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as prepared
for a virtual hearing

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regarding the Notice of Proposed Rulemaking,
“Retirement Security Rule: Definition of an Investment Advice Fiduciary”

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I am here on behalf of SIFMA representing securities firms, banks and asset managers - and the clients and individuals our members serve. While we appreciate the opportunity to testify, we are bothered by the decision to hold a hearing in the middle of the comment period. The purpose of a hearing is to allow interested persons to review other comments and provide testimony on their position, as informed by those other comments. The Department of Labor's unprecedented approach here precludes all stakeholders the opportunity to do that, resulting in a rulemaking that will be less robust, and likely flawed. Further, as we have previously stated, the Department's decision to provide only a 60 day comment period which includes three of the largest federal holidays of the year is not designed to obtain the most helpful and well considered public comments. It also makes it challenging to provide the robust analysis and internal discussions with our members necessary to help the Department reach a result that ensures continued protection for investors that can also be operationalized, while at the same time providing retirement investors access to advice and education and the ability to choose how they receive that advice and education. We question why the Department is undertaking a rulemaking of such breadth at all. We have not heard of any situations of abuse where courts have held that investment professionals were protected from liability due to a lack of oversight by the Department. If the Department's enforcement program is overrun with such instances, there is no mention of those facts in either the preamble or the cost analysis. We believe amendments to the regulation defining investment advice fiduciary are unnecessary due to the SEC's Regulation Best Interest, the NAIC's best interest model and the Department's own PTE 2020-02. Our member firms made substantial changes in 2019 and 2020 to implement Regulation Best Interest, and, for some firms, they instituted further changes to their practices to comply with PTE 2020-02. Flexibility in practices and firm arrangements provide individual investors with substantial choice in the marketplace, while still getting the benefit of financial professionals looking out for their best interest. In fact, senior Department officials have acknowledged the validity of Reg BI as a strong standard. Nonetheless, the Department has chosen to draft a regulation so broad as to make all conversations between a financial professional and an investor into ERISA fiduciary conversations. We see these changes as even broader and less tethered to the common law of trusts than the 2016 changes that were vacated by the Fifth Circuit decision in Chamber of Commerce v Acosta. This Department's new proposal is based on the arrangements a retirement investor makes with investable assets that are not even in an ERISA-covered plan or IRA. It is based on the financial professional's business, rather than on the relationship of trust and confidence with respect to the plan or IRA at hand. It does not acknowledge that dealers in securities and commodities selling to

sophisticated large plans or their very experienced investment managers are not acting as fiduciaries. It also covers market color, as well as publicly available research and quotes, despite those obviously not being fiduciary actions. It covers an individual moving from one IRA to another IRA, as well as moving from advisory services to brokerage. SEC and FINRA rules have covered the field here; there is no reason for the Department to get in between these relationships as well - especially if the Department's new rules and exemptions are getting in the way of how these financial institutions are organized and supervised, resulting only in conflicts and inconsistencies. We fail to see how these new rules meet the tests set out by the Fifth Circuit or help individuals trying to save for retirement. Prior to issuing the rule, the Department spoke about regulatory arbitrage and insurance professionals being subject to different rules from broker dealers. But if that is the Department's focus the first step should have been determining whether there is a problem, and – if there is - then the second step should have been a tailored, narrow approach to that problem. The Department took neither of those steps. Instead, the Department chose to once again drastically increase the scope of the fiduciary definition, while shoehorning everyone into a single exemption, making substantial changes to that prohibited transaction exemption for all financial institutions, and putting the Department's thumb on the scale of what products can be sold to retirement investors. PTE 2020-02 has only been in place for two years. Firms that have chosen to use PTE 2020-02 made changes in their business practices to make this exemption work, only to face the prospect of yet additional burdens and changes. In our view, much of the Department's proposal is beyond the Department's jurisdiction and likely to be vacated by the courts. This cycle of overbroad regulation, and judicial disapproval of agency action is very disruptive and costly for firms and their clients. I would also note that the Department has not made its case for why any of these changes are necessary. The Department's cost benefit analysis does not take into account the fact that the regulatory landscape has changed since their final rule of 2016 - which was found unlawful and vacated by the Fifth Circuit Court of Appeals. As I mentioned earlier, there is a new SEC rule, new state laws and the new PTE. All of those have provided new protections and a new standard of care for individual investors. The Department should be taking all of these changes into account before changing the definition of an ERISA fiduciary and increasing the burdens of accessing PTE 2020-02 with no benefit to investors – merely imposing substantial costs and limited investment access to retirement investors which will reduce retirement savings. While we are still working on our comment letter, I will highlight a few areas that we have already found to be particularly problematic. They include: - Sweeping in conversations that are merely educational, as well as those that are responsive to RFPs and other inquiries

from large plans, as well as the equivalent of a “hire me” conversation – none of these should be considered ERISA fiduciary advice; - The proposal also seems to preclude any education in the rollover area: the Department will simply deem any conversation about a rollover as a fiduciary conversation. There is no basis for this approach. - The proposal includes an ineligibility provision that unlawfully gives the Department the power of prosecutor, judge and jury. It allows a foreign government to dictate whether a large bank holding company should be allowed to service US retail investors, including based on a decision by the foreign government regarding a foreign affiliate of the bank that has no responsibility for or interaction with US retail investors – the only way around is to get an exception from the Department - causing enormous disruption in client accounts and broker affiliation; - The Department does not appear to have worked with the SEC, FINRA or the states. It will cause major disruption in the marketplace, and those costs have not been assessed accurately by the Department. The Department’s ability to issue exemptions is intended to help the markets work efficiently, yet this proposal will have the opposite result. For all of these reasons, the Department should withdraw this proposal, which is overbroad, unnecessary and inconsistent with existing federal regulations such as the SEC’s Regulation Best Interest. There are so many more areas of retirement law that deserve our attention, including helping more individuals save for retirement and save for emergencies, increasing exposure to financial literacy programs, and helping individuals make their savings last through retirement. Lets find better uses for our collective time. Thank you.