

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1 set out who is and isn't a fiduciary when providing
2 advice on plan distributions, but also suggest a safe
3 harbor for plan sponsors, who select and monitor
4 financial advisers to assist retiring participants, as
5 well as a safe harbor for advisers that set forth the
6 type of information that may be provided to retiring
7 participants. For example, something similar on the
8 lines of your Interpretive Bulletin 96-1, but written
9 in this case with distributions in mind, we believe
10 would be helpful.

11 Supporting the ability of financial advisers
12 to educate participants about investment alternatives
13 available, as well as about general issues and
14 education is important, particularly as products are
15 continuing to change in this area with lots of emphasis
16 on retirement income today. At the same time, we also
17 believe that advisers who are outside the plan should
18 not be afforded greater access to or influence over
19 plan participants and current plan service providers
20 and believe that there needs to be a balance there as
21 well.

22 In our comment letter we spoke about some of

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1 the cost estimates and coordination, and have listened
2 to your comments today on harmonization of regulatory
3 initiatives and agree that that is desirable. Thank
4 you for that. At the same time, we believe that
5 sharing these perspectives, such as the helpful comment
6 we heard earlier about swaps in written guidance would
7 help address the questions that are being raised in
8 this area.

9 To conclude, we again would like to thank you
10 for your efforts in considering further the proposed
11 rule and addressing industry comments. We acknowledge
12 that these issues are complex, yet important. Given
13 the very significant and potentially sometimes
14 unintended consequences of the proposed rule, we
15 respectfully suggest that the rule be withdrawn and re-
16 proposed after consideration of the wide range of
17 comments received in today's hearings. Lastly, because
18 the current regulations have been in existence for over
19 35 years and business practices and systems, as we have
20 heard, have developed over time on that basis, we
21 suggest a transition period of at least two years from
22 issuance of any final rules.

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1 Thank you again for this opportunity to speak
2 to you today. We are happy to answer any questions you
3 may have regarding our comments and this testimony.

4 MR. LEBOWITZ: Thank you. Theresa?

5 MS. ATANASIO: We had negotiated that I would
6 have an extra minute from yours, but it looks like it's
7 not going to happen.

8 Good afternoon. My name is Theresa Atanasio.
9 I am Vice President and ERISA counsel for Ameriprise
10 Financial, a diversified financial services, which
11 being in business for over 110 years, is a leader in
12 financial planning and a member of the Insured
13 Retirement Institute. The Insured Retirement Institute
14 is a non-profit association dedicated to the growth and
15 better understanding of guaranteed lifetime income
16 products that contribute to a secure retirement. IRI
17 represents all segments of the annuity insured
18 retirement product and retirement planning industries
19 with over 300 member organizations, including insurance
20 companies, broker dealers, banks, investment management
21 firms and industry service providers. For the sake of
22 focus and time, I will direct the majority of my

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1 testimony today to the practical impact of the
2 Department's proposed regulations on the \$4.5 trillion
3 dollar IRA market, as well as the impact on small
4 business owners, who sponsor a retirement plan for
5 themselves and their employees.

6 Although we agree with the Department's
7 desire to provide clarity around who is a fiduciary for
8 purposes of providing investment advice under ERISA, we
9 believe that the unintended consequences of the rules
10 will have a substantially negative impact upon the very
11 persons the Department is trying to protect. In that
12 regard, many broker dealers, including Ameriprise
13 Financial, support the SEC's efforts to create a
14 uniform fiduciary standard that would apply to brokers
15 and other financial professionals. However, the
16 important difference is that the SEC standard would not
17 prohibit commission-based sales or the sale of
18 proprietary products. It would not favor one business
19 model asset-based advisory fee over another commission-
20 based brokerage. Although the Department's proposed
21 regulations are limited to divining who is a fiduciary
22 under ERISA in the Code, we are concerned about what

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1 happens once the definition is expanded to cover
2 everyday activities of broker dealers, insurance agents
3 and financial advisers as they attempt to help their
4 clients. These financial advisers are typically not
5 considered fiduciaries under ERISA today, so they are
6 allowed to provide to their clients, who hold qualified
7 accounts, comprehensive information and access to the
8 full suite of products and services available to non-
9 qualified accounts, including commission-based
10 products, such as mutual funds and annuities. Again,
11 we are not seeking to avoid a fiduciary status, but
12 rather we are supportive of the SEC's uniform standard
13 that would not prevent small business and IRA owners
14 from working with the financial professional of their
15 choice. As you know, approximately 41 percent of U.S.
16 households, or 48.6 million Americans use IRAs to save
17 for their retirement. Making financial advisers
18 fiduciaries under ERISA will reduce both the choice of
19 investments and types of services these IRA owners can
20 access, and will increase their costs and create
21 confusion for both them and the advisers seeking to
22 help them. It also creates inconsistencies and

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1 confusion relative to the work being done by the SEC to
2 streamline and simplify the regulatory and investor
3 experience.

4 As a result of the Department's proposed
5 regulations, financial professionals have to either
6 level fees across a diverse array of investments, use a
7 computer program, or navigate and comply with a
8 patchwork of complex, prohibitive transaction
9 exemptions issued decades ago, and whose applicability
10 has been eroded over time by Department guidance.
11 Practically speaking, trying to use a flat fee model
12 across stocks, bonds, mutual funds and annuities that
13 pay differing compensation results in driving IRA and
14 small business retirement plan owners into wrap
15 programs, which charge a fixed asset-based fee
16 irrespective of the level or type of transaction. While
17 a great option for many investors, wrap programs can be
18 more expensive and are not a good choice for investors
19 who have long-holding periods and individual
20 investments. For these investors, entering into or
21 maintaining a wrap account would actually be more
22 expensive than a commission-based account, and in

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1 conflict with existing securities laws. IRA owners
2 would be the most negatively impacted. IRAs, workplace
3 savings, SEPs and Keoghs account for 51 percent of
4 the mass affluence investible assets. Unlike plan
5 participants, IRA owners often don't have access to
6 education or help with investment choices; they need
7 and desire the help of professional advisers.

8 The remainder of my testimony will be focused
9 on real world examples that highlight some of the
10 concerns I have noted for you. My first example is one
11 where a broker is working with an IRA owner in a mutual
12 fund-based investment account. Mutual funds charge
13 differing fees with equity funds generally charging
14 higher fees and money market funds charging the lowest
15 fees. Under current law, if a fiduciary under ERISA
16 recommends an investment that pays that fiduciary more
17 than another investment, she would be committing a
18 self-dealing prohibitive transaction. On the other
19 hand, if she recommends that a 25-year-old investor
20 purchase solely money market funds, she would be making
21 an unsuitable recommendation and also breaching her
22 fiduciary duty to act in the best interest of the

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1 investor; therefore, the client would not be able to
2 invest in different funds offered by the broker.

3 My second example is one that happens every
4 day. A long-time client walks into a broker's office
5 and asks for investment ideas for his portfolios. The
6 client holds three brokerage accounts: a self-direct
7 brokerage window under his employer's 401(k); an IRA
8 brokerage account funded from the rollover from the
9 client's former employer; and a non-qualified brokerage
10 account funded with after-tax savings. The broker
11 knows that the client plans to use all three of these
12 accounts to fund the client's eventual retirement. The
13 broker explains that she cannot provide any
14 recommendations relating to the client's IRA and
15 401(k) brokerage accounts; however, with respect to his
16 non-qualified brokerage account, she tells the client
17 she likes the energy sectors, and in particular, Exxon
18 common stock. The client later logs on-line and
19 purchases Exxon in his IRA brokerage account. Arguably
20 the broker could be deemed an ERISA fiduciary under the
21 proposed definition.

22 As demonstrated by examples one and two,

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1 brokers will be unable to sell mutual funds or service
2 commission-based brokerage accounts holding ERISA or
3 IRA assets. Instead clients would be forced into
4 advisory wrap accounts where the broker can be paid an
5 asset-based fee. For clients that hold investments
6 with long holding periods, this would likely result in
7 higher fees and less retirement income. Instead of
8 paying five percent once up front, they may pay one
9 percent per year for 20 years. Advisory wrap accounts
10 are generally not available to clients with small
11 account balances, so these individuals would receive no
12 help with respect to their qualified accounts.
13 Furthermore, certain types of investments, such as
14 annuities, are generally not sold in wrap advisory
15 accounts for good reasons.

16 First, the sale of an annuity requires
17 substantial up-front work by the financial adviser to
18 determine which annuity is best for the client, which
19 riders are appropriate, and how much of the client's
20 portfolio should be invested in an annuity.

21 Second, educating clients regarding the need
22 for guaranteed retirement income, and helping them

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1 understand the need to part with an access to a portion
2 of their funds as a trade-off for guaranteed income is
3 not an easy process.

4 Third, these products often have much longer
5 holding periods than mutual funds, as they are
6 purchased to address long-term goals. Even in a
7 variable annuity, there may be a managed account option
8 that does not require additional support by an adviser,
9 and therefore no justification for charging an ongoing
10 advisory fee. The end result of these regulations
11 would be to make IRA owners less likely to have access
12 to guaranteed income.

13 My fourth example highlights the benefits of
14 a commission-based model for small business employers.
15 Small employers often have very little time to devote
16 to establishing a retirement plan and even less money
17 to do so. Brokers introduce small employers to the
18 idea of adopting a retirement plan often over several
19 years. Fee-only planners do not usually operate in
20 this marketplace because small employers are not
21 willing to pay an advisory fee to set up a plan.
22 Frankly, in most cases, even the commission on the

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1 small start-up plan is not enough to justify the time a
2 broker spends educating the employer regarding the
3 benefits of adopting a retirement plan. In most cases
4 the broker is hoping to establish a long-term financial
5 relationship with the small employers and key
6 employees. Removing the financial incentives for
7 brokers to work with small employers will not suddenly
8 make the economics work for fee-only planners. The end
9 result would be fewer small employers adopting
10 retirement plans for their employees.

11 My final example underscores the premise that
12 clients are best served through long-lasting
13 relationships with their financial adviser. We are
14 concerned that the Department's regulations would be
15 that individuals would receive advice on their 401(k)
16 assets from one professional, advice on their IRA
17 assets from another, and advice on any other assets
18 from a third financial professional. For instance, if
19 a broker recommends with respect to a client's 401(k)
20 client and becomes a fiduciary to the plan as a result,
21 then according to the Department, a recommendation by
22 that broker to roll assets into an IRA sponsored by the

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1 broker's firm would be a prohibited transaction. This
2 would result in brokers avoiding providing information
3 relating to a client's 401(k) account for fear of being
4 excluded from advising the client with respect to her
5 distribution decision. The reality is that the biggest
6 mistake made by plan participants is not that they roll
7 their plan assets to an IRA, but that they cash out
8 their retirement plan when they switch jobs. While
9 some commentators have raised concerns that plan
10 participants may receive conflicted advice, these
11 concerns are easily solved through disclosure.

12 In conclusion, due to the unintended
13 consequences I have outlined here today, we would ask
14 the Department to carve out IRAs from the proposed
15 regulations until such time as it has studied the
16 needs, expectations and services being provided to this
17 diverse marketplace. Today, more than ever, Americans
18 are seeking professional help with all of their
19 accounts in order to plan for a secure retirement; that
20 is why it is vitally important that the Department not
21 consider the definition of who is an investment advice
22 fiduciary under ERISA in a vacuum. Rather, the

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1 Department must consider the impact of such a change on
2 the retirement plan marketplace giving the SEC's
3 fiduciary standard, existing prohibitive transaction
4 rules, and exemptions in effect today.

5 Thank you.

6 MR. LEBOWITZ: Thank you.

7 MS. BORZI: Ms. Kreindler, I have just a
8 couple of questions for you. You veered into the
9 Norman Stein territory of sophisticated investors
10 asking us to distinguish between sophisticated and non-
11 sophisticated investors, and the one thing I heard you
12 say was, for instance, if there were an independent
13 fiduciary . . . are there some other things that you
14 might want to include into that ambit of sophisticated
15 investors?

16 MS. KREINDLER: Yeah. Sure. I mean that, to
17 me, was a clear example, where, when you have an
18 independent fiduciary that they may -- you know, so the
19 example there would be that they are working with one
20 investment manager and they want to talk to some of
21 their other providers to see what other perspective
22 they may have, but they clearly don't want to pay for

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1 it as additional fiduciary advice; they are just asking
2 for information. And, you know, so that would be a
3 clear answer of where the manager is the one that is
4 seeking the information, or the professional. But,
5 other cases could be, you know, scenarios where the
6 party, themselves -- you know, so you think of large plan
7 sponsors that have asset size where they routinely
8 manage and definitely have a level of sophistication
9 that can be comfortable saying -- as you did, in a way,
10 in your QDIA regulations, that named fiduciaries should
11 be able to set up custom target glide paths, and be
12 able to do that as sophisticated parties. And so, on a
13 similar analysis, they could also fall within that.

14 MS. BORZI: On the participant's side, it
15 seems like that would be a much heavier or much more
16 difficult thing to do.

17 MS. KREINDLER: It could --

18 MS. BORZI: G. Warren Buffett wouldn't need
19 this kind of advice for his IRA. I wonder if he even
20 has an IRA -- but -- he probably has several of them
21 actually. So how would you do that on the
22 participant's side?

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1 MS. KREINDLER: Yeah. So this exception, in
2 particular, was meant to be separate from and
3 independent of the counter-party or seller exception,
4 and so this really was intended to say that
5 sophisticated fiduciaries --

6 MS. BORZI: Okay.

7 MS. KREINDLER: -- will need advice that
8 could be limited in scope and should not have to pay
9 for it as fiduciary advice.

10 MS. BORZI: There was one other thing that
11 you said that caught my attention and I just -- I don't
12 want to -- I want to make sure that I correctly
13 scribbled down what you said -- I think you said that
14 it's one thing if the adviser within the plan is giving
15 people advice, and that would be fiduciary advice. I
16 think this was in the context of the distribution
17 question. But, I think you said it would be another
18 thing if advisers out of the plan were given special --
19 outside of the plan were given special access; am I
20 quoting you correctly?

21 MS. KREINDLER: What we are trying to say is
22 we think the rules should not be biased one way or

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1 another to provide special access or, you know,
2 additional relief, if you will, to those either inside
3 or outside of the plan. We think both services are
4 important and critical to have open as a choice for
5 plans and plan sponsors to adopt.

6 MS. BORZI: Well, the discussion we were
7 having this morning with a couple of the witnesses had
8 to do with -- and the discussion we had in connection
9 with the call center questions really had to do with
10 the adviser who was inside the plan, who, because of
11 that inside the plan special relationship, had access
12 to participants, who then might be steered to another
13 business division or another profit center within the
14 same company or the same group of companies; so I
15 assume your concern there -- I mean our concern and the
16 witnesses who raised this concern was that those folks
17 should not be given some special access, or people
18 shouldn't be steered to another branch of the same
19 company, or another division or another operating
20 center of the same company simply because they had the
21 business from the employer within the plan. I mean how
22 would you respond to that?

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1 MS. KREINDLER: So I think our point really
2 was that the regulation should not create a preference
3 for one over the other. I think the question that you
4 are asking maybe, if I can restate it, is --

5 MS. BORZI: (inaudible).

6 MS. KREINDLER: -- yeah -- is really that
7 when someone provides that type of referral or
8 relationship, then is that something that is fiduciary
9 and may be beyond some of the exceptions that are
10 provided, and I think that's an interesting question
11 and one that -- you know, when we look at and when we
12 responded on the platform exception really was -- when
13 the information being provided is generic, when it's --
14 also at the same time when it is being -- not being
15 individualized, et cetera, then we think that exception
16 applies to that. But, to the extent the line goes
17 beyond that, then, yeah, it raises other questions.

18 MS. BORZI: So you were more focusing on the
19 advice versus education question, is that it?

20 MS. KREINDLER: Correct. Yeah. Correct.

21 MS. BORZI: Okay. Michael?

22 MR. DAVIS: Ms. Kreindler -- did I pronounce

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1 thatch correctly?

2 MS. KREINDLER: Yes, exactly right.

3 MR. DAVIS: Okay. I want to make sure I get
4 it right. I wanted to understand about DCIIA. So you
5 represent investment managers, consultants,
6 recordkeepers, insurance companies, plan sponsors. In
7 some cases there might be issues that those
8 subcomponents may have divergent views, and I don't --
9 we have had representatives from different -- of these
10 subgroups who have expressed different views, so the
11 perspectives that you expressed, I assume with a
12 consensus view among your membership, but can you talk
13 more about just the complexion of your membership? Is
14 it dominated by plan sponsors, or which group
15 dominates?

16 MS. KREINDLER: You know, so -- thank you.
17 It's a very good question and it's, as a new
18 organization, it's something that we work with.

19 MR. DAVIS: Right.

20 MR. KREINDLER: To start with though, what we
21 have found pretty much across the board is where we
22 find consensus among our members is the fact that

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1 everyone is really committed to moving the ball forward
2 and to creating better outcomes and better solutions
3 for participants, and so together the group wants to do
4 that. And I didn't include in a long list all the
5 different types of members that we have, because I only
6 had 10 minutes, you know, but the point is that it is
7 institutional investment managers serve on the Board,
8 insurance companies, recordkeepers, providers. I am
9 with a law firm and serve as counsel, and other law
10 firm members are involved too. And, sponsors are
11 involved in an advisory board capacity and are involved
12 at our Executive Committee level, but it is something
13 where we solicit input from providers for the solutions
14 that they are looking for within the marketplace. And,
15 what will be of assistance to them and to meet their
16 needs and try to always keep that ahead of us, and yet
17 at the same time try to address the various different
18 concerns that are being raised about the defined
19 contribution system, and work together to try and
20 create something that's a better product and for better
21 solutions. So, at this point we have really found many
22 opportunities more so for consensus, even recognizing

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1 that, yes, we do have members that might have testified
2 and had different comments on these particular
3 regulations.

4 MR. DAVIS: Okay. But you said plan sponsors
5 acting in an advisory capacity; they are not on the
6 Board, is that correct?

7 MS. KREINDLER: Yeah. They are currently
8 members of our Executive Committee, correct, and then
9 otherwise it's providers --

10 MR. DAVIS: Okay.

11 MS. KREINDLER: -- of various different
12 types.

13 MR. DAVIS: Okay. And, Aon Hewitt, Mr. --

14 MR. NOVY: It's Novy. That's all right, Mr.
15 Davis.

16 MR. DAVIS: You are right. You talked a lot
17 about obviously the distribution issue, --

18 MR. NOVY: Exclusively.

19 MR. DAVIS: -- and obviously you guys work
20 with a lot of clients, a lot of plans; --

21 MR. NOVY: We do.

22 MR. DAVIS: -- have you seen a lot of

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1 situations where there have been -- maybe the advice
2 was conflicted in the context of plan distributions
3 where you have seen assets get directed in a way that
4 perhaps without these conflicts they would not have
5 been directed in that way, or are there specific
6 conversations that you have observed that you have a
7 lot of concern about?

8 MR. NOVY: No. I don't think that we are in
9 a position to -- and we haven't made it a practice to
10 assess or evaluate the content of the advice. What we
11 do see though is, upon either termination of employment
12 or separation of service, whatever the circumstance
13 might be, or age, particular attainment of age, the
14 individuals are taking large, if not total
15 distributions, large distributions, and moving it in
16 ways in which have forced us, through many studies, to
17 really look at why is this happening? I think one term
18 that is used in the industry is leakage. And, I think
19 part of the concern is that a portion of these lump
20 sums are losing value not only in the sense of not
21 being rolled over to another tax-sheltered investment,
22 but also the types of fees that we are seeing, these

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1 higher fees -- and I think the question really -- it
2 begs the question, do participants really understand
3 the value that they are getting by leaving -- or
4 receiving by leaving their investments in the plan, as
5 opposed to taking a rollover, or an indirect rollover,
6 however their actual form of distribution might
7 actually be? So I don't want to -- just to be clear,
8 Mr. Davis, we are not evaluating the content of the
9 advice.

10 MR. DAVIS: Okay. That's helpful. Thanks.

11 MR. NOVY: Sure. Tim?

12 MR. PIACENTINI: I am struggling how to
13 refine a question I have sort of tried to ask witnesses
14 already. It goes to this question of broker business
15 model. Maybe I'll start this way? Ms. Atanasio?

16 MS. ATANASIO: Correct.

17 MR. PIACENTINI: You talked about how
18 sometimes the broker may not --

19 MR. LEBOWITZ: Can you move the mike closer?

20 MR. PIACENTINI: -- may not receive, in some
21 sense, adequate compensation in the early stages of
22 business development, and then you said that a flat fee

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1 adviser -- that their business model isn't suddenly
2 going to make that possible, but for a broker it's
3 possible. Can you elaborate on that a little bit? I
4 mean what's going on there?

5 MS. ATANASIO: Sure. The first broker is
6 working under a commission-based model, and so they are
7 looking at differing compensation depending on which
8 investments the individual invests in, and of course
9 there is FINRA and SEC in insurance disclosure around
10 all those fees and the differing compensations.

11 MR. PIACENTINI: You talked about a small
12 plan --

13 MS. ATANASIO: Sure.

14 MR. PIACENTINI: -- where they might be
15 hoping to develop a longer term relationship with the
16 owner, --

17 MS. ATANASIO: Right.

18 MR. PIACENTINI: -- with some of the
19 (inaudible).

20 MS. ATANASIO: Sure. Many times advisers
21 will -- you know, let's say the President or the owner
22 of a small company, and will be working with him or her

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1 on all of her portfolios and her household assets, and
2 will say, you know, you should probably look into
3 establishing a retirement plan for you and you are
4 employees. It's a good idea. And, of course, the
5 employer says, no, you know, I am investing in my
6 business right now. I don't have a lot of money to do
7 that, you know. I really got to focus on building my
8 business. And they say, well okay, let's talk about it
9 a little bit more on Tuesday, and they come back on
10 Tuesday and they say, okay, well, it really would be a
11 good idea for you and here is how we can do it. And
12 then that's where the commission-based model works,
13 because it's fairly inexpensive, and even though the
14 broker has worked, you know, maybe three weeks for this
15 maybe smaller commission, what he or she is hoping for
16 is that that owner will say, you know, now come and
17 meet Bob over here in my company, and I think you did a
18 good job for me; whereas, you know, small business
19 owners, you know, do not want to pay somebody \$1,500 up
20 front, \$3,000 up front to establish a 401(k) plan
21 because of the very reasons I discussed, which is they
22 are trying to invest in their business. They don't

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1 really have that kind of money. And, fee-only planners
2 are not really in that market, you know, just because
3 economics don't really work for them. So, if you don't
4 have access to sort of this commission-based model and
5 they won't pay for the advisory fee model, then you end
6 up with no 401(k) plan. Did that answer -- okay.

7 MR. LEBOWITZ: Thank you. I just had one
8 question, Theresa. At the end of your testimony you
9 said -- toward the very end, you said something about
10 disclosure. I think you said that concerns about
11 conflicts could be easily addressed through disclosure,
12 you said.

13 MS. ATANASIO: Mmm-hmm (in the affirmative).

14 MR. LEBOWITZ: But, given the discussion we
15 had this morning --

16 MS. ATANASIO: Right.

17 MR. LEBOWITZ: -- about disclosure and, at
18 least some views that it's inadequate to really --
19 particularly in the context of the receiver of the
20 disclosure really appreciating --

21 MS. ATANASIO: Right.

22 MR. LEBOWITZ: -- what the significance of

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1 the information is and, at the end of the day, having
2 some idea of what to do with that information; maybe
3 you would like to elaborate a little bit more?

4 MS. ATANASIO: Sure. I think, you know,
5 there is a great deal of disclosure out there regarding
6 fees and services, and I guess, you know, our viewpoint
7 is -- let me make sure I think through this -- you are
8 right, ERISA is not a disclosure-based regime. And, I
9 think, you know, I am directing most of my comments to
10 the IRA market, which has not really historically been
11 the subject of sort of an ERISA regime, and I think,
12 you know, the SEC is working extremely hard to
13 harmonize and create a fiduciary standard that's going
14 to cover these IRA assets. And I think they will do a
15 great job at it. I think it will be a good, uniform
16 fiduciary standard, and I think to the extent that the
17 Department believes that it has not gone far enough and
18 does not protect those assets, then at that time it
19 could issue additional guidance, perhaps after studying
20 the diverse needs of the marketplace and in greater
21 detail.

22 MR. LEBOWITZ: Thank you. Thank you, all.

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1 MS. ATANASIO: Thank you.

2 MR. NOVY: Thank you.

3 MR. LEBOWITZ: The next panel, Ed Ferrigno,
4 Tom Roberts and Larry Goldbrum.

5 MR. DAVIS: You guys ready?

6 MR. FERRIGNO: Yes.

7 MR. DAVIS: Okay. Let's get started. Ed?

8 MR. FERRIGNO: Thank you for this opportunity
9 to comment on behalf of the Profit-sharing 401(k)
10 Council of America, commonly known as PSCA. I am
11 Edward Ferrigno, and I serve as PSCA's Vice President
12 for Washington Affairs.

13 PSCA is a 64-year-old non-profit association
14 representing companies that sponsor profit-sharing 401-
15 K and similar plans. PSCA's members range in size from
16 very small firms to conglomerates with hundreds of
17 thousands of employees.

18 PSCA supports the Department's initiatives
19 with some reservations that are discussed later in this
20 testimony. The elimination of this objective regular
21 basis and primary basis test will reduce uncertainty
22 for plan sponsors, participants and beneficiaries, and

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1 service providers. Today the potential exists for plan
2 fiduciaries and participants to believe that they are
3 receiving impartial advice, while the provider believes
4 that ERISA's fiduciary standards are not applicable.
5 PSCA believes that removing this misunderstanding by
6 applying the fiduciary standard regardless of the
7 regularity of the advice, or to what degree the
8 recipient will consider it is a very positive
9 development. PSCA urges the department to reverse its
10 position that a recommendation to take a distribution,
11 even when combined with a recommendation as to how the
12 distribution should be invested does not constitute
13 investment advice. The decision by a participant or a
14 beneficiary to request a distribution of their account
15 assets and how to subsequently invest those assets can
16 profoundly affect an individual's retirement. We
17 believe the public policy benefit of our position is
18 self-evident, and that a recommendation to take a
19 distribution constitutes a recommendation to sell a
20 particular investment.

21 The expansion of activities that will be
22 considered advice under the proposed rule raises

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1 concerns that the provision of marketing informational
2 and educational materials will be constrained by new
3 liability concerns. PSCA believes the Department
4 shares our concerns, as evidenced by provisions in the
5 proposed rule relating to limitations for selling
6 activities, actions pursuant to interpretive bulletin
7 96-1, and marketing and assistance provided under
8 platform arrangements. We have several suggestions in
9 this regard.

10 The Department should clarify in the preamble
11 in the body of the final rule that educating
12 participants about distribution options, including
13 discussions of the advantages and disadvantages of
14 seeking a distribution and managing retirement assets
15 outside the plan does not constitute advice. As long
16 as these communications do not include a clear
17 recommendation to seek a distribution, they should not
18 be treated as advice.

19 Education information advice regarding the
20 tax effects of taking a distribution should not
21 constitute a provision of advice under the proposed
22 rule. This important information is frequently sought

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1 by or provided to plan participants that are
2 contemplating taking a distribution of their plan
3 assets.

4 In the course of the Department's joint
5 inquiry with the Department of Treasury on lifetime
6 income products, the Agencies requested comments
7 regarding the provision of information to help
8 participants make choices regarding management and
9 spend-down of retirement benefits. PSCA and several
10 other organizations identified the expansion and
11 clarification of Interpretive Bulletin 96-1 to
12 explicitly apply to the provision of information, to
13 help participants and beneficiaries make better
14 informed retirement income decisions. We urge the
15 Department to take this action in conjunction with the
16 development of this rule.

17 PSCA believes that the limitations in
18 subparagraph (c) (2) (I) for selling activity should be
19 referred to as a provision of a sales proposal, not the
20 provision of advice. A plan fiduciary who makes a
21 decision regarding the investment of plan assets
22 pursuant to a sales proposal is not acting in response

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1 to advice. Our concern is that a plan fiduciary that
2 acts on conflicted advice may be liable for a fiduciary
3 breach. We suggest, for purposes of clarity, that the
4 language in paragraph (c) (2) (I) be amended to read:

5 "Knows, or under the circumstances, reasonably should
6 know that the person is providing a sales proposal in
7 his capacity as a purchaser or seller."

8 The proposed rule specifies in (c) (2) (II) (B)
9 that marketing or making available securities or other
10 property from which a plan fiduciary may designate
11 investment alternatives under a fund platform or
12 similar arrangement does not constitute the provision
13 of advice if certain disclosures are made.

14 Subparagraph (c) (2) (II) (C) provides the
15 general financial information and data to assist a plan
16 fiduciary's selection or monitoring of such securities
17 or property does not constitute the provision of advice
18 if certain disclosures are made. PSCA strongly
19 supports these provisions and urges the Department to
20 retain and expand them in the final rule. The relief
21 provided for the provision of general financial
22 information and data is currently limited to

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1 information provided in conjunction with offering a
2 platform arrangement. It should be available for all
3 plans regardless of whether or not it is offered in
4 conjunction with a platform arrangement.

5 It's common for fund investment managers to
6 provide newsletters, economic market analyses and
7 forecasts to plan fiduciaries. For example, the recent
8 worldwide debt crisis and its effect on capital
9 markets, the economic impact of the political crises in
10 the Middle East and Africa, or reports about emerging
11 markets, such as China or Brazil, might be discussed in
12 these reports.

13 Another common topic of analysis is
14 Washington's political environment and its potential
15 impact on industries and markets. These reports and
16 analyses may influence a plan fiduciary's decision
17 about the selection and monitoring of plan investments.
18 PSCA believes that the Department does not intend that
19 these activities constitute the provision of advice. We
20 request the final rule include specific provisions that
21 clarify our interpretation.

22 Under the proposed rule the provision of

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1 advice or an appraisal or fairness opinion concerning
2 the value of securities or other property of an
3 employee benefit plan constitutes a provision of
4 advice. The Department simultaneously announced that
5 the proposed rule supersedes this position in Advisory
6 Opinion 76-65A, where it held that making valuations to
7 be used in establishing an ESOP (ph) does not establish
8 a fiduciary relationship because a plan did not yet
9 exist, and an advice provided to an existing ESOP
10 regarding the value of employer securities also does
11 not constitute the provision of advice. These changes
12 will create a new fiduciary relationship for a large
13 group of service providers that provide valuation and
14 appraisal services for all types of retirement plans.
15 According to the preamble of the proposed rule, the
16 Department would expect a fiduciary appraiser's
17 determination of value to be unbiased, fair and
18 objective, and to be made in good faith, and based on a
19 prudent investigation under the prevailing
20 circumstances unknown to the appraiser. PSCA supports
21 this standard of conduct and generally supports the
22 assumption of fiduciary status by plan service

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1 providers that deal with plan investments. However, we
2 also share the significant concerns in the retirement
3 plan community about the increased costs that may
4 result from their proposed changes. For example,
5 questions have been raised of whether the Department's
6 standard of impartiality is consistent with the
7 fiduciary duty of loyalty. The magnitudes of the cost
8 and the willingness of providers to provide valuation
9 services under the proposed rule are, we believe,
10 undetermined. We expect that additional information
11 about the costs and benefits of this proposed change
12 will be provided in this hearing, and we are hopeful
13 that a clearer understanding of the impact of this
14 proposal will result. At a minimum, valuations
15 fairness opinions and appraisals of assets traded on
16 generally recognized markets should never be considered
17 the provision of advice.

18 Additionally, the Department's position in
19 Advisory Opinion 76-65A that, where a plan is not yet
20 in existence, a fiduciary relationship within the
21 meaning of section 3(21)(a) cannot be established is
22 widely recognized as established law that applies to

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1 all retirement plans subject to ERISA. We urge the
2 Department to clarify that it is superseding this
3 particular finding in the Advisory Opinion.

4 Thank you for considering my comments.

5 MR. DAVIS: Thanks so much. Mr. Roberts?

6 MR. ROBERTS: Good afternoon. My name is Tom
7 Roberts, and I am Chief Counsel with ING Insurance
8 U.S., testifying on behalf of the American Council of
9 Life Insurers.

10 ACLI member companies represent more than 90
11 percent of the assets in premiums of the U.S. life
12 insurance annuity industry, and offer insurance
13 contracts and other investment products and services to
14 qualified plans, including defined benefit pension and
15 401(k) arrangements, and to individuals through
16 individual retirement arrangements, or in a non-
17 qualified basis. ACLI member companies also are
18 employer sponsors of retirement plans for their own
19 employees.

20 We appreciate this opportunity to offer our
21 views of the proposed rule with the Department.

22 ACLI submitted written comments describing 11

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1 key concerns, and today I focus on three of them: one,
2 the importance of the seller's limitation; our
3 suggestions to ensure that all interested parties
4 clearly understand when advice is subject to ERISA; and
5 lastly, our concerns regarding the proposed rules
6 applicability to IRAs, and the need for further inquiry
7 on the nature of these programs, and the products and
8 services offered to support them.

9 The proposed rule would dramatically enlarge
10 the universe of persons who owe duties of undivided
11 loyalties to ERISA plans, and to whom the prohibited
12 transaction restrictions of ERISA and the Internal
13 Revenue Code would apply. It substantially broadens
14 the concept of rendering "investment advice for a fee".
15 ACLI appreciates the Department's concern that, under
16 some circumstances, the current rule impinges the
17 Department's ability to bring enforcement actions in
18 situations that are clearly abusive. We share the
19 Department's interest in seeing that plans and
20 participants, who seek out and are promised advice that
21 is impartial ultimately receive advice that adheres to
22 the rigorous standards imposed by ERISA. At the same

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1 time, we are concerned that the proposed rule's pursuit
2 of this objective interferes with investment sales and
3 distribution practices that are customary in the
4 marketplace, well understood, and commonly relied upon
5 by financial services providers, plans and participants
6 alike. We are concerned that these changes will result
7 in plans, plan participants and IRA owners having less
8 access to investment information, and/or increased
9 costs. Our comments seek to preserve the Department's
10 enforcement objective while avoiding unnecessary
11 disruption and negative impacts to plans, participants
12 and individuals.

13 First, we would like to address the seller's
14 limitation of fiduciary status. In the preamble to the
15 proposed rule, the Department notes that, in the
16 context of selling to a purchaser, communications with
17 the purchaser may involve advice or recommendations,
18 and that those communications ordinarily should not
19 result in fiduciary status. We believe that this point
20 is absolutely critical to the development of a workable
21 rule. Persons who are engaged in the sale and the
22 distribution of investment products and services need

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1 to have confidence that ordinary course sales
2 recommendations will not, in hindsight, be subjected to
3 a fiduciary standard that disallows the payment of
4 sales commissions and other traditional forms of
5 distribution related compensation.

6 Parties engaged in transactions with ERISA
7 plans and IRAs need clear, unambiguous rules by which
8 to determine their duties and obligations. Financial
9 institutions, such as life insurers and their sales
10 representatives, should not be treated as fiduciaries
11 under ERISA when they are engaged in selling
12 activities, and are clear that they are acting in a
13 sales capacity. As written, the wording of the
14 seller's limitation, which describes sellers and their
15 agents, may raise some uncertainties about the
16 availability of the seller's limitation for other
17 distribution channels, such as independent insurance
18 agents, insurance affiliated and unaffiliated broker
19 dealers and resident investment advisers that offer
20 life insurance products; whether exclusively, or as
21 many other products from a variety of different product
22 manufacturers. It is essential that these parties be

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1 covered by the limitation. The seller's limitation is
2 only available when the recipient of the advice knows
3 or has a basis for knowing that the interest of the
4 selling firm and its distributors are adverse to the
5 interest of the plan and its participants. We think
6 that the word adverse is not the right word to explain
7 that a seller is not impartial. While the seller of a
8 financial product has a financial interest in the
9 outcome of a transaction, we think that it is
10 inappropriate to describe that financial interest as
11 necessarily entailing broad adversity of interest. As
12 responsible providers, we have an interest in seeing
13 that our customers are well-served, that they are happy
14 with their products and services, and that they find
15 our products and services useful to the attainment of
16 financial goals. We believe the seller's limitation
17 should make the point that the seller of an investment
18 or an investment product has a financial interest in
19 the transaction it is recommending. And, so long as
20 purchases are provided with that information, they will
21 have the requisite basis for evaluating the recommended
22 transaction in light of the seller's financial

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1 interest, and will be in a position to understand that
2 the selling firm's recommendation is not impartial.

3 We think the rule should provide an example
4 or examples of circumstances in which a person
5 reasonably demonstrates that the recipient of
6 information knows that a recommendation is being made
7 by a seller. For example, a written representation
8 would suffice if it clearly notes that the person is a
9 seller of products and services; that the person and,
10 if applicable, its affiliates will receive compensation
11 for the selection of the products and services; and
12 that such compensation may vary depending on which
13 product is purchased, or which investments under a
14 product or products are selected. This type of
15 representation would provide a clear indication to the
16 plan, plan fiduciary or participant that the person is
17 a non-impartial seller of products and services, and it
18 would also address the Department's stated concern
19 about undisclosed conflicts of interest. The
20 Department should clarify that the seller's limitation
21 covers all aspects of both an initial sale and the
22 subsequent ongoing relationship between a plan, plan

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1 fiduciary, or individual and an investment provider, or
2 any agent, broker, and/or registered investment adviser
3 involved with the sale of the investment provider's
4 products and services. This would include information
5 and recommendations regarding the use of a product; for
6 example, advice regarding the choice of investments
7 available under a product's menu of investments. It is
8 common for Defined Contribution plans to request of
9 potential investment providers a sample menu of
10 investments from among a provider's available
11 investments, which, in the opinion of the provider,
12 best match the plan's current investment options. There
13 should be no expectation that any such recommendation
14 is impartial, or that the plan seeks advice upon which
15 it will rely for its investment decisions. The nature
16 of this relationship should not change after a sale. A
17 product provider, agent, broker, and/or registered
18 investment adviser may continue to make recommendations
19 regarding products and services, and there should be no
20 expectation that these recommendations differ in nature
21 following the initial sale.

22 I'd like to address next written

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1 representations. In its preamble, the Department
2 expresses the belief that explicitly claiming ERISA
3 fiduciary status, orally or in writing, enhances the
4 the adviser's influence and forms a basis for the
5 advice recipient's expectation that the advice rendered
6 will be impartial. The proposed rule reflects that
7 view by applying fiduciary status to all persons
8 offering those acknowledgments and disallowing the
9 availability of the seller's limitation to such
10 persons. We think prudence dictates that where a plan,
11 plan participant or individual seeks out impartial
12 disinterested advice delivered in a manner consistent
13 with ERISA's fiduciary standard of conduct, then the
14 plan, plan participant or individual should obtain the
15 appropriate acknowledgement in writing in order to
16 secure the acknowledgement in a permanent form. We are
17 concerned about the potential proof issues that are
18 inherent in claims that an adviser provided oral
19 representations of fiduciary status. advisers may be
20 hard put to dispute erroneous or otherwise fictitious
21 claims that oral assurances of fiduciary status were
22 provided. And, for these reasons, we request that the

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1 rule be modified to apply only to persons who represent
2 or acknowledge in writing, electronic or otherwise,
3 that they are acting as a fiduciary within the meaning
4 of ERISA with respect to the advice they are providing.

5 Lastly, we suggest that the Department
6 separately consider a rule for IRAs. We request that
7 the Department take additional time to study the IRA
8 and self-employed markets, and to carefully consider
9 the economic impact of the proposed rule on both
10 individuals and providers of products and services. The
11 Department is separately considering welfare benefit
12 plans under the recently issued 408(b)(2) regulations.
13 We would ask that the Department do likewise for IRAs
14 and for self-employed plans, and hold them apart from
15 the scope of a final rule. The Department should take
16 time to consider the IRA and the Keogh marketplace, and
17 the economic impact that a change to the current rules
18 would have on this retail marketplace. In addition,
19 the Department should consider changes in the
20 regulatory environment affecting retail products; in
21 particular, there are regulatory efforts that are
22 underway by the Securities and Exchange Commission

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1 regarding the standard care under the securities laws
2 for broker dealers and investment advisers that provide
3 personalized investment advice about securities to
4 retail customers. On January 21st, 2011, the SEC issued
5 a study on broker dealers and investment advisers, and
6 we think it is essential that the SEC and DOL efforts
7 lead to rules that are complimentary and harmonized in
8 nature. We urge the Department to provide the public
9 sufficient opportunity to consider the SEC's regulatory
10 efforts, and to offer additional comments on the
11 proposed rule.

12 As we read the proposed regulation, the
13 seller's limitation applies to IRAs. It is common for
14 advisers and for agents to engage customers and
15 perspective customers on their particular goals and
16 objectives in order to better understand their product
17 and service needs. Based on those conversations an
18 adviser might explain the pros and cons of various
19 investment vehicles, including variable annuities,
20 mutual funds, brokerage accounts, banking products,
21 fixed annuities, alternative investments, and several
22 types of advisory accounts, and within each of these

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1 types of securities and property, advisers and agents
2 can usually recommend several different specific
3 securities that may have different features.
4 Compensation paid by product and by service will vary.
5 For instance, compensation charged for executing a
6 stock trade will differ from compensation received for
7 selling an annuity. The seller's limitation, with an
8 appropriate indication of the seller's interest, makes
9 it possible to recommend products and services to
10 customers.

11 I would like to thank the Department again
12 for holding this hearing, and thank you for inviting
13 the ACLI to testify. I am happy to answer any
14 questions you may have.

15 MR. DAVIS: Right on time. Thanks, Mr.
16 Roberts. Mr. Goldbrum?

17 MR. GOLDBRUM: Good afternoon. My name is
18 Larry Goldbrum, and I am General Counsel of the SPARK
19 Institute, an industry association that represents the
20 interests of retirement plan service providers,
21 including recordkeepers, mutual fund companies,
22 insurance companies, bank, investment managers and

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1 others. Thank you for the opportunity to share our
2 views with you.

3 The SPARK Institute supports clarifying and
4 updating the definition of who is a fiduciary; however,
5 we urge the EBSA to consider the following five guiding
6 principles as it makes any changes to the rules.

7 First, any new definition must be clear and
8 precise. It is crucial that service providers are able
9 to structure their products, services and compensation
10 arrangements with reasonable certainty about whether
11 they will be a fiduciary. Absent clear and precise
12 guidance, service providers will be at substantial risk
13 of unintentionally and unwillingly becoming fiduciaries
14 and engaging in prohibitive transactions. Unfortunately
15 the proposal includes broad changes that are unclear
16 and will result in unintended consequences.

17 Additionally, the availability and scope of the
18 proposed exceptions are unclear. Unintentional
19 fiduciary status will be a realistic possibility for
20 service providers. For example, we are concerned about
21 investment platform providers' ability to provide non-
22 fiduciary information and assistance to plan sponsors,

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1 to help them narrow down the investment choices
2 available to a plan; for example, from 1,000 funds
3 available on a platform to 30 possible alternatives. We
4 are also concerned about a provider's ability to rely
5 on the seller's exception, because of the complexities
6 associated with the selling process and how and when
7 plan sponsors make plan investment decisions. For
8 example, investment decisions may be made after a
9 General Services Agreement is signed, but the plan
10 sponsor will expect the seller to continue to provide
11 the information and assistance that was provided before
12 the agreement was entered into. The stakes for the
13 service providers are very high because a
14 misinterpretation of the rules or an unintentional
15 violation could affect a provider's entire line of
16 products and services and all of its plan
17 relationships. We urge EBSA to provide clear and
18 precise guidance, and to consider the value, importance
19 and complexity of plan products and services.

20 Second, any new regulations must provide
21 flexibility and preserve choices. Today's service
22 providers have the ability to structure their products

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1 and services so that they can provide fiduciary and
2 non-fiduciary services that plans need and demand. We
3 believe that service providers and plan sponsors should
4 have flexibility and discretion in determining and
5 agreeing on the service provider's role, and whether a
6 fiduciary relationship is mutually expected. The
7 proposal substantially lowers the threshold for when a
8 service provider will be considered a fiduciary, and in
9 some instances, treats some services as investment
10 advice that, in our view, should not be treated as
11 such. As a result, service providers will be forced to
12 discontinue providing many services that plan sponsors
13 demand, or to charge substantially higher fees in order
14 to account for the higher risk and responsibility that
15 comes with being a fiduciary. Many plan sponsors do
16 not want and cannot afford to hire someone to serve in
17 a fiduciary capacity, to provide the limited non-
18 fiduciary assistance that they can get today. If plans
19 are forced to hire fiduciary services, plan
20 participants will ultimately bear the burden of higher
21 fees. We believe that this does not advance EBSA's
22 other goals of facilitating lower cost ways for

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1 American workers to save for retirement.

2 Additionally, our comment letter included a
3 safe harbor recommendation that would allow service
4 providers and responsible plan fiduciaries to determine
5 and agree, in writing, on the provider's role and
6 whether a fiduciary relationship is mutually expected.
7 The provider would have to disclose the financial
8 interest it may have regarding plan decisions. We
9 recognize that under certain circumstances EBSA would
10 be unwilling to allow the provider and plan
11 representative to agree to non-fiduciary status. For
12 example, when the provider exercises discretion, or
13 when it provides individual investment advice that is
14 clearly and mutually intended to be the primary basis
15 for the plan investment option decisions, those
16 circumstances should be clearly defined in any final
17 rule. We urge EBSA to consider including the safe
18 harbor in its final rule.

19 Third, any new regulation must avoid
20 unintended potential harm. We are concerned that the
21 proposal is likely to cause such harm and be disruptive
22 to the retirement plan community in at least two ways.

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1 First, as I already mentioned, service
2 providers will likely have to discontinue providing
3 services or start charging higher fees to account for
4 being a fiduciary. Some organizations that represent
5 financial advisers that typically provide fiduciary
6 services will try to convince EBSA that this is a good
7 outcome. Such views seemingly underestimate the
8 issues, concerns and potential harm that are identified
9 in the majority of the comments submitted to EBSA.
10 While the proposal may be good for those who want to
11 serve and charge for serving as a plan fiduciary, it
12 will likely be harmful and disruptive to the vast
13 majority of the retirement plan community, particularly
14 small plans that cannot afford to hire outside
15 fiduciaries.

16 Second, services providers should not be
17 subject to the significant risks that an arrangement to
18 provide non-fiduciary products and services will be
19 treated after the fact as a fiduciary relationship.
20 Class action attorneys have discovered retirement plans
21 as potentially fertile grounds for large settlements
22 from perceived deep pocket defendants; typically large

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1 plan sponsors and service providers. Although they
2 have had limited success on the merits of their cases,
3 the greater risk of hindsight recharacterization of
4 relationships, the increased threat of litigation and
5 the costs to defend against them will have a chilling
6 effect on the retirement plan community.

7 Our fourth guiding principle is that any
8 changes should be measured and harmonized with other
9 initiatives. The proposed changes are significant and
10 we are encouraged that EBSA is working with the SEC, as
11 it evaluates regulatory action that will have a direct
12 impact on the standards of care and fiduciary
13 obligations of brokers and financial advisers.

14 We urge EBSA to continue to engage the
15 retirement plan community, as it is doing today, as it
16 evaluates the issues and concerns raised by many
17 different organizations. We believe that significant
18 changes to the proposal are needed, and that the
19 retirement plan community would benefit greatly if EBSA
20 repropose the modified rule. This will ultimately
21 result in a more harmonized set of regulations
22 governing these matters in a more effective and

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1 transition for everyone, including plan sponsors.

2 Contrary to what has been suggested by the
3 limited number of groups encouraging EBSA to move
4 quickly in finalizing the proposal, uncertainty and
5 consistencies will not benefit or -- help or benefit
6 anyone except for the litigators and perhaps those who
7 want to expand the number of plans for which they
8 provide fiduciary services. I am encouraged by the
9 comments I heard this morning, that perhaps many of our
10 changes and our issues and concerns would fall into the
11 category of line drawing and drafting, so I do want to
12 mention that. That was encouraging.

13 Our fifth guiding principle is to allow
14 adequate time for compliance. The proposed changes
15 raise very complex issues and will dramatically impact
16 the products and services available to plans, and could
17 have devastating consequences for any provider, who
18 unintentionally and unwillingly becomes a fiduciary. We
19 urge EBSA to allow 18 months from the date that any
20 rule is published for the retirement plan community to
21 evaluate the rules, determine how to comply with them,
22 and for service providers to educate their customers

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1 about the rules, and to modify their service
2 arrangements.

3 Finally, with respect to distribution
4 counseling, the SPARK Institute supports EBSA's efforts
5 to safeguard the interests of participants in
6 connection with plan distributions, and encourages it
7 to develop further guidance, but not in connection with
8 the current effort to redefine who is a fiduciary. EBSA
9 has received many comments on this topic with differing
10 views; however, most agree that plan participants want
11 and need assistance when deciding whether to take a
12 distribution, what distribution to take, and what to do
13 with the proceeds. Groups will disagree over who a
14 participant can trust when seeking help on these
15 issues. We agree that a plan fiduciary should neither
16 be able to act in its own interest, nor be able to
17 influence its own compensation when helping a plan
18 participant with these decisions. We also believe that
19 it is equally, if not more important, for EBSA to
20 consider the concerns about unknown advisers who make
21 cold calls to plan participants, and their ability to
22 exercise greater influence when participants are unable

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1 to get the assistance that they need from the plan
2 sponsor and incumbent service providers. Moreover, we
3 do not believe that the solution to this problem is to
4 deem all distribution counseling to be fiduciary
5 activities. That would have a chilling effect on the
6 availability of health. Instead, we urge EBSA to issue
7 additional guidance that is comparable to IB-96-1 that
8 clearly defines acceptable distribution counseling,
9 assistance and education that can be provided by the
10 plan sponsor and incumbent service providers, including
11 plan fiduciaries.

12 On behalf of the SPARK Institute I want to
13 thank you for the opportunity to share our views.

14 MR. DAVIS: Thanks so much. We'll turn to
15 the Panel for questions, but first, for the record, I
16 just want to note you guys have harmonized your own
17 choice of wardrobe today. It's very impressive. In
18 the spirit of harmonization, I just want to note that
19 for the record.

20 MR. GOLDBRUM: It's a shame that we couldn't
21 get a picture.

22 MS. ATANASIO: Is that a commentary?

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1 MR. DAVIS: We'll start with Virginia.

2 MS. SMITH: Actually, I noticed that halfway
3 through and for a few minutes I couldn't listen to the
4 testimony.

5 I do have a couple of questions. My first
6 one is for Mr. Ferrigno. I am intrigued by your
7 recommendation that the Department reverse its position
8 that a recommendation to take a distribution, even when
9 combined with a recommendation as to how the
10 distribution should be invested, does not constitute
11 investment advice, and my question is, do you come to
12 this position based on experience that you have seen?
13 Can you give examples of situations that would cause
14 you to make this recommendation?

15 MR. FERRIGNO: Well, I mean, we have never
16 thought it made sense from the day it was issued; that,
17 to us, it was self-evident that clearly telling someone
18 to sell their assets in their plan and seek a
19 distribution would constitute advice. And, we always
20 felt that that particular piece of advice was at least
21 as important to the plan participant as any other
22 advice that we could get.

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1 MS. SMITH: Have you seen abusive situations?

2 MR. FERRIGNO: There are definite abuses from
3 outside advisers that target certain companies that
4 have extremely rich profit-sharing programs, and --

5 MS. SMITH: Okay.

6 MR. FERRIGNO: -- and there are stories of
7 people who have been talked into quitting. Even
8 internally there is some level of discomfort in the
9 plan sponsor community regarding rollover activity.

10 MS. SMITH: Okay. Mr. Roberts, when you were
11 talking about the seller's limitation you emphasized
12 quite a bit about disclosure and all of the things that
13 should be disclosed, in order to take advantage of the
14 seller's limitation, but the one thing that I didn't
15 hear is the amount of the compensation. Do you think
16 that that should be part of the disclosure?

17 MR. ROBERTS: The amount of the compensation?
18 Well, I mean -- I am with that -- that takes me back to
19 is I know that, you know, some of the prohibited
20 transaction exemptions that were issued years ago
21 provide disclosure-based relief where the amount of the
22 compensation is disclosed. And, what I am thinking of

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1 particularly is PTE-8424, which covers insurance
2 agents, and part of taking advantage of 8424 is to
3 disclose the fact that you are being compensated what
4 the amount is to an independent plan fiduciary who
5 would make the purchase decisions. So,
6 philosophically, disclosing the amount of compensation
7 I don't think troubles me.

8 MS. SMITH: And just one more, if I may? The
9 second point that you made, Mr. Roberts, was that --
10 that the determination of fiduciary status should only
11 be based on written representations, and I tried to
12 follow what your suggestion was, and it seemed to me --
13 and correct me if I am wrong -- that what you were
14 saying was really that the burden should be shifted to
15 the plan level fiduciary to get this written
16 acknowledgement of fiduciary status; is that what you
17 were saying?

18 MR. ROBERTS: Not quite. You know where I
19 was going is that the seller's limitation becomes
20 awfully important to our members, because our members
21 are insurance companies who are in the business of
22 selling insurance products. We are all about selling

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1 insurance products, and we need to make sure that we
2 don't find ourselves strained into a situation where we
3 might be deemed to be fiduciaries with an impermissible
4 conflict of interest, so we seek the seller's
5 exception. And, what troubles us in the proposed
6 regulation is that you lose the benefit of the seller's
7 exception if you have asserted that you are acting as a
8 fiduciary under ERISA. So the point I was trying to
9 make is that given the gravity of the loss of that
10 seller's exception to us, we think it should only be
11 subject to being forfeited, if you will, if the
12 assertion or the acknowledgement of ERISA fiduciary
13 status is made in writing; in other words, so you don't
14 have someone saying, you can't take advantage of the
15 seller's exception because you told me you were acting
16 as an ERISA fiduciary, and you get into a quarrel of,
17 well, no, we didn't. We think that something of that
18 magnitude ought to be put in writing if it's going to
19 lead to the loss of that exception.

20 MR. DAVIS: Mr. Goldbrum, you, in your
21 testimony, you said that if the regulation went forward
22 as proposed there are certain services that would be

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1 discontinued, certain retirement services, advice
2 services perhaps. Can you be more specific; what
3 specific would be discontinued and why?

4 MR. GOLDBRUM: Yeah. Our comment focused
5 mainly on the relationship between the vendor and the
6 plan sponsor, so some examples that we included in our
7 comment letter related to the whole narrowing of the
8 number of funds that are available on a vendor's
9 platform. If the information that a plan sponsor is
10 seeking, whether it's through an RFP because they are
11 asking for a sample line-up or they are asking for
12 specific information in order to narrow a field of
13 funds from thousands down to perhaps the several dozen
14 from which they can choose from, that's considered a
15 fiduciary activity. Then we are concerned that service
16 providers will simply stop providing that assistance
17 and say that in order for us to maintain the service
18 arrangement that we are proposing with you and the fee
19 arrangement that we are proposing with you, we are
20 unable to provide you any information that would cause
21 us to be a fiduciary, or we may have a potential
22 conflict. And we don't think that that's a desirable

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1 outcome. We think that, you know, there is a line that
2 can be drawn that would allow service providers to
3 continue to provide information on objective criteria
4 that would help a plan sponsor narrow the field, and
5 then ultimately the plan sponsor would make the final
6 decision. I think based on some of the earlier
7 testimony today, you know exactly where that line will
8 be. You know I don't think that I have the answer for
9 you today as we sit here, but I think that's part of
10 the process that we are encouraging the Department to
11 go through and engage the retirement plan community, so
12 we can see where that line is, and if the line is clear
13 so that both the service provider and the vendor -- the
14 vendor provider and the plan sponsor know where that
15 line is and have mutually similar expectations of what
16 the relationship is.

17 MR. DAVIS: Thanks.

18 MR. HAUSER: Mr. Roberts, and this is
19 following up on Virginia's question, but I think the
20 way you put it was, well, if somebody wants a fiduciary
21 sort of relationship with its intending consequences,
22 the burden really ought to be on them to seek it. But,

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1 at least when you are talking about, you know, people
2 who aren't plan fiduciaries, but rather are
3 participants, accountholders of one sort or another, I
4 would think that more typically they have an
5 expectation that they are getting fiduciary conduct,
6 and that it's almost the reverse; if you want to assert
7 the seller's exception and you want a very bright line
8 approach to take to avoid it, why wouldn't the burden
9 be on you to get -- essentially to give a statement
10 that's in writing that says I am a seller, I am
11 conflicted, here are the fees I am going to get, and
12 you acknowledge -- and here are the rights you lose if
13 I am not a fiduciary, you know, you won't have a
14 remedy, a loss remedy, you won't be entitled to
15 prudence and loyalty under ERISA, and then say -- and
16 have a signature line that says, never -- you know,
17 yes, you are good to go. Please, don't treat -- don't
18 be a fiduciary. I mean would that be -- that kind of
19 approach work?

20 MR. ROBERTS: Well, I don't think -- you know
21 I don't think our members have talked about anything
22 quite as extensive as you have just described, but I

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1 will say we have talked a fair amount about the fact
2 that -- you know, in situations where we are selling
3 products or services, we want to make sure that the
4 person to whom we are selling understands that, and so
5 we would be comfortable with putting a written
6 statement out saying you should know that we are not an
7 impartial provider of investment advice; we have a
8 financial interest in this transaction and whatever
9 goes along with that. You know in my dialogue with Ms.
10 Smith earlier, what I was trying to get at is, we were
11 concerned about the possibility that even after you had
12 done all of that, you might still lose the benefit of
13 the seller's exception if the person to whom you were
14 selling stood up and said, ah, but, you know, yesterday
15 he told me he was acting as an ERISA fiduciary orally.
16 We think that the threat of losing the seller's
17 exception on the basis of claims of unwritten
18 statements is extremely troubling and problematic, and
19 we think that, given the magnitude of potential loss,
20 it is not unreasonable to ask for a requirement that
21 the loss of the seller's exception occurs when a
22 written representation of ERISA fiduciary status has

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1 been given.

2 MR. HAUSER: Well, would that need to be, in
3 your view, done as a requirement for fiduciary
4 treatment, or could it simply be a safe harbor; you do
5 a statement in this form, you get the participant's
6 signature and acknowledgement, and if you do that, you
7 won't be treated as a fiduciary?

8 MR. ROBERTS: Well, you know, really my
9 remarks are not aimed at one who is acting as a
10 fiduciary, but rather aimed at the situation where one
11 makes no bones about the fact that they are acting as a
12 seller, but that they are subject to the loss of the
13 seller's exception by claims of unwritten assertions of
14 fiduciary status.

15 MR. HAUSER: Right. No, I understand, but I
16 guess my question is just in terms of writing a
17 regulation, as I understood while you were saying it,
18 was almost as if, well, this ought to be a requirement
19 of falling outside of the seller's exception is that
20 there be this written statement, but what about just a
21 safe harbor sort of document? I mean, would that just
22 as easily meet your goal?

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1 MR. ROBERTS: You mean a --

2 MR. HAUSER: I mean essentially a rule that
3 will say, if you have this kind of statement, that kind
4 of argument is going to be unavailing?

5 MR. ROBERTS: I think we would be quite
6 receptive to that sort of approach.

7 MR. HAUSER: And then I know, Mr. Goldbrum,
8 you didn't want to do any line drawing, but you know,
9 what -- do you have any advice you would care to give
10 when it comes to this business of giving advice or
11 information, however you want to characterize it, in
12 connection with narrowing down essentially the options
13 on a fund menu or on a plan menu?

14 MR. GOLDBRUM: With the caveat that I may
15 decide to supplement what I say or revise it, but, yes,
16 I mean, to the extent that you are providing generic
17 information or you are helping serve a plan sponsor
18 narrow down the field based on objective criteria. We
19 mention this in our comment letter. So, you know, when
20 you are looking at historical returns, comparison to a
21 peer group, you know, Morningstar ratings, whatever
22 objective criteria, and you are running the funds that

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1 are on your platform through those screens, you know,
2 that should still be considered non-fiduciary
3 assistance. You know there are other situations that
4 we talked about where there are -- in the comment
5 letter where there are problems; you know, handling the
6 plan conversions, you know; what does a plan do with
7 the assets while they are shifting from an old provider
8 to a new provider? plan sponsors are going to want
9 help in understanding, well, should we liquidate all
10 the assets to cash and hold them in cash temporarily;
11 should we put them in some sort of equity fund
12 temporarily while we are conducting the conversion? You
13 know those are other questions that plan sponsors will
14 have where they really do need help from someone who
15 understands the situation, and we are concerned --

16 MR. HAUSER: It sounds like they need
17 investment advice.

18 MR. GOLDBRUM: No. I don't think that that
19 is investment advice. I think that that is sort of
20 education of what the different options are; what are
21 the advantages and disadvantages of them so that they
22 can ultimately make an informed decision for

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1 themselves. And I think that's where some of the art
2 is in the line drawing is sort of understanding the
3 practical situations, and there are probably about four
4 or five of them that we identified in our comment
5 letter, that service providers are faced with where
6 plan sponsors are coming to them and saying, help us
7 understand what our choices are and what the advantages
8 and disadvantages of those are. And, to the extent
9 that the Department can provide guidance on that as to,
10 you know, what is acceptable education to a plan
11 sponsor in making those decisions versus where does --
12 where do you become a fiduciary would be very, very
13 valuable. And, I think that should be done in
14 conjunction with any change, because to simply change
15 the definition of fiduciary without telling the
16 industry what is it you can do would be a concern.

17 MR. HAUSER: Thanks.

18 MR. PIACENTINI: I guess let me pick up on
19 Tim's question and take it in a little bit different
20 direction. So, if this narrowing down of a menu off of
21 a platform, if that is a fiduciary act, then you said
22 that that would introduce costs, I think?

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1 MR. GOLDBRUM: Well, there are two things
2 that can happen: the plan service providers can simply
3 decide that they are unable to provide that information
4 and assistance because it will cause them to be a
5 fiduciary, and under their fee structure, perhaps
6 engaging in prohibited transactions; or they can decide
7 to re-price their products to factor in the increased
8 responsibility and risk that comes along with being a
9 fiduciary.

10 MR. PIACENTINI: So I guess my question is,
11 how big is that? Do you see this as a large risk that
12 will be expensive to take on? I mean, I am trying to
13 juxtapose that against your characterization of this
14 process as being one that is based on objective
15 criteria and so forth. It sounds like it's pretty
16 clear-cut and maybe doesn't have much risk, so how do I
17 put that together?

18 MR. GOLDBRUM: Yeah. You know there are
19 probably others that are, you know, more of the direct
20 service providers that may be able to give you a better
21 sense and may have tried to quantify that, but let me
22 say this; you know, generally the information and the

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1 assistance that is provided in the process today is
2 provided at no additional cost. It's, you know,
3 something that can be done and provided cheap,
4 relatively cheaply. But, when you tell a service
5 provider, okay, you are now a fiduciary and you have to
6 figure out what is suitable for that particular plan
7 and what is best for that particular plan, it's going
8 to involve more due diligence; it's going to involve
9 extensive monitoring of and for that plan, and there
10 will be some price to it; whether it's 50, 75, 100
11 basis points a year, I'm just not able to tell you.

12 MR. PIACENTINI: Okay. And then one
13 different question, and I guess this is maybe for Mr.
14 Ferrigno. So you talked about your view that a
15 recommendation to distribute an account should be
16 advice; Mr. Novy, in the preceding panel, I think had a
17 similar view, but also went further to say that he
18 thought that the cost of that being fiduciary advice
19 would be minimal. Do you share that view?

20 MR. FERRIGNO: Yeah, I do. I do. Absolutely.
21 You know, most people today will tell you that they
22 don't provide -- they don't steer people to take a

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1 distribution, so basically codifying that shouldn't be
2 a problem.

3 MR. PIACENTINI: Okay. Thanks.

4 MR. WONG: I just have one question that I
5 hope is very narrow. It's for Mr. Roberts. I think,
6 in talking about the seller's limitation, you indicated
7 that, by the way, we drafted and used the term agent,
8 it might not encompass other parties involved in the
9 distribution of investments, who might need to take
10 advantage of it. Can you go into a little bit more
11 detail about who some of those parties are and why you
12 are and why using the agent might not capture them?

13 MR. ROBERTS: Well, you know, true
14 confession; you know, it's partially concerned with the
15 drafting. It's also partially a concern about some of
16 the remarks that were made by various officials from
17 the Department in terms of explaining the regulation
18 immediately after it was published. There was some
19 confusion and some concern frankly amongst our members
20 that, at different points in time, it seemed that it
21 was not clear how far the seller's exception extended;
22 that certain folks, who we would have thought naturally

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1 would be recognized as acting in a sales capacity as
2 agents of a seller, if you will, sometimes seem to be
3 covered, and other times seem not to be. So my remarks
4 were really aimed at trying to pin that down once and
5 for all, and to go back to the language that was in the
6 preamble, which seemed to recognize that, if you are
7 engaged in selling activity and you are willing to say
8 you are engaged in selling activity, there shouldn't be
9 a problem in terms of casting you inside the seller's
10 exception and not as an ERISA fiduciary. So when we
11 look at all of the various sales channels we have, we
12 just want to make absolutely sure that they are all
13 available for coverage under that sales exception;
14 whether they are independents; whether they are
15 captives, general agents, what-have you.

16 MR. DAVIS: Okay. No more questions?

17 (No audible response).

18 MR. DAVIS: Okay. Thanks so much.

19 MR. ROBERTS: Thank you.

20 MR. DAVIS: We'll call Panel 7. Brian? Here
21 he comes.

22 MR. GRAFF: I almost didn't make it.

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1 MR. DAVIS: Okay. I think we'll get started
2 with Brian Graff, first on the agenda.

3 MR. GRAFF: Hi, Michael.

4 MR. DAVIS: How are you?

5 MR. GRAFF: On behalf of ASPPA and its sister
6 organizations, NAIRPA (ph) (the National Association of
7 Independent Retirement plan advisers) and CIKR (ph)
8 (the Council of Independent 401(k) Recordkeepers), I
9 thank you for this opportunity to testify today on this
10 important subject.

11 My testimony today will focus on two points:
12 one, we generally support the proposed change to the
13 basic definition of investment advice, and want to
14 encourage you to stay the course; two, we believe that
15 it is critically important that these rules not apply
16 to IRAs, as such application would effectively create
17 an uneven marketplace playing field, to the ultimate
18 detriment of participants.

19 Regarding the proposed change to the
20 definition of advice, many of those testifying today,
21 as well as many comments filed, suggest that there is
22 no need to change a definition, since the current

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1 definition provides clarity and certainty. We agree,
2 sort of. The current definition does provide clarity
3 on how a non-registered broker or adviser can avoid
4 providing what is considered ERISA investment advice,
5 and thus provides clarity on how a broker or adviser
6 can avoid being subject to ERISA's fiduciary duties.
7 The current definition also certainly is confusing to
8 plan sponsors, who really have no idea whether or not
9 their broker or adviser is providing advice for the
10 protections of ERISA. A recent survey of plan sponsors
11 reported that 60 percent of small business plan owners
12 indicated they received advice on their plan. Well, if
13 that's ERISA investment advice, what are we all arguing
14 about? That would mean that almost two-thirds of small
15 plans are getting served by a fiduciary adviser. Of
16 course, what we believe is that the investment advice
17 most of these small business owners and plans are
18 receiving is actually non-ERISA investment advice,
19 whatever that means, which is really the point. There
20 is nothing clear and certain about that, particularly
21 to a small business owner trying to provide a
22 retirement plan for his or her employees. When a

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1 broker or adviser is helping a small business owner set
2 up a 401(k) plan and says to the owner, these are the 20
3 investment options that you should offer to your plan,
4 that owner naturally thinks he or she is getting
5 advice. If you never heard of the current five-part
6 definition, wouldn't you? In our members' experience,
7 small business owners are rather surprised when they
8 are informed that the advice that they have received
9 for their ERISA-covered 401(k) plan is not actually
10 ERISA-covered investment advice. The idea that the
11 same advice would theoretically have to be given two,
12 three, maybe four times for the advice to be considered
13 ERISA investment advice, under the current rules, it's
14 a victory of form over substance. What should matter
15 most is the perception of plan sponsors, and to them,
16 particularly small business owners, advice is advice is
17 advice. Marketplace confusion about the roles and
18 responsibilities of brokers and advisers is not a new
19 issue, and is definitely not limited to retirement
20 plans. The SEC recently issued a study recognizing
21 that the recipients of advice are often confused about
22 the duties and obligations of the persons providing

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1 advice. Some commentators have argued that the
2 Department should postpone its consideration of the
3 proposed regulation until the SEC has completed its
4 work on a fiduciary standard for brokers and advisers
5 to avoid potential inconsistencies. We strongly
6 disagree. The issues and implications of advice given
7 to ERISA plans are very different than retail level
8 advice. For instance, advice given to a plan sponsor
9 directly impacts other individuals, namely
10 participants, and thus it's appropriate for the
11 Department to develop its own standards specifically
12 designed for ERISA plans. It's also important to point
13 out that the proposed regulation would not, as some
14 commentators have suggested, preclude commission-based
15 brokers and advisers from working with sponsors, and
16 thus would not eliminate an important distribution
17 channel for plans. Under the so-called limitation of
18 the proposed regulations, such brokers and advisers
19 would be able to exempt themselves from the regulation
20 provided certain disclosures are made to the recipient
21 of the advice. Admittedly, we believe these
22 disclosures are over-broad and unduly harsh. The vast

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1 majority of professional brokers and advisers are
2 dedicated and qualified, and are very much focused on
3 the interest of their clients. No broker or adviser
4 could ultimately be successful in their practice, if
5 their interest were adverse to their clients, and to
6 require disclosure indicating as such, as the proposed
7 regulation does, is just not fair in our view.

8 In these instances, what we believe is most
9 important to be disclosed to recipients of advice are
10 three things: one, that the broker or adviser is not
11 acting as an ERISA fiduciary, and thus the advice given
12 is not afforded the protections of ERISA; two, that the
13 broker or adviser's advice may not be impartial since
14 he or she is compensated by the provider of the
15 investment options being considered, and the amount of
16 the compensation may be affected by the investment
17 selected; and three, the amount of compensation the
18 broker or adviser is reasonably accepted to receive
19 based on the investments selected, which ties nicely
20 into what the Department has already done in its ERISA
21 section 408(b)(2) regulations. This kind of
22 disclosure will reasonably and effectively give plan

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1 fiduciaries the information they need to understand
2 what role their broker or adviser is playing, and what
3 financial relationships exist between the broker or
4 adviser and the plan investment providers. However, it
5 is also critical that this disclosure be clear and
6 conspicuous and not allowed to be buried in a lengthy
7 service agreement. We suggest the Department provide a
8 model notice along these lines. Interestingly, such a
9 disclosure framework would actually be very much in
10 line with what was suggested by the SEC staff in its
11 recent study; namely, a possible fiduciary standard
12 would not preclude commission-based compensation, but
13 would rather require a clear disclosure.

14 We believe what we are suggesting would
15 address the current confusion of plan sponsors and will
16 level the playing field between those providing advice
17 that are currently ERISA fiduciaries and want to be,
18 and those that are not ERISA fiduciaries and don't want
19 to be. In other words, if a broker or adviser provides
20 to a plan what any layperson would think is advice, the
21 broker or adviser will either: one, be subject to the
22 duties and responsibilities of an ERISA fiduciary; or

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1 two, disclose they are not acting as an ERISA
2 fiduciary, and that their advice may not be impartial
3 due to compensation received from the investment
4 providers. That's it. What could be more clear and
5 certain that that?

6 I'd like to spend a few minutes now talking
7 about IRAs. The proposed regulation as currently
8 written, as you know, would apply to IRAs. Further,
9 the proposed regulation asks for comments on whether
10 the definition of investment advice should extend to
11 recommendations related to taking a plan distribution,
12 namely, IRA investments. We strongly recommend that
13 the regulation should not apply in either case. There
14 is no debate that IRAs are an important retirement
15 savings vehicle. Over 40 percent of American
16 households owned IRAs, and they are the primary tool
17 for retirees to manage their retirement assets. But,
18 IRAs are different than ERISA-covered plans. As the
19 Department itself said to the preamble to the fee
20 disclosure regulations, IRA holders have considerable
21 flexibility in the choice of their IRA provider, or the
22 ability to roll over their balances to an IRA provider

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1 of their choice. The Department thus appropriately
2 concluded that the participant fee disclosure
3 regulation should not extend to IRA-based plans. We
4 believe the Department should do the same here with
5 respect to IRAs in general.

6 IRAs are different than ERISA plans in
7 another critically important respect; in contrast to
8 the thorough enforcement regime applicable to ERISA
9 plans, there is no federal agency that currently has a
10 comprehensive enforcement program for IRAs. The fact
11 is, IRA enforcement appears to be more often occurring
12 at the state level, and is hodge-podge at best. Recent
13 warnings issued by the states of Kansas and Oregon
14 about investing IRAs in fractional shares of viatical
15 (ph) settlements are a good example. The fact that
16 states have felt the need to get involved in IRAs is
17 testament to the current lack of federal enforcement.
18 If the Department decides to extend these regulations
19 to IRAs, this is what will happen. Players in the
20 retirement industry who are more formally regulated
21 with extensive compliance departments, like the firms
22 represented by my colleagues on this Panel, will comply

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1 with the rules, and those less formally regulated, who
2 know there is no practical enforcement of the rules,
3 will choose not to comply. While responsible firms
4 will have limitations on their ability to distribute
5 IRAs, less responsible firms will practically have free
6 reign giving them a competitive advantage and uneven
7 playing field. Consumers will be exposed to a
8 significantly great risk as a consequence. Further, if
9 the Department chooses to apply the definition of
10 investment advice to plan distributions, including
11 distributions to IRAs, retirement plan service
12 providers who already have existing relationships with
13 participants will be severely hampered from discussing
14 IRA options with them. These service providers have
15 done an excellent job building programs to work with
16 employees approaching retirement, to encourage them to
17 roll over their retirement savings and prevent leakage
18 from the retirement system. The IRAs they offer have
19 investment options that are generally consistent with
20 those available to the employee in the plan, are high
21 quality, and have reasonable fees. If these service
22 providers are effectively precluded from offering IRAs

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1 to employees, that means participants will be
2 potentially left exposed to less responsible vendors
3 making it easier for some vendors to offer retirees
4 IRAs investing in viatical settlements which is
5 certainly not a result anyone would want.

6 Some people in our industry has described the
7 IRA market as the Wild West. If you apply these
8 regulations to IRAs, you will, metaphorically speaking,
9 be taking the guns away from the good guys leaving only
10 the bad guys with guns. Forgive me, that's not a fair
11 fight. Simply put, any regulatory initiative in the
12 IRA area must be supported by an active, comprehensive
13 enforcement regime to ensure consistent application. In
14 the absence of such enforcement, we strongly encourage
15 you to exclude IRAs from these rules.

16 Thank you, and I would be happy to take any
17 questions.

18 MR. DAVIS: Thank you, Mr. Graff. Mr.
19 Stevens?

20 MR. STEVENS: Thank you, and I thank the
21 Department for holding this hearing, and I congratulate
22 you on your stamina and diligence. I guess you have

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1 been at this since about 9 o'clock this morning?

2 Fiduciary status entails one of the highest
3 obligations known to the law. It also entails some of
4 the heaviest liabilities known to the law. It
5 underpins the entire ERISA compliance structure, and
6 thus we believe that rules governing who is a fiduciary
7 need to provide clarity. They should not impede
8 commonplace financial interactions. They must allow
9 plans and retirement savers to obtain investments that
10 meet their needs, and also to gather a range of market
11 input into their decision-making process.

12 Now the Department's current rule is 35 years
13 old, and we agree that the Department should review its
14 rule in light of changes in how Americans save for
15 retirement. But, what has not changed in those 35
16 years is the need to make very clear the line between
17 commonplace financial market interactions and true
18 advisory relationships. The rule adopted in 1975 did
19 not narrow the definition of investment advice, as some
20 now suggest, but rather implemented Congress' intent
21 that ERISA not disrupt established business practices
22 of financial institutions interacting with employee

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1 benefit plans. In our judgment, revisions to the rule
2 should embrace the following principles. Persons who
3 deal with plans or IRA investors must know whether or
4 not they are fiduciaries. Fiduciary status should
5 attach only to genuine advisory relationships where a
6 position of trust and confidence exists. Simply
7 selling an investment product or a service cannot be a
8 fiduciary act without more, and the rules should not
9 discourage the assistance that recordkeepers engaged to
10 administer plan accounts provide to help fiduciaries
11 prudently select and monitor plan menu investments.
12 Now, in our judgment, to this end, the Department
13 should revise it's proposal as follows.

14 First, the rules should create fiduciary
15 duties only when the adviser provides advice or
16 recommendations individualized to the plan or
17 participant. Unfortunately the proposal does not
18 require that the investment recommendation be specific
19 to either. General statements about an investment or a
20 class of investments, indeed all manner of ordinary
21 business interactions, could be swept in. Many firms
22 send out market newsletters, for example, that might

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1 suggest where interest rates or the price of gold are
2 headed. When someone calls an IRA provider about a
3 rollover, a call center representative might advise
4 that X fund is designed to meet a particular investment
5 objective, or that Y fund is a target date fund
6 designed for people who expect to retire around a
7 particular date. While providing no investment advice
8 as such, no reasonable person would believe those sorts
9 of interactions create or should create an advisory
10 relationship of trust and confidence.

11 Second, the rule should not deem an entity to
12 be a fiduciary based on a person's status, such as
13 whether the entity or its affiliate is an investment
14 adviser as defined in the Investment adviser's Act of
15 1940, if meeting that definition is unrelated to how
16 the entity and the plan sponsor or participant
17 interact. Determining whether someone gives advice
18 under ERISA requires looking at the interaction itself
19 and not whether that person or an affiliate is an
20 adviser under the adviser's Act, the Department and the
21 Courts consistently and properly have viewed ERISA
22 fiduciary status as a functional test based upon what

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1 you do. Now, to be sure, advisers do owe a fiduciary
2 duty under the securities laws, but this duty extends
3 only to their clients; that is, to those institutions
4 or individuals with whom the adviser has a mutual
5 agreement to provide investment advisory services for
6 compensation. It does not apply to every person with
7 whom the adviser or its affiliates or any of its
8 employees interacts. If Congress had wanted every firm
9 that meets the adviser's Act definition to be an ERISA
10 fiduciary, it could and would have said so. It did
11 not. Moreover, the Department should clarify that
12 fiduciary status requires a mutual agreement that the
13 person will be providing individual advice that the
14 recipient will consider in making investment decisions.
15 This should be objectively determined; so parties
16 dealing with plans and IRA customers in good faith are
17 not forever in doubt about their obligations and their
18 potential liabilities.

19 Third, our letter suggests several ways to
20 improve the exceptions in the proposal. The exceptions
21 are essential to making the rule work. We strongly
22 urge the Department to retain the exceptions for

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1 participant investment education and information
2 related to platform investments, so as not to
3 discourage the assistance and education the
4 recordkeepers provide to plan fiduciaries making
5 decisions on plan menu investments, and to participants
6 deciding how to allocate their accounts. As our letter
7 points out, these exceptions also should be available
8 for IRAs.

9 The Department also should retain and clarify
10 the exception for selling an investment product. As
11 proposed, transactions that might entail advice are
12 exempt if it can be demonstrated that the recipient
13 knows or should know the person is providing any advice
14 in its capacity as a seller or an agent of a seller,
15 whose interests are adverse to the interests of the
16 plan or its participants, and that the person is not
17 undertaking to provide impartial investment advice. In
18 this context the Department should make clear first
19 that the exception is available to a broad range of
20 sellers and agents; for example, it should be available
21 when a mutual fund is sold directly by the fund company
22 or its affiliated distributor, and when a fund is sold

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1 through a broker dealer. Second, the exception should
2 not require that a seller characterize itself as
3 adverse. The sale of a mutual fund is not a zero sum
4 game where one side benefits only at the expense of the
5 other.

6 Fourth, the Department should carefully
7 consider how the rules relate to rollovers and IRAs. In
8 our view, it should maintain its position that the
9 recommendation to take an otherwise permissible
10 distribution is not investment advice; otherwise, it
11 will chill the routine process in which a worker leaves
12 a job, contacts a financial services firm for help in
13 rolling over a 401(k) balance, and the firm explains the
14 investments it offers and the potential benefits of a
15 rollover. This is simply not investment advice with
16 respect to the old 401(k) plan even if the result is a
17 liquidation of the prior employer's 401(k) account. And
18 I would add here that, if the Department does say that
19 advising on a rollover is investment advice, it should
20 take the same position with respect to an employer
21 advising a participant not to rollover. There has to
22 be symmetry if the rollover decision is an advisory one

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1 and entails a fiduciary obligation. And, from the
2 employer's perspective, that would require considering
3 -- and I think this is an impossibility -- the range of
4 all the possible rollover options that the employee
5 might consider, and also whether its plan offerings are
6 or are not suitable for an individual at that point in
7 his or her career, including someone who may be
8 approaching retirement. I think that illustrates why
9 it shouldn't be looked at as investment advice on
10 either side of the coin, although we can all agree that
11 advising participants about the pros and cons of one
12 strategy or the other is a good idea.

13 In addition, we think the Department should
14 complete and publish an analysis of the costs of the
15 proposal on IRA investors and providers. While the
16 proposal's language reaches non-employer-based IRAs,
17 the Department's economic analysis, which derives from
18 Form 5500 data, does not consider the cost of the
19 proposal on IRA investors and providers at all. The
20 proposal will generate costs for IRA savers, in that
21 the prohibited transaction rules prohibit commission
22 compensation to fiduciaries in many instances. If

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1 financial advisers must move from a commission
2 structure to a wrap fee in the IRA market to comply
3 with those prohibited transaction rules, this may, in
4 many cases, result in higher fees to IRA investors,
5 especially given the long-term nature of any IRA
6 investments. In addition, there are costs to IRA
7 savers if financial advisers must curtail the
8 information and services they offer to avoid crossing
9 into fiduciary status.

10 Finally, we strongly urge the Department to
11 look at the entire proposal in light of the comments it
12 has received, to draft appropriate revisions, and issue
13 a re-proposal. This would be in keeping with President
14 Obama's recent direction to make sure that interested
15 parties are given a full and fair opportunity to
16 comment on significant regulatory proposals. And, it
17 is in the best interest of Americans saving for
18 retirement that the final rule is clear and workable,
19 and that like it's predecessor, can stand the test of
20 another 35 years.

21 Thank you all very much.

22 MR. DAVIS: Thank you, Mr. Stevens. Mr.

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1 Sweeney?

2 MR. SWEENEY: Thank you, Mr. Davis. My name
3 is John Sweeney. I am an Executive Vice President with
4 Fidelity. I am responsible for planning and advisory
5 services there. Fidelity Investments is the leading
6 provider of investment management, retirement planning,
7 portfolio guidance, brokerage, and many other financial
8 products and services to more than 20 million
9 individuals and institutions, as well as through 5,000
10 financial intermediary firms. Fidelity is the number
11 one provider of IRAs and workplace savings plans
12 providing recordkeeping and other services to other 8.5
13 million IRA accountholders, and over 11 million covered
14 participants with close to 17,000 401(k) plans.

15 During my 13-year career at Fidelity I have
16 held a variety of roles that have centered on the
17 development and management of a wide range of investor
18 products and services. At present I am responsible for
19 the development and management of Fidelity's planning
20 and guidance tools for investors.

21 Our team sits as a shared resource between
22 the divisions that serve retail investors and divisions

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1 providing recordkeeping services to our employer-
2 sponsored retirement plans. The structure of our team
3 is purposely aligned with customer needs rather than
4 the account that they are invested in. Investors don't
5 ask us, how do I save in my 401(k); rather, they ask us,
6 how do I save to meet all of the goals that I have?
7 Many investors that we have are members of the
8 proverbial sandwich generation; one that has many
9 competing needs for a finite amount of savings. An
10 investor is often trying to pay down mortgage debt,
11 save for their own retirement, and might be trying to
12 save for a child's education at the same time they are
13 preparing for an aging parent. Fidelity provides a
14 continuum of products and services so that the investor
15 can choose how they want to interact with us. The
16 simplest end of the spectrum, we offer target date
17 retirement funds, like Fidelity's freedom funds, that
18 provide diversified, age-appropriate investment options
19 in the form of a mutual fund that adjusts out the
20 allocation as the investor ages. Many investors want
21 additional assistance with their investments and we
22 offer a range of planning and educational tools to help

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1 investors answer questions like, how much should I save
2 in my 401(k); how do I construct a diversified portfolio
3 to meet my investment needs; how much income will I
4 need in retirement; and what choices are available to
5 me to help construct a reliable stream of retirement
6 income.

7 For customers who want Fidelity to manage
8 their portfolios, we offer a managed account service.
9 And finally, for customers who have more complex
10 planning needs, we offer a referral to an independent
11 financial adviser. My testimony today will focus on
12 that second category of interaction where Fidelity
13 provides education to investors and prospects free of
14 charge regardless of the type of account that the
15 investor holds.

16 The current investment environment, as you
17 know, is declining -- you know, market declines through
18 2008 to the first quarter of 2009, investors without an
19 understanding of asset allocation, time horizons and
20 risk tolerances may have panicked and left the market.
21 Without the benefit of guidance many remain sidelined
22 today unsure of how to re-engage with their portfolios.

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1 Those who understood the role of equities, bonds and
2 cash, and a diversified portfolio, and had the
3 perspective to remain focused on their long-term goals
4 remained invested, and, in most cases, continued to
5 contribute to their 401(k)s even as the market declined.

6 Beginning in March 2009, as the markets
7 rebounded, those shares purchased when assets were
8 depressed began to appreciate. By the end of 2010, our
9 review corporate-defined contribution plans and 11
10 million participants revealed that the average account
11 balance for participants continually invested for the
12 last year had rebounded 55 percent to almost \$72,000,
13 reaching a 10-year high. More importantly, for
14 participants continually invested for the last decade,
15 this was not a lost decade. In fact, the average 401(k)
16 balance increased from \$59,000 at the end of 2000 to
17 \$183,000 at the end of 2010, which is a combination of
18 continuous contributions, plus appreciation of the
19 underlying securities.

20 As you can well imagine, the last couple of
21 years have tested investors' resolve. Investors looked
22 for answers from their financial services providers.

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1 As financial services providers are providing
2 services for many different types of accounts: taxable
3 accounts, brokerage accounts, and the range of
4 investment options available for retirement, we had
5 many inquiries from our customers over the last couple
6 of years and they delivered some very clear messages to
7 us. One, now, more than ever, investors need our help.
8 Since 2008, the number of investors attending seminars
9 at our branches have increased nearly 30 percent; so,
10 in response, last year we hosted 20,000 live investor
11 forums with more than half a million investors
12 attending an event at either an investor center or at
13 their workplace.

14 In response to customer requests for more
15 insight, we increased the frequency of our investor
16 viewpoints, targeted educational articles on a wide
17 range of investor topics. These have been read four-
18 and-a-half million times.

19 And finally, in response to customer
20 inquiries about what to do with their portfolios, we
21 have seen a dramatic increase in the usage of our
22 guidance tools, such as portfolio review and retirement

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1 income planner, and last year Fidelity provided more
2 than 1.4 million guidance center actions to both
3 customers and prospective customers, free of charge.

4 To summarize, our data has shown us that what
5 is a clear investor need during good economic times
6 becomes an absolute necessity during times of market
7 volatility.

8 The second point is that much of our help
9 assists those who need it the most; the low balance and
10 younger participants. We know that for most workers
11 the primary way that that they receive financial
12 education and guidance is through their workplace
13 savings plan. While some may claim that low and
14 moderate income workers are not savers, our data shows
15 that 53 percent of eligible employees who make between
16 \$20,000 and \$40,000 do participate in their plan, and
17 71 percent of employees making between \$40,000 and
18 \$60,000 participate in the workplace savings plans.
19 These numbers increase significantly for those who have
20 auto enrollment features as part of their plan. And,
21 based on an analysis that we did last year of workplace
22 utilization of our My plan Guidance Tools, nearly three

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1 out of four plan participants were under the age of 50.
2 It's unclear where this group of investors could turn
3 for immediate, no cost guidance of this type.

4 The third major finding that we have is that
5 guidance improves investor outcomes. Based on a six-
6 month workplace analysis that we did last year,
7 participants who used our guidance tools increased
8 their deferral savings rates, on average, by about
9 three percent. When it comes to asset allocation, 40
10 percent of the people who use our on-line investment
11 modeling tool, Portfolio Review, initiated a change to
12 their asset allocation. And, we continue to innovate
13 and respond to investor needs.

14 Nearly three million baby boomers will turn
15 65 today -- that's about 7,500 per day -- and they'll
16 begin their transition into retirement, which must
17 account for longer lifespans, stockmarket volatility, a
18 low interest environment, rising health care costs, and
19 a potentially changing tax landscape. We recently did
20 a study, which found that 62 percent of our pre-
21 retirees heading towards retirement feel anxious or
22 stressed about making that transition from saving for

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1 retirement to living off those savings in retirement.
2 Despite that concern, 75 percent of those pre-retirees
3 do not have a formal retirement income plan in place
4 that could help alleviate some of that anxiety. Several
5 years ago we launched Retirement Income planner to help
6 customers answer the question, how much will I need to
7 live in retirement? By helping customers understand
8 concepts like inflation, rising health care costs and
9 longevity, we began a dialogue with our customers that
10 helped them understand some of the risks they faced
11 when they entered retirement. But, today's retirement
12 environment is facing -- forcing even more questions
13 for America's workers; interest rates are low,
14 corporations have cut the dividends they pay their
15 investors, pensions are under pressure, and retirees
16 are being asked to shoulder a larger portion of their
17 health care expenses.

18 Last month we expanded our education and
19 guidance to pre-retirees by unveiling an innovative new
20 program to help investors and workplace participants
21 close to retirement explore vehicles that provide
22 income in retirement. We know that lifetime income is

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1 an important priority for the Department and view the
2 tools that we have developed is an important step in
3 helping to educate investors on how to shift their
4 portfolios from the accumulation mode towards
5 portfolios that will provide income streams throughout
6 retirement. The program's highlights include an
7 intensive 30-day coast-to-coast education, an investor
8 education initiative that includes 200 free live
9 educational seminars and events, one-on-one guidance
10 sessions with Fidelity professionals, and the
11 introduction of a Fidelity income strategy evaluator,
12 an on-line tool designed to help participants
13 understand how different investment products can help
14 generate income throughout retirement. This program is
15 already available to more than 10 million workplace
16 plan participants and to non-Fidelity customers as
17 well.

18 We appreciate the Department's desire to
19 thoughtfully re-examine what constitutes fiduciary
20 investment advice. What we cannot stress enough is
21 that the new rules must encourage, not restrict, the
22 ability of financial services providers to provide

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1 educational support. Over 11 million participants
2 invested in Fidelity through a workplace-sponsored 401-
3 K plan. Most of these participants also have IRAs and
4 other savings vehicles, either at Fidelity or at other
5 firms. We know that most Americans will be required to
6 use a combination of their workplace retirement
7 accounts, their IRAs, as well as taxable accounts to
8 supplement social security and any pension that might
9 be available to provide income in their retirement.

10 At Fidelity our experience has been that
11 investors do not treat these accounts differently when
12 considering questions such as: am I prepared for
13 retirement; am I meeting my savings goals; and how can
14 I transform my savings into retirement income.
15 Similarly, regardless of whether an investor is
16 deciding between 30 investment option in his or her
17 401(k) or broad universal investment choices when
18 dealing with his or her IRA, the deliberations are the
19 same; investors do not and cannot be expected to
20 believe that the legal framework governing these
21 investment decisions is different based solely on the
22 vehicle they have chosen to make their investment.

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1 Given the importance of proper oversight on
2 behalf of investors and the services they receive, we
3 appreciate that the Department is working with the SEC
4 to ensure that these investor services are protected
5 and not restricted under a new regulatory regime.

6 Any changes to the current ERISA definition
7 of fiduciary investment advice should not threaten
8 access to the guidance that all the investors receive
9 every day by placing a phone call, going on-line,
10 attending an investor workshop, or visiting a branch
11 for one-on-one assistance. Investors do not understand
12 the underlying regulatory complexity that allows for
13 the valuable services they receive; however, they have
14 a growing awareness that they need to save and invest
15 in their workplace plans, their IRAs, and other
16 accounts, as the saving and retirement tools for most
17 Americans. We ask for your assistance in providing a
18 framework in which we continue to respond to the
19 thousands of American investors who ask us every day,
20 how do I save and invest to meet the many goals I have
21 in life?

22 Thank you for the opportunity to testify

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1 today. I am happy to respond to any questions you have
2 at this time.

3 MR. DAVIS: Thanks so much, Mr. Sweeney. I'll
4 turn to Virginia for the first question.

5 MS. SMITH: Mr. Stevens, in the previous
6 panel Mr. Ferrigno talked about his experience with
7 rollover distributions and why people involved with
8 that should be considered fiduciaries, and you
9 indicated that that should not be considered investment
10 advice, and the way you provided the example is really
11 what I want to hone in on. Your example was, when a
12 participant approaches somebody about rollover advice
13 then that shouldn't be considered fiduciary advice. Did
14 you really mean to narrow it just in situations where
15 the participant instituted the discussion, or are you
16 looking at both ways?

17 MR. STEVENS: Well, first of all, my focus on
18 the rollover issue, as such. Presumably you could then
19 get into a whole range of issues. Well having decided
20 to rollover, I recommend this, that and the other
21 thing. That may very well constitute investment
22 advice.

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1 MS. SMITH: Mmm-hmm (in the affirmative).

2 MR. STEVENS: That may very well be subject
3 to all sorts of regulatory issues, but it's not
4 investment advice of the sort that we are talking about
5 here, I don't think. The rollover decision --

6 MS. SMITH: Which is whether to rollover?

7 MR. STEVENS: -- the rollover decision
8 itself, I could say it's advice about tax planning; I
9 could say it's advice about structuring one's financial
10 assets. I personally have had five 401(k) plans in my
11 career, and frankly I would have been very ill-advised
12 to keep my assets in five different places. So I would
13 look at that as advice not with respect to the
14 investments in the old plan, but advice with respect to
15 how you are going to maintain your investments going
16 forward and the tax advantages or disadvantages there
17 might be of one or the other, and the flexibility in
18 terms of the investment options in one as opposed to
19 the other.

20 MS. SMITH: Okay. I listened to your
21 description of what you think the regulation should be
22 that started out with the caveat that you think

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1 standard business practices should not be disrupted,
2 and I am not sure I followed you, but is there any part
3 of the five-part rule that you would agree is
4 unnecessary?

5 MR. STEVENS: I appreciate, Ms. Smith, the
6 opportunity to address that. We think it's quite
7 reasonable that the Department would, for a variety of
8 reasons. One, to address this notion that it's not
9 investment advice and let's just provide it on an
10 ongoing or regular basis. We certainly would
11 acknowledge that you can have investment advice, which
12 is a one-off event, which could be quite significant.

13 MS. SMITH: Okay.

14 MR. STEVENS: We also think that it's
15 reasonable to say that there shouldn't be a requirement
16 to prove that it was the primary basis for investment
17 decision-making. It could simply be a basis or a
18 factor, or something of that nature, and that would
19 make sense to us as well.

20 MS. SMITH: Okay.

21 MR. STEVENS: There are other things the
22 Department can do to as it thinks about this going

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1 forward. You have identified for yourselves an issue
2 we don't really have any position on with respect to
3 valuation, for example, which is predicated on
4 experience the Department has. So, we would say there
5 are certainly things that you could do that, from our
6 perspective at least would not be terribly
7 controversial, but it's some of the other aspects of
8 the rule and the lack of clarity that they entail that
9 causes us the concern.

10 MS. SMITH: Okay. One last question, if I
11 may, of Mr. Graff, if I can find my question? When you
12 were talking about -- putting aside the IRA issues
13 please for me --

14 MR. GRAFF: Sure.

15 MS. SMITH: -- I mean --

16 MR. GRAFF: Oh, come on, Virginia? Okay.

17 MS. SMITH: But, the other information that
18 you provided, one of the things that you did not
19 address that several people today have addressed is
20 this idea that a regulation is going to cause a lot of
21 increased cost; how does ASPPA view that?

22 MR. GRAFF: We don't agree with that

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1 assertion at all.

2 MS. SMITH: You don't? And, why not?

3 MR. GRAFF: Because the -- what we believe is
4 that if we can fashion a seller's exemption that is
5 somewhat more -- is written in a way that people are
6 more comfortable with, we believe frankly the
7 marketplace will settle out such that those people that
8 want to be ERISA fiduciaries, who currently are right
9 now, will continue to do so. Those costs are already
10 baked into their fees. And, those that don't want to
11 will take advantage the seller's exemption. So that's
12 what's important, is that the marketplace clearly
13 understands what's going on with the person that they
14 are working with. If they are a commission-based
15 adviser, the customer should know that they are dealing
16 with someone who is a commission-based adviser and
17 decide to work with that person and move on. So we
18 don't believe, in the end, if this is fashioned
19 correctly, that it would have any significant
20 marketplace disruption.

21 MS. SMITH: Thanks.

22 MR. DAVIS: Mr. Stevens and Mr. Graff, I

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1 think you both in your testimonies talked about the use
2 of the word adverse, and we have heard testimony on
3 that word in previous panels. Do you guys have
4 thoughts that you would share on what you would use in
5 place of the word adverse?

6 MR. STEVENS: Well, I guess my point is
7 fairly simple. If you think about economic
8 transactions -- I took a cab over here just now -- I
9 got in the cab. I knew I was going to have to pay the
10 taxicab driver and I paid the taxicab driver, and he
11 did a fine job of getting me here to the Labor
12 Department. But, I didn't consider the fact that he
13 was going to be compensated for what he did, to create
14 a conflict of interest, because if it does, then we
15 have conflicts of interest virtually everywhere in our
16 economic society. It proves too much. The
17 compensation is a subject for disclosure, and the
18 Department has worked long and hard on making sure that
19 plans and plan participants and others are well-
20 informed, and we have supported that idea. But, the
21 fact that a service has provided for compensation or an
22 investment product for compensation doesn't necessarily

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1 mean that's a conflict of interest. I doubt that my
2 colleague here, Brian, would say that the unregulated
3 advisers that he -- the providers that he represents,
4 who are providing recordkeeping services, necessarily
5 are adverse to the plans that -- by the recordkeeping
6 services just simply because they expect to be paid for
7 them. So I think it's gratuitous. It's not necessary
8 to the rule to put that in. And frankly, in our frame
9 of reference, we don't accept it as a characterization.

10 MR. GRAFF: Yeah. And, as I said, I
11 certainly think it's unduly harsh. We -- you know,
12 again, what does the customer need to know, the plan
13 sponsor need to know so they can approach this in a
14 transparent way and understand who they are dealing
15 with and what the financial arrangements are. So, as I
16 said before, I think, one, they need to know that the
17 person that they are dealing with is not an ERISA
18 fiduciary, okay; two, that the advice may not be
19 impartial because they are being compensated by the
20 individual, the investment providers, and that the
21 amount of that compensation could be affected by the
22 investments selected; and three, what -- as 408(b)(2)

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1 is going to require, what's the amount that's
2 reasonably expected to be received as compensation from
3 those investment providers? We think -- you know we
4 can dither over the word impartial, if that's the right
5 word. I think there is a word somewhere along the
6 lines -- I think their principles frankly are more
7 important than words, and we believe if that, the
8 essence of those points of information are conveyed,
9 then the plan sponsor, with open eyes, will be making a
10 choice. And, we absolutely believe, particularly in
11 the small business market, that many small business
12 sponsors will continue to work with an adviser, who is
13 commission-based, and there is nothing wrong with that,
14 and I think it's important that everyone recognize
15 that. We just want to make sure that, in our world,
16 there is this -- sometimes it's referred to as the
17 blind squirrel -- you may have heard that expression --
18 and our basic concern, from a policy standpoint, is we
19 want to make sure that, to the extent there is behavior
20 out there that is concerning, that this information is
21 clearly disclosed.

22 MR. STEVENS: May I supplement my comment,

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1 because the disclosure issue seems to be taking such a
2 front and center attention here? I worry about
3 disclosure for two reasons as a way of approaching this
4 issue.

5 One, it celebrates form over function. You
6 can essentially get a boilerplate disclaimer, and I
7 don't know what lengths you'll have to go to get it,
8 but a boilerplate disclaimer that then basically says,
9 well, I can now invite all the trust and confidence I
10 want because you have said that I am not your
11 fiduciary, and I think that invites lots of mischief
12 potentially.

13 The second thing about a disclosure regime is
14 that it will burden the system with paperwork, because
15 you will have to get it into each interaction. There
16 is not a once and forever way of doing that, and you
17 will even only -- as a provider of a service, you think
18 about an interaction about a mutual fund call center,
19 perhaps discover long into the conversation that the
20 context that the individual is calling you about is one
21 where you need to give a disclosure. And then some
22 have suggested that it be written. And so you'll have

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1 to stop the world and say, you'll have to send this
2 form back to me before I can talk to you about anything
3 here just to acknowledge that I am not your fiduciary.
4 The Department ought to be looking at the course of
5 dealing between the parties and ask itself whether it
6 is reasonable for the individual to expect that the
7 person on the other side of the table has undertaken to
8 provide impartial investment advice to them. And,
9 irrespective of whatever paperwork -- if that's the
10 case, then that's fine -- I also don't believe that you
11 can simply ask people, do you think this person is a
12 fiduciary, and that solves it. The fiduciary concept
13 is a legal concept. Most people don't understand it,
14 but I think, looking at the course of dealing, the
15 Department ought to be able to tell when the line has
16 been crossed or not.

17 MR. GRAFF: You know just to add to what Paul
18 is saying, I think there is a concern, and this goes to
19 the issue of whether or not there should be a
20 postponement of these -- of considering these rules,
21 waiting for the SEC to act. There are plenty of folks
22 in our industry, who are regulated by the SEC by FINRA,

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1 but there are also plenty of folks who are not, and you
2 need to be mindful of that. They may be subject to
3 some state regulation; they may be subject to no
4 regulation, and they are out there. And, it's
5 important that you guys address this because of that
6 gap. So there are going to be situations where there
7 will be customers, in our view, that will not
8 appreciate who they are dealing with, and so it's
9 important that they understand that.

10 MR. DAVIS: Thank you.

11 MR. LEBOWITZ: I -- not to be argumentative,
12 but I was intrigued by your cab driver story. It seems
13 to me that the only reason that your interests were not
14 adverse was because your ride was very tightly
15 regulated; the cab driver was not free to set his own
16 compensation, unless he went by Bethesda or something
17 from wherever you were coming from. But for that
18 regulation, if you got into the cab and there were no
19 meters, no regulations at all, the cabbie says let's
20 negotiate. In that circumstance your interests, it
21 seems to me, were quite adverse to the driver's. So I
22 think it proves the value of regulation.

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1 MR. STEVENS: Can I respond? They were
2 adverse, Alan, only because the cab driver had an
3 interest in being paid more and I have an interest in
4 paying less.

5 MR. GRAFF: Right.

6 MR. STEVENS: And that operates without a
7 framework, you are right, but that's true within
8 markets too.

9 MR. LEBOWITZ: Right.

10 MR. STEVENS: But it's always in the
11 provision of any kind of service or sale of any product
12 that those two interests are, or it seems to me, at
13 odds with one another.

14 MR. LEBOWITZ: Yeah. And I think that's
15 really all we are getting at in the use of the word.
16 But, I just wanted to -- just one question for Brian.
17 You described the IRA market as the Wild West, but you
18 are opposed to our proposed approach to it, leaving it
19 the way it is, I guess, --

20 MR. GRAFF: Mmm-hmm (in the affirmative).
21 Yeah, that's right.

22 MR. LEBOWITZ: -- which you think is better

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1 than it would be?

2 MR. GRAFF: Correct.

3 MR. LEBOWITZ: So can you talk about that a
4 little bit more?

5 MR. GRAFF: Explain why?

6 MR. LEBOWITZ: Yeah.

7 MR. GRAFF: Well, very much so, and we
8 thought long and hard about this. I personally spent
9 some time in dealing with some state issues. I
10 personally spent some time in the state of Nevada,
11 quite a bit of time, dealing with a situation with some
12 vendors that were selling fractional shares of viatical
13 settlements, interest in limited partnerships, and
14 literally the enforcement regimen that was practically
15 being employed to these providers was minimal, and
16 that's probably overstating it. And so, your concern,
17 as policy makers, your concern and our shared concern
18 isn't about the fact that, on a marginal basis it might
19 be that the retirement plan service provider is going
20 to get five basis points more on an IRA investment
21 versus the in-plan investment. The bigger concern
22 frankly is elderly people losing their entire IRA and

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1 their entire retirement assets because they had been
2 investing in limited partnerships interests and
3 viatical -- stuff that they shouldn't be anywhere near.
4 And, if the more regulated providers, the larger
5 providers who have compliance departments, are hampered
6 in any way, then they are going to be disadvantaged in
7 that marketplace. And right now, given what's going
8 on, our concern about where the money has been going in
9 the first place is paramount relative to the issue of
10 fees. And we think, frankly, the IRA market is
11 generally very competitive. As you pointed out in your
12 preamble, there are -- you know the IRA is under the
13 control of the retiree; they can decide to move the
14 money where they want to be and they have control over
15 it, and given all those factors, until there is some
16 basis where you can apply enforcement in a consistent
17 way and meaningful way, we think you will do more harm
18 than good in the short run.

19 MR. LEBOWITZ: Do you have a vision of a --

20 MR. GRAFF: Well, I mean, you know there has
21 been some -- there has been -- it's interesting --
22 there are people in our industry who are scared to

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1 death about what I am about to say, but I'm going to
2 say it anyway, because I think you guys know that I
3 never am shy about these things -- I do think that, as
4 more and more baby boomers are retiring, as my
5 colleague to my left said, and they are choosing to
6 move their money typically to an IRA, there is a larger
7 universe of consumers who are prey to vendors who are
8 selling products that, for most retirees, they
9 shouldn't be anywhere near. And I think we are going
10 to start hearing more and more of these stories. I do
11 think we need some type of regime -- it may have to be
12 disclosure only because, practically speaking, the idea
13 of an army of -- of any agency having an army of
14 employees, to imagine that right now in this fiscal
15 situation is rather unlikely, but nonetheless, if there
16 was some uniform disclosure rules, at least it would be
17 somewhat easier to identify whether the enforcement is
18 happening. And, where would that be placed? That's --
19 you know, that's an inter-agency issue and, as a
20 general manner, I have learned that that's generally
21 not something I should get myself in the middle of.

22 MR. LEBOWITZ: Mr. Sweeney, do you have any

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1 observations about that?

2 MR. SWEENEY: I think that in terms of IRAs,
3 what you -- what I mentioned before is that people
4 think of them as one of the stools of retirement income
5 -- well, retirement savings first of all, and then
6 ultimately retirement income; so we think that they are
7 used in combination. Legislatures have given investors
8 the option to save in a workplace sponsored retirement
9 account plus an IRA, and most customers that we see
10 have to use both of those to solve their retirement
11 income. And we think it's important that people know
12 about their options and be able to choose from them.

13 To Mr. Stevens' point earlier around the
14 choices, we think it's important to make sure that
15 people understand their options, so whether they --
16 when they are leaving their jobs -- you said you had
17 five 401(k)s at some point -- the average American will
18 work for seven employers over their career, and so
19 managing investments across seven different 401(k)s is
20 very difficult. We talk about concepts not only around
21 asset allocation, but asset location. You want to
22 think about what accounts you hold different asset

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1 classes in. You want your high turnover or high tax
2 accounts in the accounts that are tax deferred, and you
3 want more efficient vehicles in the accounts that are
4 taxable. So when you start thinking about a client's
5 portfolio, you want to educate them on concepts when
6 they are thinking about their portfolio in totality,
7 because it's important that they see all of the options
8 available to them when they are trying to accumulate
9 savings and then ultimate generate income in
10 retirement.

11 MR. HAUSER: For Mr. Stevens, I was intrigued
12 by your suggestion that the focus ought to be on, you
13 know, whether the person had a reasonable expectation
14 that they were in a position of trust and confidence,
15 vis-the adviser, as opposed to getting too into the
16 weeds on various disclosure sorts of documents. But,
17 with respect to the seller exception, I just wonder
18 exactly how you go about accomplishing that purpose,
19 because it seems to me one of the problems is that
20 there is a lot of confusion, and especially in
21 unsophisticated investors' minds, as to whether they
22 are being sold a product or whether they are really

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1 being sold advisory services? And, even broker
2 dealers, they may -- you know they are brokers when
3 they are submitting comment letters to us, but they are
4 financial advisers and financial planners, you know,
5 when they are dealing with participants. And, the
6 commercials, you know, suggest that they are there.
7 They are in your corner. They are -- you know, they
8 are going to be there for your retirement. And so I
9 think for a lot of people there probably really is kind
10 of an expectation that we are getting good faith,
11 professional advice that's in no way steered by any
12 conflicts we may have. And, I guess, what, short of
13 disclosure, is where you draw the line and have a
14 seller's exception that's going to get at that problem?

15 MR. STEVENS: Well, first of all, I would say
16 that I am very sympathetic. I understand the challenge
17 of drawing the line, but my point most basically is
18 that there has to be a context in which it is in fact a
19 sale and it's not been that relationship of trust and
20 confidence that's been assumed. I think if you were to
21 adopt a rule with that as the standard and make it
22 clear that the Department will look at all the facts

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1 and circumstances for that purpose, that will encourage
2 people, not necessarily in some sort of wooden,
3 regulatory, mandated disclosure regime, but just as a
4 matter of a course of dealing with participants or with
5 plan sponsors to try to make sure that they are on the
6 right side of that line when they want to be looked at
7 as sellers. And, there are people, there are
8 industries, certainly in our context included, where
9 that would be the case. If you have a directly
10 marketed fund firm, you know, they don't undertake --
11 and this is in the normal marketplace -- they do not
12 undertake to have an advisory relationship with a
13 customer. They offer a menu, they inform you about the
14 menu, and you select from the menu, and it's a sale. So
15 my point is that the rule needs to make room for both
16 and draw the line as best you can. I wouldn't do it
17 simply on the basis of some disclaimer document, but
18 more in the context and all the circumstances, and
19 thereby incentivize people to make sure that dealing
20 honestly and conscientiously with people they don't
21 leave a lot of room for doubt about which part of that
22 -- which side of that line they are on.

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1 MR. HAUSER: Thank you.

2 MR. DAVIS: I think that's it. Thanks so
3 much.

4 MR. STEVENS: Thank you.

5 MR. DAVIS: We are adjourned for the day. Our
6 panel number eight starts tomorrow at 9:15 in this
7 room. Thank you.

8 (Whereupon, the meeting is adjourned).

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, NATALIA KORNILOVA, the officer before whom the
3 foregoing meeting was taken, do hereby certify that the
4 witness whose testimony appears in the foregoing pages
5 was recorded by me and thereafter reduced to
6 typewriting under my direction; that said hearing is a
7 true record of the proceedings; that I am neither
8 counsel for, related to, nor employed by any of the
9 parties to the action in which this hearing was taken;
10 and, further, that I am not a relative or employee of
11 any counsel or attorney employed by the parties hereto,
12 nor financially or otherwise interested in the outcome
13 of this action.

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Natalia Kornilova
Notary Public in and for the
District of Columbia

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21 My commission expires: April 14, 2012

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