

In The Matter Of:

*Alina Boyden and Shannon Andrews v.
State of Wisconsin Department of Employee Trust Funds*

*Deposition of Herschel E. Day
April 2, 2018*

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*Original File Day Herschel 4-2-18.txt
Min-U-Script® with Word Index*

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
 SHANNON ANDREWS,

Plaintiffs,

-vs- Case No. 17-CV-264

STATE OF WISCONSIN DEPARTMENT
 OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

Deposition of HERSCHEL E. DAY, taken
 at the instance of the Plaintiffs, under and pursuant
 to Section 804.05 of the Wisconsin Statutes, before
 Rowan L. Bright, RPR, CRR, and Notary Public in and
 for the State of Wisconsin, at the offices of the
 State of Wisconsin Department of Justice,
 17 West Main Street, Madison, Wisconsin, on
 April 2, 2018, commencing at 1:00 p.m. and ending at
 4:43 p.m.

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1 HERSCHEL E. DAY, called as a witness,
 2 being first duly sworn, testified on
 3 oath as follows:
 4

5 EXAMINATION

6 By Mr. Fairweather:
 7 Q Can you please state your full name for the
 8 record.
 9 A Herschel Edwin Day.
 10 Q Mr. Day, what is your current address, residence?
 11 A [REDACTED]
 12 Q How are you currently employed?
 13 A I am an associate professor at the
 14 University of Wisconsin-Eau Claire.
 15 Q I'm going to back up and give you some
 16 introductory rules, if that's okay.
 17 A Okay.
 18 Q Have you ever given sworn testimony before?
 19 A I have not.
 20 Q Have you given any kind of testimony before?
 21 A I have not.
 22 Q You understand that you're under oath here today?
 23 A I do.
 24 Q So I'm going to ask you a series of questions
 25 relating to your role on the

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1 A P P E A R A N C E S

2 HAWKS QUINDEL, S.C., by
 3 MR. NICHOLAS E. FAIRWEATHER,
 4 409 East Main Street,
 Madison, Wisconsin 53703,
 appeared on behalf of the Plaintiffs.

5 STATE OF WISCONSIN DEPARTMENT OF JUSTICE by
 6 MR. COLIN T. ROTH and JODY J. SCHMELZER,
 7 17 West Main Street,
 Madison, Wisconsin 53707,
 appeared on behalf of the Defendants.

8 Also Present: Laurence J. Dupuis and David Nispel

9 I N D E X

10 Examination:	Page
11 By Mr. Fairweather	3/110
12 By Mr. Roth	101/113
13 Exhibits Identified:	
14 1 E-mail from Tara Pray 7/21/2016	43
15 2 E-mail from Herschel Day 7/15/2016	59
16 3 E-mail from J.P. Wieske 9/28/2016	68
17 4 Correspondence Memorandum 8/12/2016	70
18 5 Meeting minutes 12/13/2016	77
19 6 Meeting minutes 12/30/2016	80
20 7 E-mail from Lisa Ellinger 1/31/2017	95
21 8 Meeting minutes 2/8/2017	98
22 9 Meeting minutes 5/24/2017	99
23 (The original exhibits were attached to the original 24 transcript, and copies were provided to counsel)	
25 (The original deposition transcript was filed with Attorney Nicholas E. Fairweather)	

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1 Group Insurance Board. And if you don't
 2 understand one of my questions, just let me know
 3 and I'll try to rephrase it. But if you don't say
 4 something and you go ahead and answer, I'm going
 5 to assume that you've understood my question. Is
 6 that fair?
 7 A Yes.
 8 Q One rule is if I ask you a yes-or-no question,
 9 please respond with a yes or no, not a nod or a
 10 head shake, so Rowan can take down the testimony.
 11 Is that okay?
 12 A Yes.
 13 Q If you need a break at any point, just let us know
 14 and we'll take a break. You can use the restroom,
 15 get a drink of water, whatever you need to do.
 16 The only thing I would ask is if there's a
 17 question pending, that you answer that question
 18 before you take the break. Is that okay?
 19 A Yes.
 20 Q What did you do to prepare for today's deposition?
 21 A I reviewed some of the documents that I had sent
 22 to DOJ, the documents that were requested.
 23 Two weeks ago I met with DOJ here for about an
 24 hour and a half. And that's the extent of it.
 25 Q You testified that you reviewed documents that you

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1 sent to DOJ; is that correct?
2 A Yes.
3 Q What documents did you review?
4 A I reviewed some of the documents in terms of
5 e-mails that I had sent related to the case.
6 That's primarily what I reviewed, were the -- not
7 all of them but some of the e-mails that I had
8 sent.
9 Q Any other documents that you remember reviewing to
10 prepare for today's deposition?
11 A None that I recall.
12 Q Have you spoken with anyone about your deposition
13 outside of your lawyers, the DOJ lawyers?
14 A I have.
15 Q Who have you spoken with?
16 A My wife, primarily.
17 Q Anyone else?
18 A My department chair knows. I informed him about
19 it so he knew I would be gone today.
20 Q Did you speak with your department chair about the
21 substance of your deposition, that is, what you
22 expected it to be today?
23 A I'm not sure I understand.
24 Q Sure.
25 Outside of telling your department chair that

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1 you were going to be here today and not in
2 Eau Claire, did you talk about the substance of
3 the case or the deposition today with him?
4 A I told him about the case generally, yes.
5 Q What did you tell him about the case?
6 A I told him that there was a case brought against
7 the board on behalf of two transgender individuals
8 and that I was asked to provide a deposition.
9 Q Anything else you remember telling him about the
10 case?
11 A Nothing else I recall.
12 Q Outside of your department chair and your wife,
13 anyone else you remember talking to about the case
14 or today's deposition?
15 A A colleague and friend.
16 Q Is that the same person?
17 A Yes.
18 Q Who is that?
19 A Kris Presler is his name, K-r-i-s.
20 Q Does Mr. Presler work at the
21 University of Wisconsin-Eau Claire?
22 A He does.
23 Q What does he do there?
24 A He is a professor.
25 Q In the mathematics department?

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1 A Correct.
2 Q Anyone else you can remember talking to about the
3 deposition or the case prior to today outside of
4 who you've already mentioned?
5 A May I -- to clarify, since I found out about the
6 deposition? Is that --
7 Q Correct.
8 A -- what you're asking?
9 Q Let's start there. Since you found out about the
10 deposition, have you talked with anyone about
11 either the deposition or the case generally?
12 A I spoke with a former pastor of my church,
13 Kurt Jacobson, K-u-r-t.
14 Q And that was relatively recent?
15 A Yes, in the last two to three weeks.
16 Q Why did you speak with Mr. Jacobson about the
17 case?
18 A He had called with an update for his personal
19 life, and he had asked what was going on. And I
20 had simply let him know that I was asked to
21 provide a deposition in this case.
22 Q Is that all you can recall, as far as people
23 you've spoken to since learning about the
24 deposition?
25 A Yes. That's all I recall at this time.

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1 Q You testified earlier that you are an associate
2 professor of mathematics at the
3 University of Wisconsin-Eau Claire; is that
4 accurate?
5 A Yes.
6 Q How long have you been an associate professor at
7 the University of Wisconsin-Eau Claire?
8 A I have been at UW-Eau Claire for almost
9 seven years now. I can't remember when I was
10 promoted to associate professor. I don't know how
11 long I've been in that role, per se, but I've been
12 at the university almost seven years.
13 Q Were you hired as an assistant professor at
14 UW-Eau Claire?
15 A I was.
16 Q Do you recall when? Was that 2011?
17 A Yes. Fall of 2011 was my first semester at
18 UW-Eau Claire.
19 Q You were hired as an assistant professor in the
20 department of mathematics; is that right?
21 A Yes.
22 Q What were your job duties as an assistant
23 professor in the department of mathematics?
24 A Duties include teaching, scholarship, service to
25 the department, and service to the university.

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1 Q I want to back up and talk about your background a
 2 little bit.
 3 I understand you have a B.S. in mathematics;
 4 is that right?
 5 A Yes.
 6 Q And that's from Luther College?
 7 A Yes.
 8 Q Any other degrees after high school? You have
 9 your Bachelor's of Science. Any other advanced
 10 degrees?
 11 A No.
 12 Q When did you receive your B.S. in mathematics from
 13 Luther College?
 14 A 2000.
 15 Q Did you find a job right away out of college in
 16 2000?
 17 A Yes.
 18 Q Where was your first job outside of college after
 19 your graduation?
 20 A A company called Aid Association for Lutherans.
 21 Q Did you work in the Fox Valley?
 22 A Yes.
 23 Q How long did you work at Aid Association for
 24 Lutherans? Was it in Appleton?
 25 A Yes.

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1 Q How long were you there?
 2 A Approximately 18 months.
 3 Q What did you do at AAL?
 4 A I was an actuarial assistant.
 5 Q What did you do as an actuarial assistant, your
 6 job duties?
 7 A I was in the corporate reporting area. So my
 8 responsibilities consisted of assisting with
 9 quarterly reporting.
 10 Q Did your job duties change at all during your time
 11 at AAL?
 12 A Not materially, as I recall.
 13 Q You left there in 2001; is that accurate?
 14 A I left there in February of 2002.
 15 Q Where did you start working then?
 16 A Humana.
 17 Q Where were you physically located?
 18 A I worked at the Humana building in De Pere,
 19 Wisconsin. I maintained residence in Appleton.
 20 Q What did you do at Humana?
 21 A I was an actuary.
 22 Q How long did you work at Humana as an actuary?
 23 A Approximately five years.
 24 Q So until about 2007; is that right?
 25 A Uh-huh.

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1 Q Is that a yes?
 2 A Yes. Sorry.
 3 Q That's all right.
 4 What were your job duties as an actuary at
 5 Humana?
 6 A My duties at Humana were primarily centered around
 7 renewal adequacy, so ensuring that our renewal
 8 business was adequately priced.
 9 Q Is that what you did your entire five years at
 10 Humana?
 11 A Yes.
 12 Q Were the actuarial sciences something you were
 13 interested in in college as a career path?
 14 A Yes.
 15 Q When you left -- strike that.
 16 Can you explain what an actuary does,
 17 generally?
 18 A Generally, an actuary has to put a price tag on a
 19 future or a contingent risk.
 20 Q Now, when you left Humana in 2007, where did you
 21 go for employment?
 22 A I went to WellPoint, or Anthem, as it's now known.
 23 Q What did you do at WellPoint?
 24 A I was an actuary at WellPoint.
 25 Q Same general job duties there as you had at Humana

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1 or different?
 2 A At Anthem, I took on slightly different
 3 responsibilities than what I had at Humana. I was
 4 an actuarial director at Anthem.
 5 Q What did you do as an actuarial director?
 6 A I had responsibilities for pricing the small group
 7 and large group commercial business --
 8 Q So --
 9 A -- for the --
 10 Q Go ahead.
 11 A For the State of Wisconsin, generally.
 12 Q So your job duties as an actuarial director
 13 related to the group health insurance plan for the
 14 State of Wisconsin; is that accurate?
 15 A Yes. That was a slice of my responsibility, the
 16 State plan.
 17 Q And you had other private plans outside of that
 18 plan; is that accurate?
 19 A Yes.
 20 Q When you say it was a slice of your job duties,
 21 what do you mean by that? If you could give me a
 22 percentage, that would be fantastic.
 23 A I can't recall the specific details in terms of
 24 what portion of our book of business the State of
 25 Wisconsin plan represented. It was one employer

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1 plan of many that Anthem had at the time.
 2 Q Was it also one plan of many that you had
 3 responsibility for?
 4 A Yes.
 5 Q Do you know how many employer plans you personally
 6 had responsibility for?
 7 A I do not.
 8 Q Was the State of Wisconsin plan the largest that
 9 you had responsibility for?
 10 A Yes.
 11 Q When I ask you that question, how do you define
 12 "largest"? Is it by number of members?
 13 A Members and premium.
 14 Q As it relates to the State of Wisconsin plan, what
 15 were your job duties as actuarial director?
 16 A My duties were to work with the large group
 17 underwriting team, to review State of Wisconsin
 18 experience, and to price the plan for the upcoming
 19 year.
 20 Q What is State of Wisconsin experience?
 21 A I'm referring there primarily to the claims
 22 experience on the group. So to review the claims
 23 experience so that we could appropriately price
 24 the plan in an upcoming year.
 25 Q Can you describe for me what the claims experience

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1 is?
 2 A Claims experience is generally a 12-month period
 3 where you look at all the claims that have come
 4 through on the group, usually in total. And that
 5 forms the basis for your pricing projection.
 6 Q That was, along with pricing, something that you
 7 worked with your underwriting team on; is that
 8 right?
 9 A Yes.
 10 Q In your role as actuarial director specifically as
 11 it relates to the State of Wisconsin plan, did you
 12 work with individuals at the Department of
 13 Employee Trust Funds?
 14 A Could you define "work with"?
 15 Q Sure.
 16 Did you have communication with them about
 17 any facet or aspect of the State plan?
 18 A Only insofar as ETF would request information from
 19 carriers, and then I would provide the requested
 20 information. I cannot recall any specific
 21 instances of correspondence, but it's -- I would
 22 guess at some point in my tenure in that role, I
 23 had contacted ETF for some guidance pertaining to
 24 the exhibits.
 25 Q Pertaining to the what? I'm sorry.

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1 A To the exhibits we had to complete or the requests
 2 that ETF made.
 3 Q Okay. Thank you.
 4 In your role as actuarial director, did you
 5 have occasion to work with any GIB members,
 6 Group Insurance Board members?
 7 A Not that I recall.
 8 Q Are you currently a fellow of the
 9 Society of Actuaries?
 10 A Yes.
 11 Q How long have you been a member in that
 12 organization?
 13 A I believe I obtained my fellowship in 2006. So
 14 12-ish years.
 15 Q What did you have to do to obtain that?
 16 A To earn your fellowship in the
 17 Society of Actuaries, you have to pass a series of
 18 professional examinations. I believe eight to
 19 ten examinations in total. Yeah.
 20 Q Is that series of examinations something you
 21 passed in 2006?
 22 A I completed my final exam in either late 2005 or
 23 early 2006. I don't recall.
 24 Q Have you had to take any of those tests again
 25 since that time?

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1 A Thankfully, no.
 2 Q What do you have to do to keep your fellowship in
 3 the Society of Actuaries current? Besides pay
 4 dues, I'm sure.
 5 A Yes, pay dues is one. Actuaries are required to
 6 certify that they meet some professional
 7 development or continuing education requirements.
 8 So I annually certify that I'm keeping active and
 9 up to date on my professional development.
 10 Q Are there any other requirements that you have to
 11 keep current in the Society of Actuaries, besides
 12 what you just testified about?
 13 A Not that I recall.
 14 Q Were you required to take any tests to become a
 15 member of the American Academy of Actuaries?
 16 A Specifically to become a member of the
 17 American Academy, there were no additional exams
 18 beyond those that I completed to become a fellow
 19 of the Society of Actuaries.
 20 Q Do you also have to certify to the MAAA that
 21 you're continuing your education on an annual
 22 basis?
 23 A I don't believe an annual certification is
 24 required for the American Academy of Actuaries.
 25 Q So how long did you work as an actuarial director

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1 at Anthem?
 2 A Timeline, I don't recall exactly. I believe I was
 3 in the director role for two to three years at
 4 Anthem before I transitioned to other roles in the
 5 organization.
 6 Q So the two to three years that you were actuarial
 7 director at Anthem, were you the sole actuarial
 8 director?
 9 A I was one of many actuarial directors. Anthem
 10 operates plans in several states; and, again, my
 11 responsibilities were primarily for the
 12 State of Wisconsin at the time.
 13 Q You stayed in that position for two to
 14 three years. What position did you move into?
 15 A I moved into a position in the specialty
 16 department, which was primarily dental, vision,
 17 group life, and disability insurance.
 18 Q How long did you work in that position?
 19 A Approximately a year, a little less than a year, I
 20 believe.
 21 Q Did you then move to the position at UW-Eau Claire?
 22 A No.
 23 Q What was the next position you took?
 24 A I was -- I took a position as a staff vice
 25 president in charge of actuarial healthcare

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1 reform.
 2 Q Was that a position at Anthem?
 3 A Yes.
 4 Q What did you do in that vice president position?
 5 A I worked with the public policy team primarily
 6 to -- well, in an effort to quantify the impacts
 7 of reform on the organization and to advocate for
 8 reforms that we felt were sensible.
 9 Q How long were you in the VP position at Anthem?
 10 A Again, approximately one year.
 11 Q That was a year. I apologize if I asked you that.
 12 A That's okay.
 13 Q I'm not trying to trip you up --
 14 A Oh, no.
 15 Q -- on your work history here.
 16 After you worked in the VP position for about
 17 a year, did you leave Anthem?
 18 A Yes.
 19 Q Is that when you moved on to UW-Eau Claire?
 20 A Yes.
 21 Q What courses have you taught at UW-Eau Claire?
 22 A I have taught elementary statistics, foundations
 23 of actuarial science, contingent payment analysis,
 24 introduction to the actuarial career, credibility
 25 in loss models. I believe that's it.

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1 Q Is it fair to say that all of the courses you've
 2 taught at UW-Eau Claire are somehow related to
 3 actuarial sciences or statistics?
 4 A Yes.
 5 Q Outside of the teaching duties that you just
 6 described, what are your other job duties at
 7 UW-Eau Claire, both as an assistant and an
 8 associate professor?
 9 A A large portion of the job duties were
 10 advising-related, so advising students with regard
 11 to course selection or providing professional
 12 advice to them for their job search.
 13 In addition to the advising, as I mentioned
 14 earlier, there's service to the department and to
 15 the university. So I serve on several
 16 departmental committees. There -- there is a
 17 scholarly activity requirement as well of the
 18 faculty.
 19 So I've -- I have worked with some students
 20 on research or -- I've actually -- the
 21 Group Insurance Board counts as part of my
 22 activity as well.
 23 Q We'll get to that.
 24 Your work with departmental committees, what
 25 does that consist of?

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1 A Sure. We have things like an awards committee to
 2 provide scholarships to students. So I serve on
 3 that committee reviewing student applications and
 4 rewarding scholarships to those students.
 5 Q Any other committees you currently serve on?
 6 A Currently? I believe it's just the awards
 7 committee right now.
 8 Q Do you recall any other departmental committees
 9 that you've served on during your tenure at
 10 UW-Eau Claire?
 11 A Yes.
 12 Q What are those?
 13 A I serve currently on the department personnel
 14 committee. There's another committee. I don't
 15 remember the name of it exactly. It's more campus
 16 events for students, making sure we have
 17 representation for the math department at those
 18 events. Social -- social concerns or something to
 19 that effect, perhaps.
 20 Q So it's the awards personnel and the campus events
 21 committees you just described. Do you recall any
 22 other departmental committees you've served on
 23 during your time at UW-Eau Claire?
 24 A I don't remember any others.
 25 Q You testified that part of your community service

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1 is your service on the Group Insurance Board; is
2 that right?
3 A No.
4 Q You referenced your service on the
5 Group Insurance Board earlier today; is that
6 right?
7 A Yes.
8 Q In what context were you referencing that?
9 A In the context of scholarly activity I referenced
10 the Group Insurance Board. Our department
11 evaluation plan says a faculty must engage in
12 scholarly activity or its equivalent. And my
13 department has determined that my involvement with
14 the Group Insurance Board counts as an equivalent
15 to scholarly activity.
16 Q I see. Okay.
17 You were appointed to the board in 2013; is
18 that right?
19 A Yes.
20 Q Is that an appointment that you sought out, or did
21 someone approach you with that opportunity in
22 2013?
23 A I was approached.
24 Q Who approached you?
25 A Dan Schwartzter.

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1 Q Who is Mr. Schwartzter?
2 A At the time, I believe Dan was the deputy
3 commissioner of OCI.
4 Q OCI being the Commissioner of Insurance?
5 A Yes.
6 Q That's a state office; is that right?
7 A Yes, I believe.
8 Q Mr. Schwartzter was the deputy commissioner at the
9 time, that is 2013?
10 A As best I recall his title, yes. I think it was
11 deputy commissioner.
12 Q How is it that you knew Mr. Schwartzter in 2013?
13 A I got connected with him via a former coworker at
14 Anthem.
15 Q Who is that former coworker?
16 A Ted Osthelder. Ted O.
17 Q So Mr. Osthelder introduced you to Mr. Schwartzter;
18 is that right?
19 A Yes.
20 Q Do you recall when that introduction was made?
21 A I do not.
22 Q How soon after that introduction did
23 Mr. Schwartzter approach you about the GIB
24 opportunity, that is to serve on GIB?
25 A I don't recall.

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1 Q Had you known him for a matter of years, that is
2 Mr. Schwartzter, prior to him approaching you with
3 the GIB opportunity?
4 A No.
5 Q Was it a matter of months?
6 A I don't -- I don't recall.
7 Q Well, do you recall what he said to you when he
8 approached you with the opportunity?
9 A The opportunity came electronically. It was not
10 an in-person discussion. I don't recall what was
11 said in that communication other than there had
12 been a vacancy on the board and they were
13 seeking -- it was for a teacher in the
14 UW retirement system and that I met that
15 qualification. And I was being asked if I had
16 interest in serving on the board.
17 Q Do you recall Mr. Schwartzter mentioning your work
18 experience as a reason that he was approaching you
19 with the opportunity?
20 A I can't say I recall that. I don't remember
21 specifically.
22 Q So after receiving the -- was it an e-mail that
23 Mr. Schwartzter sent you?
24 A I believe so.
25 Q After you received the e-mail from Mr. Schwartzter

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1 presenting you with the opportunity to serve on
2 the GIB, what did you do to follow up, if
3 anything?
4 A One of the things I did was have a phone
5 conversation with the outgoing board member.
6 Q Who was that?
7 A I do not recall her name. I believe it was Esther
8 something, but I could be wrong.
9 Q What else did you do to follow up after receiving
10 the opportunity to serve on the GIB in 2013?
11 A Nothing specific that I recall.
12 Q So did you, then, inform someone at GIB or the
13 Department of Employee Trust Funds that you were
14 interested?
15 A I had to fill out an application to be appointed
16 to the position. So I remember completing the
17 application and submitting it.
18 Q After submitting the application, did you
19 interview with anyone?
20 A Not that I recall.
21 Q How soon after you completed and filed the
22 application were you appointed to the GIB?
23 A I don't remember.
24 Q So you were first appointed in 2013; is that
25 right?

Page 25

1 A Yes.
2 Q That appointment was by the governor; is that
3 correct?
4 A Yes.
5 Q Was that Governor Scott Walker?
6 A Yes.
7 Q You did not interview with anyone from the
8 governor's office prior to your appointment in
9 2013; is that right?
10 A Not that I recall.
11 Q You were reappointed in 2015; is that right?
12 A Yes.
13 Q So is each term a two-year term?
14 A Yes.
15 Q Were you reappointed in 2017?
16 A I don't know.
17 Q Why is that?
18 A The Group Insurance Board roster right now shows
19 my term expiring May 1st of 2017, and I have not
20 received any paperwork signaling that I have been
21 reappointed.
22 Q When you were reappointed in 2015, did you receive
23 paperwork to inform you of a reappointment or to
24 inquire about your desire to be reappointed,
25 either of those?

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1 A I believe I did.
2 Q Did you, then, have to affirmatively follow up and
3 indicate your interest in serving another two-year
4 term at that point?
5 A I don't remember if I had to do any follow-up or
6 if it was just a question put to me as to whether
7 or not I wanted to continue to serve. I don't
8 remember if it was the formal process or not.
9 Q You have served at some point as the secretary of
10 the board; is that right?
11 A Yes.
12 Q When did you first take on that role, that is
13 secretary of the GIB?
14 A I believe it was late 2016, is my recollection.
15 Q Prior to the late 2016 date, had you served in any
16 kind of executive capacity on the board?
17 A No.
18 Q Did someone ask you to serve as secretary?
19 A Yes, someone asked me to consider running as
20 secretary.
21 Q Who asked you to do that?
22 A Lisa Ellinger.
23 Q What are your job duties as the secretary of the
24 board?
25 A Primarily, I sign off on the minutes for the

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1 board.
2 Q Do you have any role in setting the agenda?
3 A Not that I'm aware of.
4 Q Do you still serve as the secretary of the board,
5 assuming that your appointment is somehow valid
6 currently?
7 A I do.
8 Q How often does the GIB meet?
9 A Usually we meet quarterly.
10 Q You testified that your duty as secretary of the
11 board is to primarily sign off on the minutes.
12 What other job duties do you have as the secretary
13 of the board?
14 A None specifically that I'm aware of.
15 Q Do you actually take the notes during the board
16 meetings, or does someone else do that?
17 A Someone else does.
18 Q Who does that?
19 A I'm not sure what title they would have.
20 Q Is it ETF staff?
21 A It's usually ETF staff, yes.
22 Q So ETF staff would take notes during open and
23 closed sessions of the board; is that right?
24 A Yes.
25 Q And then type those up and send them on to you as

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1 secretary; is that right?
2 A They are not sent directly to me. They're typed
3 up and sent to the entire board as part of the
4 next meeting's agenda.
5 Q Is the board then given an opportunity to make
6 corrections to the minutes prior to the next
7 meeting?
8 A One of the first agenda items on -- first or
9 second agenda items on most board meetings is to
10 review the minutes and approve them. At that
11 point, members are given an opportunity to amend
12 or revise, as needed.
13 Q Then do you sign off on the minutes?
14 A Yes.
15 Q You actually put ink to paper and sign off; is
16 that right?
17 A I do.
18 Q What do you do with the minutes after you've
19 signed them?
20 A I hand them back to ETF staff.
21 Q Who is the staff member that you currently hand
22 those minutes off to?
23 A It's a relatively new individual at ETF. My
24 apologies. The name isn't coming.
25 Q That's okay.

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1 Is it the person that took over for
 2 Lisa Ellinger?
 3 A No.
 4 Q Ms. Ellinger resigned her employment in January of
 5 this year; is that right?
 6 A I believe so.
 7 Q How much time do you spend on GIB business in a
 8 given month? Can you estimate that for me?
 9 A In a typical non-meeting month?
 10 Q Correct. Let's start with that.
 11 A It isn't a lot. Zero to two hours.
 12 Q How about during a meeting month?
 13 A It varies considerably for a meeting. But I would
 14 guess anywhere from three to ten, fifteen hours,
 15 something like that.
 16 Q Are the meetings held during the same months every
 17 year?
 18 A Typically. The regularly scheduled quarterly
 19 meetings typically are the same month, yes.
 20 Q Where are those meetings typically held?
 21 A The -- I don't know how to pronounce it. The
 22 Lussier Family Heritage Center, typically.
 23 Q Here in Madison?
 24 A Yes.
 25 Q On the south side of Madison?

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1 A Sounds right. I don't have my geography all
 2 figured out down here.
 3 Q So the board typically meets in person at the
 4 Lussier Family Heritage Center?
 5 A Yes.
 6 Q Do you typically attend the meetings in person?
 7 A Lately I have taken more by phone; but I would say
 8 typically, yes, in person.
 9 Q Now, with respect to your uncertainty about your
 10 current status, your current appointment status on
 11 the board, have you communicated with anyone about
 12 that, either at ETF or the board?
 13 A Yes.
 14 Q Who did you talk with about that or communicate
 15 with about that?
 16 A I communicated with Lisa Ellinger.
 17 Q What information did she provide to you, if any?
 18 A On several occasions, she told me she was looking
 19 into it. And then Sara Brockman is another name.
 20 Q She's an ETF employee?
 21 A She's ETF staff. At one point, Sara told me that
 22 I had been reappointed, but no paperwork has come
 23 through.
 24 Q Do you recall when she told you that you had been
 25 reappointed?

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1 A I do not.
 2 Q You testified that during the meeting months for
 3 your appointment to GIB, you spend between three
 4 to ten and fifteen hours, I think was your
 5 testimony. Outside of attending meetings, what
 6 are your duties in those meeting months that
 7 comprise that over the year?
 8 A Primarily reviewing the agenda items and the
 9 attachments that are attached to the agenda items.
 10 Q Did you include your travel time in that estimate?
 11 A I did not.
 12 Q You live in the Eau Claire area; is that right?
 13 A Yes.
 14 Q Are you paid for your service as a board member?
 15 A I get mileage reimbursement; and I'm paid, I
 16 believe, \$25 a day when the board meets.
 17 Q That \$25 figure, has that been your compensation
 18 during your entire time at the board or has that
 19 gone up?
 20 A I believe it's still \$25. I'm not certain. I
 21 believe.
 22 Q Outside of the \$25 per day and your mileage
 23 reimbursement, do you receive any other kind of
 24 compensation for your service on the board as a
 25 member?

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1 A I do not.
 2 Q Can you describe for me what you do as a GIB
 3 member?
 4 A Yes. I review documentation, you know, that's
 5 provided to the board and try to get educated on
 6 issues before the board so that I can vote
 7 accordingly.
 8 Q What role does the board play in determining the
 9 package of health insurance benefits for State
 10 employees?
 11 A The board has a lot of authority to establish the
 12 health benefits for State employees.
 13 Q Can you walk me through the process of how that
 14 works?
 15 A Annually, typically, things like benefit changes
 16 or proposed benefit changes are brought before the
 17 board for consideration. So we review those
 18 proposed changes and vote yea or nay to implement
 19 them.
 20 Q That happens on an annual basis; is that right?
 21 A Typically. I believe the benefit changes are
 22 reviewed annually, yes.
 23 Q Are those benefit changes considered at the same
 24 time of year each year?
 25 A Typically.

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1 Q Which meeting is that typically?
 2 A I believe it's the May meeting.
 3 Q And you also meet in February; is that right?
 4 A Yes.
 5 Q And in August?
 6 A Yes.
 7 Q And then in November?
 8 A Yes.
 9 Q If you're discussing the annual benefit changes at
 10 the May meetings and then voting on those
 11 proposals, what do you do at the other three
 12 meetings?
 13 A They are filled with any number of different
 14 topics and agenda items.
 15 Q So at the February 2018 meeting, for instance, you
 16 didn't discuss proposed changes to the annual
 17 benefits, did you?
 18 A I recall hearing that there was discussion about
 19 benefit changes with some partners but that formal
 20 recommendations would be coming at the May meeting.
 21 Q When you say "partners," who are the partners?
 22 A I believe there's a steering group, in essence,
 23 composed of some of the insurers and, I don't
 24 know, other key stakeholders who are discussing
 25 potential benefit changes for the State of

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1 Wisconsin.
 2 Q So the annual benefit changes process starts in
 3 February; is that accurate?
 4 A I don't know when that discussion begins.
 5 Q Do you know who brings those proposed changes to
 6 the board?
 7 A Again, typically, it is ETF staff bringing a
 8 recommendation forward to the board.
 9 Q So ETF staff would bring proposed changes that
 10 they recommend to the board for board action; is
 11 that right?
 12 MR. ROTH: Objection; misstates the
 13 testimony.
 14 Q Let me start over.
 15 So ETF staff would bring proposed changes to
 16 the annual meeting in February; is that right?
 17 A No.
 18 Q You testified that ETF staff would bring these
 19 proposed changes to the board; is that right?
 20 A Yes.
 21 Q Typically, that has happened in as early as
 22 February of each year; is that right?
 23 A Yes, it can happen as early as February.
 24 Q Is most of that process taking place at the
 25 May quarterly meeting?

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1 A Yes.
 2 Q You first testified that ETF staff would also
 3 bring their recommendations, is that right, as it
 4 relates to those specific proposed changes?
 5 A Yes.
 6 Q Who from ETF typically presents what the agency's
 7 recommendations are, or does that change?
 8 A I don't know if there's a typical person who
 9 provides the recommendation.
 10 Q Do you typically, you and the board, that is, vote
 11 at that May quarterly meeting on those proposed
 12 changes?
 13 A I believe so, yes.
 14 Q Do you receive copies of the proposals prior to
 15 the actual meeting at which you are voting?
 16 A Again, yes, typically.
 17 Q And is that typically an agenda?
 18 A Yes, usually.
 19 Q You do not have any role in creating that agenda;
 20 is that right?
 21 A I have not played a role in creating that agenda
 22 in the past.
 23 Q To your knowledge, do any board members play a
 24 role in creating that agenda, either as the
 25 current process or in the past?

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1 A I'm not certain.
 2 Q In the typical year, about when do you start
 3 receiving the proposals on which you would be
 4 voting in May?
 5 A I'd say typically it's within a two-week window in
 6 advance of the May meeting.
 7 Q Typically, how many proposals are you presented
 8 with during that two-week window prior to the
 9 May meeting?
 10 A Again, typically it's just one. It is the ETF
 11 staff recommendation.
 12 Q Is that recommendation applicable to several
 13 changes to the plan, or is it usually just one
 14 change?
 15 A It would contemplate any and all changes being
 16 proposed.
 17 Q So would ETF create a memo with their proposals,
 18 send that to you within the two-week window prior
 19 to the May quarterly meeting?
 20 A Yes.
 21 Q Would you then do some outside research into any
 22 of those proposals, or would you just limit it to
 23 what's been presented to you by ETF?
 24 A Sometimes, not always, I would do additional
 25 research.

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1 Q What kind of research would you do on those
2 occasions?
3 A Oftentimes, it would pertain to the pricing
4 estimates.
5 Q What's a pricing estimate?
6 A The board's actuarial consultant will typically
7 provide a pricing estimate for, I would say,
8 material changes that are brought before the
9 board. And I would often conduct research just to
10 inform myself about the estimate and the
11 reasonableness of it.
12 Q You mentioned the actuarial consultant. Is that
13 Segal Consulting?
14 A It is currently.
15 Q Am I saying that correctly?
16 A Segal, yes.
17 Q Like the bird?
18 A I believe so, yes.
19 Q Would you typically receive pricing estimates for
20 proposed changes with the ETF memo in that
21 two-week period?
22 A I believe so, yes.
23 Q Were there occasions on which you reviewed Segal's
24 pricing estimate and disagreed with either their
25 methodology or their conclusion?

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1 A There were times I had questions about their
2 estimate.
3 Q What would you do when you had a question about an
4 estimate?
5 A I would often send those questions through
6 Lisa Ellinger.
7 Q Who is Lisa Ellinger?
8 A She was -- I don't remember her official title
9 with ETF, but she was in some managerial capacity
10 within ETF.
11 Q From your perspective, what was her role as it
12 related to the board?
13 A Lisa -- again, this is from my perspective -- you
14 know, often helped provide background to the board
15 on topics. She took insight from the board in
16 terms of -- or I should say direction from the
17 board. Things that the board requested or wanted
18 to investigate or wanted more information on, Lisa
19 would capture those items and then bring them back
20 to a subsequent meeting of the board.
21 Q Would you say that your communications with Lisa
22 spiked during that two-week period prior to the
23 May meetings?
24 A I don't know. I don't know if that's fair.
25 Q Did you see Lisa as kind of a liaison between ETF

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1 and the board?
2 A I did. I saw her as, you know, the board's
3 partner.
4 Q Did you see any other ETF employees as falling
5 into that role as a partner with the board at any
6 point during your time on the board?
7 A Only insofar as ETF staff would come before the
8 board and provide presentations, typically
9 accompanied by a memo that the board could review
10 prior to the meeting. And ETF staff were there to
11 help us with any questions that arose.
12 Q Would you say out of all the ETF staff,
13 Lisa Ellinger was the person that you worked most
14 frequently with?
15 A Yes. Between her and Sara Brockman, I would say.
16 Q Was Sara Brockman Ms. Ellinger's assistant?
17 A I don't know.
18 Q Do you know what her role or title was, either of
19 those?
20 A I believe her official role was board liaison.
21 Q Was Ms. Brockman the board liaison from the
22 beginning of your time on the board, that is 2013?
23 A I don't recall.
24 Q So the ETF memo that you, as a board member, would
25 receive prior to the May quarterly meeting, you

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1 testified earlier that that came with ETF's
2 recommendations; is that right?
3 A Yes.
4 Q Do you know where those recommendations
5 originated?
6 A I assume they originated from the work group I
7 mentioned previously that is a makeup of insurers
8 and ETF staff and others -- like I said, other
9 stakeholders I may be leaving out.
10 Q I think you referenced that as a steering
11 committee; is that right?
12 A Yes. I don't know that that's an appropriate
13 label for them, but --
14 Q Sure.
15 But in any event, it consists of ETF staff,
16 insurers, and other stakeholders; is that correct?
17 A As far as I know, yes.
18 Q The recommendations that accompanied that May memo
19 from ETF come directly from that committee, that
20 group that you just referenced; is that right?
21 A I don't know that they come directly from that
22 committee.
23 Q Do you know if that committee has a significant
24 role in composing those recommendations, making
25 those recommendations?

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1 A I don't know.
 2 Q Is it your understanding that insurers play a role
 3 in making recommendations to the board about
 4 annual changes?
 5 A Yes.
 6 Q What role do they have, if you know, in that
 7 process?
 8 A I'm not certain of their exact role in the process
 9 other than to bring forward potential changes for
 10 consideration.
 11 Q So in the typical year, the board is making
 12 decisions at its May meeting about changes, annual
 13 changes, to the group's health insurance plan; is
 14 that right?
 15 A I believe so.
 16 Q Well, that's been your experience during your time
 17 on the board; is that right?
 18 A Yes.
 19 Q After the board votes at its May quarterly meeting
 20 on those changes, what does it do to ensure that
 21 those changes are then implemented?
 22 A There's no specific board role as it pertains to
 23 the implementation of those changes. We simply
 24 rely on ETF staff, then, to implement any changes
 25 the board is active on.

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1 Q How does ETF staff advise the board about the
 2 board's responsibilities?
 3 A We are provided training at times on the board's
 4 responsibilities. I can recall presentation on
 5 our fiduciary responsibility. I'm blanking on
 6 others. But periodically we receive either
 7 documentation to read or we receive a formal
 8 presentation about board responsibilities.
 9 Q You testified that you recall receiving training
 10 on the board's fiduciary responsibilities; is that
 11 right?
 12 A Yes.
 13 Q When was that training?
 14 A I don't remember.
 15 Q Do you recall the year?
 16 A I do not.
 17 Q Was it shortly after you began your tenure on the
 18 board in 2013?
 19 A I don't remember.
 20 Q Outside of the training that you received on
 21 fiduciary duties, can you think of any other
 22 examples where ETF has provided training to the
 23 board and board members?
 24 A Yes.
 25 Q What was that?

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1 A Training relating to the board communication
 2 policy.
 3 Q Do you recall when that training occurred?
 4 A I do not.
 5 Q What did it consist of?
 6 A As far as I recall, it was a review -- primarily a
 7 review of the board communication policy.
 8 Q Did that training take place at one of the
 9 standing quarterly meetings?
 10 A As far as I recall, yes.
 11 Q Does ETF legal counsel provide advice to the
 12 board?
 13 A Yes.
 14 Q Does ETF legal counsel provide advice on how the
 15 board is to comply with state or federal law?
 16 A Yes.
 17 (Exhibit No. 1 marked
 18 for identification)
 19 Q Mr. Day, I'm showing you what's been marked as
 20 Deposition Exhibit 1. It looks like the third
 21 page is simply your first name. But if you could,
 22 turn to the second page, the middle of the page.
 23 It appears to be an e-mail.
 24 Do you see that?
 25 A Yes.

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1 Q This is a document that's been marked previously
 2 as ETF 02204. We've handwritten that on the front
 3 page, but you're on page 2; is that right?
 4 A Yes.
 5 Q I'm going to give you a minute to take a look at
 6 that, unless this is one of the documents you
 7 reviewed in preparing for your deposition today.
 8 If it was, just let me know.
 9 A It was not.
 10 Q It was not. Okay. I'm going to give you a minute
 11 to take a look at that.
 12 You've reviewed it?
 13 A I have.
 14 Q Do you recall sending that e-mail in July of 2016?
 15 A I do.
 16 Q Do you recall any board discussion regarding a
 17 removal of the current exclusion for benefits and
 18 services related to gender reassignment or sexual
 19 transformation?
 20 A I do.
 21 Q What do you recall about any communications you
 22 had with either ETF staff or other board members
 23 regarding that current exclusion prior to sending
 24 this e-mail?
 25 A I don't -- I don't recall any communication in

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1 advance of this specific to the removal of the
 2 exclusion.
 3 Q So do you recall a meeting at which the removal of
 4 the exclusion was discussed by the board prior to
 5 sending this July 2016 e-mail?
 6 A I believe the board met immediately prior to this.
 7 I don't know if it was that week or month or if it
 8 was the June meeting. From the note it appears it
 9 would have been July 12th, saying that I didn't
 10 contribute yesterday. I believe at that meeting,
 11 something came before the board. I don't know
 12 exactly what it was.
 13 Q So this was a July 2016 meeting. You testified
 14 earlier that typically the quarterly meetings took
 15 place in May; is that right?
 16 A Yes.
 17 Q Do you recall why there was a July meeting held in
 18 2016?
 19 A I do not recall the specifics.
 20 Q It's your belief that the meeting took place the
 21 day prior to you sending the e-mail that we've
 22 marked as Deposition Exhibit 1 on page 2?
 23 A I believe so.
 24 Q You write in the e-mail that you were apologizing
 25 if you missed opportunities to contribute

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1 yesterday due to technical issues with the
 2 conference line; is that right?
 3 A Yes.
 4 Q So your belief was that there was a meeting of the
 5 board on July 12th, 2016; right?
 6 A I believe so.
 7 Q Was the removal of the current exclusion
 8 referenced in your second paragraph discussed at
 9 the July 12th, 2016, meeting?
 10 A I don't recall for certain. I assume it was,
 11 based on my e-mail.
 12 Q What do you recall about the discussion that may
 13 have happened on July 12th, 2016, as it relates to
 14 the current exclusion issue?
 15 A It's difficult for me to recall the specific
 16 meetings where this was discussed.
 17 Q Do you recall the first time it was discussed at a
 18 board meeting?
 19 A I don't recall the specific date, no.
 20 Q Outside of the date, do you recall what the
 21 substance of the conversation or communication
 22 was?
 23 A I believe the first time it came before the board
 24 was in ETF staff recommendations for benefit
 25 changes for the 2017 calendar year.

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1 Q So it's your belief that ETF staff recommended, as
 2 part of the changes, that there would be a removal
 3 of the current exclusion for benefits and services
 4 related to gender reassignment or sexual
 5 transformation?
 6 A Yes.
 7 Q When I say "current," I'm referencing your e-mail,
 8 not 2018.
 9 A Yes.
 10 Q Is that typically the process? That is, any
 11 changes to the group health insurance plan would
 12 take effect beginning January 1st of the following
 13 calendar year?
 14 A Yes.
 15 Q So is it your recollection that sometime in the
 16 first half of 2016 is when you first heard about a
 17 potential removal of the current exclusion for
 18 benefits and services related to gender
 19 reassignment or sexual transformation?
 20 A I believe so.
 21 Q You don't recall which part of that first half of
 22 2016, though?
 23 A I do not.
 24 Q But you do recall that it was presented to you as
 25 part of ETF's recommendations for changes that

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1 would take effect in 2017; is that right?
 2 A Yes, I believe so.
 3 Q Prior to sending your e-mail on July 13th, 2016,
 4 do you recall the board having any discussion
 5 about removal of the then-current exclusion?
 6 A I do not recall any.
 7 Q Now, in the e-mail that we've marked in your
 8 deposition as Exhibit 1, you state under Point 1,
 9 "I'm fully supportive of the removal of the
 10 current exclusion for benefits and services
 11 related to gender reassignment or sexual
 12 transformation."
 13 Did I read that correctly?
 14 A You did.
 15 Q What's your recollection of what the exclusion for
 16 benefits and services was prior to any changes
 17 taking place after this time? Do you understand
 18 my question?
 19 A I believe so.
 20 Q Okay.
 21 A As I recall, it was just kind of a blanket
 22 exclusion for services related to gender
 23 reassignment or sexual transformation.
 24 Q What's your understanding of what is meant by
 25 "benefits and services related to gender

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1 reassignment or sexual transformation?"
2 A I assume it means things like gender reassignment
3 surgery that would be excluded as a covered
4 benefit under the plan.
5 Q Was that an exclusion that was in place as of the
6 time you joined the board in 2013?
7 A I believe so, yes.
8 Q Was that something that you recall noticing as an
9 exclusion upon joining the board in 2013?
10 A It's not something I recall noticing at the
11 outset, no.
12 Q Was it something that you had had any discussion
13 with either ETF staff or other board members about
14 prior to hearing about the proposed removal of the
15 exclusion in 2016?
16 A Not that I recall.
17 Q Why were you, as of July 13th, 2016, fully
18 supportive of the removal of the exclusion?
19 A Primarily because I view the exclusion as
20 discriminatory and I support -- I support the
21 right of transgender individuals to get the
22 healthcare they need. And I feel that, moreover,
23 covering these services can make a positive impact
24 on their lives.
25 Q Any other reasons for your full support of the

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1 removal of that exclusion as of 2016, in July?
2 A I guess the only additional thing I would add is
3 that it's not costly to add it to the group plan.
4 Q You go on in your paragraph 1 to ask about why
5 there was no cost estimate in the memo as it
6 related to that exclusion; is that right?
7 A Yes.
8 Q That estimate would have been provided with the
9 Segal report; is that correct?
10 A Typically, the estimates are enveloped into the
11 ETF staff recommendations.
12 Q Is it your understanding that the estimates
13 originate from the Segal and then are communicated
14 to ETF?
15 A Yes. I understand ETF staff brings the
16 recommendations to Segal, who then provides an
17 actuarial cost estimate back to ETF for the
18 changes.
19 Q Is that your understanding of what happened with
20 respect to the exclusion for transgender benefits
21 and services?
22 A Yes.
23 Q You reference in your paragraph that's noted as
24 paragraph 1 there a sentence starting, "Also,
25 given where we are at in the 2017 rate

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1 negotiations, will carriers be allowed to
2 reconsider rates for the benefit change?"
3 Did I read that correctly?
4 A Yes.
5 Q As of July 13th, 2016, was the board negotiating
6 rates for the following year?
7 A Yes.
8 Q Do you know whether other changes to benefits for
9 2017 had already been considered and voted upon by
10 the board as of July 13th, 2016?
11 A I don't know for certain.
12 Q Is it your recollection that the proposal to
13 remove the current exclusion for transgender
14 benefits and services was a later proposal than
15 others for the 2017 year?
16 A Yes.
17 Q Do you recall if there were any that happened
18 after this one for the 2017 year?
19 A No.
20 Q Did you ask why it was coming in so late in the
21 process?
22 A No.
23 Q Do you have an understanding as to why it came so
24 late in the process?
25 A From what I recall about the ETF memo, it was

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1 that, you know, in response to federal law, we
2 needed to update the policy so that it was aligned
3 with the particular section of the Affordable Care
4 Act that prohibited such an exclusion.
5 Q Did you do any research into the history of the
6 exclusion in the State group health insurance plan
7 after being presented with this information in
8 July of 2016?
9 A I can't say I recall doing any research on this
10 State-specific aspect of the exclusion.
11 Q Do you recall doing any research on any aspect of
12 the exclusion?
13 A If I did anything, it was to evaluate the pricing
14 impact that, you know, either the coverage or lack
15 of coverage would have on the plan.
16 Q What research did you do on the pricing impact?
17 A Mostly literature review, examining any studies
18 that were publicly available about other states
19 that had enacted coverage of these benefits and
20 what, if anything, they found the impact to be.
21 Q Do you recall specifically any states that had
22 given this coverage prior to you sending this
23 e-mail in July 2016 or shortly thereafter?
24 A I recall that there was a state or there were
25 states. I just don't remember which ones.

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1 Q Do you recall the nature of the pricing impact in
2 those specific examples, if any?
3 A To the best of my recollection, the impact was
4 negligible, which played into my expectation
5 that's described in the e-mail.
6 Q In your e-mail, you state, "I don't anticipate
7 that the cost of the change will exceed .1 to
8 .2 percent, so this doesn't seem overly material."
9 Do you see that?
10 A Yes.
11 Q Why is it that you didn't anticipate the cost of
12 the change exceeding that level that you cited?
13 A Primarily based on the research I conducted.
14 Q So you did the research that you testified about
15 earlier regarding other states that had given this
16 benefit and found that cost estimates or cost
17 impacts were in the .1 to .2 percent range; is
18 that accurate?
19 A I don't know for certain that's where they were at
20 for all states that I would have reviewed. But to
21 the best of my ability, I would have, you know,
22 tried to take all the information into account and
23 come up with my own estimate of where I thought
24 the impacts would be.
25 Q How did you do that? What was your methodology?

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1 A Again, mostly consisting of literature review,
2 looking at other states that had enacted, and any
3 public information I could find about the number
4 of individuals who were taking advantage of such
5 services and what the cost per service would be.
6 And then you can look at that as a portion of the
7 overall state spending on healthcare and come up
8 with some type of reasonable estimate as to what
9 the impact might be.
10 Q So the first time you heard about a potential
11 removal of the exclusion was on July 12th, 2016;
12 is that right?
13 A I believe so.
14 Q At some point after that first time, you did the
15 research and then e-mailed Lisa Ellinger on the
16 13th; is that right?
17 A Yes.
18 Q So is it your recollection that you kind of made
19 that a priority after hearing about the removal of
20 the exclusion in July of 2016, that is, doing the
21 research?
22 MR. ROTH: Object; vague.
23 Q Do you understand my question?
24 A Could you repeat it, please?
25 Q Sure.

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1 You first heard about the removal of the
2 exclusion on July 12th, 2016; is that right?
3 A Not necessarily. It could have been in documents
4 sent to the board ahead of that July meeting. So
5 I may have read about it prior to the board
6 meeting.
7 Q Do you recall when you may have read about it
8 prior to the board meeting?
9 A I do not.
10 Q But in any event, there was discussion about it at
11 the July 12th, 2016, board meeting; correct?
12 A I believe so.
13 Q You made it a priority to do some research about
14 other states' experiences with similar exclusions;
15 is that right?
16 A Yes.
17 Q The very next day, you e-mailed Lisa Ellinger
18 after completing your initial research; right?
19 A Yes. I'm not sure if that was right after
20 completing my research or if it had already been
21 completed. But, yes, I e-mailed Lisa right after.
22 Q So is it fair to say that you were concerned about
23 the potential exclusion that was in place and
24 whether that would be removed?
25 A I guess I'm not sure what -- when you say I was

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1 concerned about it, I'm not sure what you mean.
2 Q Well, prior to July of 2016 or thereabouts, when
3 you first heard about the fact that there was this
4 exclusion in the group plan, you didn't do any
5 research about that, did you? You didn't know it
6 was there.
7 A Right.
8 Q After you then heard about it for the first time,
9 were you then concerned that there was an
10 exclusion in place?
11 A Yes.
12 Q Then you went to do research about the potential
13 cost impact; is that right?
14 A Yes.
15 Q The conclusions of your research are in the e-mail
16 that you sent to Lisa on July 13th, 2016; is that
17 right? That is, your initial research?
18 A Yes.
19 Q Now, the last sentence of your paragraph 1 here
20 says, "Having said that, I think the board should
21 be made aware of how the late 2017 benefit change
22 is accounted for, as similar situations could
23 arise in the future, parentheses, to the extent
24 that some form of fully insured plans still
25 exist."

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1 Did I read that correctly?
2 A Yes.
3 Q What do you mean by "the late 2017 benefit change"?
4 A What I meant there was that this change was being
5 considered after we were in negotiation with
6 insurers, and that's why those changes are
7 typically discussed and voted upon at the
8 May meeting, so that insurers have an opportunity
9 to take them into account in their pricing.
10 Q Do you recall most of the changes actually being
11 voted on in the May meeting for the following
12 year?
13 A Yes, I believe so.
14 Q Now, after first hearing about the potential
15 removal of the exclusion, did you have any
16 conversations with other board members at or
17 around the time you sent this e-mail to
18 Lisa Ellinger, Deposition Exhibit 1?
19 A Not that I recall.
20 Q Do you recall having any communications outside of
21 the e-mail with Lisa Ellinger?
22 A Again, not that I recall.
23 Q Did Lisa respond to you?
24 A Yes.
25 Q So if you look at page 1 of Exhibit 1 -- I think

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1 the e-mail cut off at the bottom there -- is that
2 her response to you?
3 A Yes.
4 Q Did you have time to review that response as well?
5 A Yes.
6 Q Outside of the response that Lisa Ellinger sent to
7 you on July 14th, 2016, do you recall any
8 discussion with her or other ETF staff about the
9 removal of the exclusion or was this it?
10 A Are you asking specifically -- I'm sorry. I'm
11 trying to understand if you mean between then and
12 today.
13 Q No. At the time, at or around the time that
14 Ms. Ellinger responded to your e-mail, was this
15 the sole response to you or were there other
16 discussions around that time? Do you know?
17 A I don't -- I don't recall.
18 Q When you sent the e-mail to Lisa July 13th, 2016,
19 why didn't you mention the discrimination aspect
20 of your concerns about that exclusion?
21 A Primarily because I thought the ETF staff memo
22 handled that piece. The part that was lacking
23 that I was accustomed to was the cost estimate;
24 and that's why I had, you know, asked the
25 follow-up question of Lisa.

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1 Q Do you recall, at the time the board received the
2 information about the potential removal of the
3 exclusion whether other board members were
4 strongly in favor of the removal or opposed to it,
5 outside of yourself, of course?
6 A I don't recall anybody voicing their support or
7 lack of support in the July meeting.
8 Q How about shortly after the July meeting?
9 A I certainly don't recall anything outside of
10 public discussion that the board would have had on
11 the matter.
12 Q "Public discussion" meaning discussions in open
13 session of the board or in some other forum?
14 A I know this issue came up at subsequent board
15 meetings, and board members may have voiced either
16 support or lack of support at those meetings. I
17 did not have any separate discussions with board
18 members.
19 MR. ROTH: Are we coming up on a
20 good time for a break?
21 MR. FAIRWEATHER: Five or
22 ten minutes, yes, that's fine.
23 (Recess)
24 (Exhibit No. 2 marked
25 for identification)

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1 Q Mr. Day, there's a document in front of you that
2 we've marked as Deposition Exhibit 2, which
3 consists of three e-mails, two of which you've
4 seen, I believe, already this afternoon and then
5 the top one.
6 Do you remember responding to Lisa Ellinger's
7 response to your questions in July of 2016?
8 A Yes, sure.
9 Q And is that why you sent the e-mail on Friday,
10 July 15th, 2016?
11 A Yes.
12 Q After sending the July 2016 e-mail, did you do any
13 additional research into the exclusion or the
14 coverage of services, procedures for transgender
15 individuals before the board took formal action on
16 it later that year?
17 A I don't recall.
18 Q The research that you testified about earlier,
19 that is the research you did before sending your
20 July 13th, 2016, e-mail to Lisa Ellinger, did you
21 share that research with anyone else outside of
22 the e-mail?
23 A Not that I recall.
24 Q Deposition Exhibit 2, the short e-mail from you at
25 the top states, "Thanks for the response, Lisa.

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1 Makes sense to me. See you at the end of August.
2 Until then, I hope life treats you well."
3 Did I read that correctly?
4 A Yes.
5 Q What was coming up at the end of August, if you
6 remember?
7 A I assume that's in reference to a board meeting
8 that would have been scheduled at the end of
9 August.
10 Q Your statement, "That makes sense to me,"
11 indicated that Lisa's explanation to you was
12 satisfactory at that point?
13 A Yes.
14 Q At any point, did you get an actual cost impact of
15 the removal of this exclusion prior to taking a
16 board vote on it?
17 A We did receive a formal estimate from Segal about
18 the removal of the exclusion. From my
19 recollection, that estimate was provided in
20 advance of the -- I think it was in advance of the
21 February 2017 Group Insurance Board meeting, but
22 I'm not certain.
23 Q Did the board, at some point, take action to
24 remove the exclusion that you're discussing in
25 your e-mails with Lisa in July of 2016?

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1 A Yes.
2 Q When did they do that? When did you do that?
3 A I believe that action was in July of 2016, to
4 remove the exclusion based on the ETF staff
5 recommendation.
6 Q So do you recall there being a board vote to
7 remove the exclusion?
8 A Yes.
9 Q Do you recall that happening at the July 12th
10 meeting?
11 A I assume so.
12 Q So your recollection was that the board voted on
13 removing the exclusion prior to you sending your
14 e-mail to Lisa Ellinger on July 13th, 2016; is
15 that right?
16 A As best I can recall, that was the sequence of
17 events.
18 Q Did you vote at the July 12th, 2016, meeting to
19 remove the exclusion?
20 A I assume I did.
21 Q How did you vote?
22 A It would have been an aye vote, I believe, to
23 adopt the recommendation from ETF staff to remove
24 the exclusion.
25 Q Was that a unanimous vote to remove the exclusion,

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1 if you recall?
2 A I don't recall.
3 Q You voted to remove the exclusion prior to getting
4 any response from Lisa Ellinger about your cost
5 impact questions; is that right?
6 A Again, as best I can remember, that was the
7 sequence. It's possible the vote could have been
8 later. I don't recall exactly.
9 Q And the board wouldn't have voted out of a meeting
10 that was noticed properly and received an agenda;
11 is that right?
12 A Correct. No vote on this outside of a meeting
13 with appropriate notice.
14 Q So it looks like Deposition Exhibit 2 in
15 Ms. Ellinger's response to you, she ends by
16 saying, "Thanks again for stepping into the
17 secretary role."
18 Do you see that?
19 A Uh-huh.
20 Q Is that a yes?
21 A Yes.
22 Q Does that refresh your memory as to when you began
23 as secretary of the board?
24 A I don't -- I assume that means I was approved as
25 secretary or voted in as secretary at the July '16

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1 meeting.
2 Q Now, after the board vote in what you believe was
3 July of 2016, in which you voted to remove the
4 exclusion, do you recall having any discussion
5 about reinstating the exclusion later that year
6 among the board?
7 A Yes.
8 Q What do you recall about that?
9 A I recall that the issue was brought back before
10 the board by a board member for reconsideration.
11 Q Do you recall when that was?
12 A I believe it happened multiple times in 2016. So
13 I don't recall if it happened -- my recollection
14 is that there were two board meetings in
15 December of 2016, and there may have been a
16 November meeting as well. Between those meetings
17 and a potential August meeting, I don't recall
18 exactly at which meetings it came up again for
19 reconsideration. But I do have recollection of it
20 being brought up multiple times before the board
21 later in that year.
22 Q You testified that the issue was brought up for
23 reconsideration by a board member; is that right?
24 A Yes.
25 Q Which board member?

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1 A J.P. Wieske.
2 Q Did Mr. Wieske bring the issue up multiple times?
3 A Yes, to the best of my recollection.
4 Q Do you recall when, during that second half of
5 2016, Mr. Wieske first brought it up to the board?
6 A I do not recall exactly.
7 Q Do you recall if it was one of the standard
8 quarterly meetings of the board at which he
9 brought it up?
10 A I do not.
11 Q Do you recall whether Mr. Wieske voiced his
12 objection to removing the exclusion at the
13 July 2016 meeting?
14 A I do not recall.
15 Q What do you recall about Mr. Wieske raising
16 objection to the removal of the exclusion during
17 2016?
18 A I recall him just asking the board to reconsider
19 this. I recall some question about the
20 constitutionality of the portion of the
21 Affordable Care Act that it enacted. I think it
22 was Section 1557. I could be wrong. But that was
23 specific to, kind of, transgender coverage and
24 discrimination.
25 And I -- yeah, I think there were subsequent

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1 comments about not being able to put the
2 toothpaste back in the tube. I recall that being
3 used as part of the justification for
4 reconsideration. And, yeah, that's about it.
5 Q Now, the comments that you just described and
6 recalled from Mr. Wieske in 2016, did those happen
7 in open session of the board?
8 A I believe so.
9 Q Do you recall specifically, the comment about not
10 being able to put the toothpaste back in the tube,
11 when that happened?
12 A To the best of my recollection, that was the
13 December 30th, 2016, meeting and it was before we
14 went into closed session. It was either before or
15 after closed session. I do seem to recall that
16 those comments were made in open session.
17 Q The other comments regarding the constitutionality
18 of Section 1557 and general requests that the
19 board reconsider removal of the exclusion, did
20 those also happen in open session?
21 A Again, as best I recall, yes.
22 Q Do you recall which meetings those happened at?
23 A I do not exactly.
24 Q Did you or anyone else ask Mr. Wieske what he
25 meant by his toothpaste comment?

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1 A I did not, and I don't recall others asking.
2 Q Do you recall, at the time, having an
3 understanding about what he meant?
4 MR. ROTH: Objection to the extent
5 it calls for speculation.
6 Q Do you understand my question?
7 A I do.
8 Q Okay.
9 A And I do recall having an understanding of what he
10 meant.
11 Q I'm not asking you to speculate as to what your
12 state of mind was at the time. You recall having
13 a specific understanding of what he meant at that
14 time; is that right?
15 A Yes.
16 Q What was your understanding of what he meant?
17 A He was trying to suggest, again, my
18 interpretation, that once we started covering the
19 benefit, we could not uncover the benefit later.
20 Q So as of the time Mr. Wieske made the toothpaste
21 comment, the official action of the board was to
22 cover the benefit, is that right, or were you
23 about to vote on that?
24 A At the time that comment was made, I believe the
25 exclusion had been removed and the board was,

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1 again, preparing to reconsider the removal of the
2 exclusion.
3 Q Did Mr. Wieske provide any further explanation
4 about what he meant by his toothpaste comment
5 outside of making the comment?
6 A Not that I recall.
7 (Exhibit No. 3 marked
8 for identification)
9 Q Mr. Day, I've handed you what's been marked as
10 Deposition Exhibit 3.
11 Have you seen that before today?
12 A I have not.
13 Q Is Mr. Wieske at the bottom, the signature there,
14 J.P. Wieske, who you've been testifying about
15 today?
16 A Yes.
17 Q Do you know who Bonnie Cyganek is?
18 A Yes.
19 Q Who is that?
20 A Bonnie served on the board with me through -- I
21 believe through much of 2017. She had been on the
22 board for years prior. Our service overlapped.
23 Q So as of September 28th, 2016, Ms. Cyganek was a
24 member of the GIB; is that right?
25 A Yes. I believe she was also the vice president of

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1 the -- or the vice chair, I should say, of the
2 board.
3 Q Do you recall who the chair was at that time?
4 A Mike Farrell.
5 Q As of September 28th, 2017, had you reviewed a DOJ
6 memo on transgender issues? Do you recall?
7 A I don't recall a DOJ memo prior to -- I'm sorry.
8 There may have been a memo presented at our
9 August meeting. I'm not certain. So I don't
10 recall for certain.
11 Q So you don't recall, as of late September 2017,
12 having reviewed a DOJ memo on transgender issues;
13 is that right?
14 A I recall a DOJ memo. I can't recall the timing of
15 that memo and when it was released.
16 Q Do you recall what it said?
17 A I recall that it had a lot of legal terminology in
18 it, and I cannot recall a lot of specifics about
19 the document. Yeah.
20 Q Do you recall what the recommendation was, if any?
21 A I don't know that that document came with a formal
22 recommendation.
23 Q Do you recall, at any point after the board voted
24 to remove the exclusion, hearing from someone at
25 DOJ with a recommendation or request that the

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1 exclusion be reinstated?
2 A I do recall a DOJ memo, that the DOJ memo --
3 MR. ROTH: Just -- I'm going to
4 object to the extent this calls for
5 attorney/client-privileged communication.
6 There's at least one privileged memo at issue
7 in this case, and I just want to be sure that
8 the witness's answer does not disclose the
9 contents of that communication.
10 So if you could be more specific, I
11 guess, with respect to which communication
12 you're referencing, I think that would be
13 helpful.
14 Q Do you recall more than one e-mail from the DOJ
15 regarding this issue?
16 MR. ROTH: I'm also going to object
17 to the extent that misstates the testimony.
18 MR. FAIRWEATHER: My question?
19 MR. ROTH: Yes. I'm not sure he
20 referenced an e-mail from DOJ.
21 (Exhibit No. 4 marked
22 for identification)
23 Q I'll give you a few minutes to take a look at
24 that, Mr. Day.
25 Mr. Day, have you had an opportunity to

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1 review Deposition Exhibit 4?
2 A Yes.
3 Q Do you recall reviewing this at any point prior to
4 today?
5 A Upon receipt.
6 Q Did you review it in preparation for the
7 deposition today?
8 A I did not.
9 Q What is the document, to the best of your
10 understanding?
11 A There's a memorandum from DOJ that contains some
12 rationale for reconsideration, and then there is
13 an accompanying memorandum from ETF.
14 Q If you could, look at the first page, which is
15 entitled "Correspondence Memorandum." That's from
16 Sara Brockman.
17 Do you see that?
18 A Yes.
19 Q Ms. Brockman, in the second very short
20 paragraph there, states, "Since the July 12th,
21 2016, board meeting."
22 So is it your understanding that the meeting
23 would have been on July 12th, 2016?
24 A Yes.
25 Q It was at that meeting, to your recollection, that

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1 the board voted to remove the exclusion that we've
2 been discussing here today; is that right?
3 A Yes.
4 Q Now, at any point between July 12th of 2016, that
5 board meeting, and your receipt of the DOJ's
6 memorandum attached to Deposition Exhibit 4, did
7 you receive any communication from the board or
8 DOJ regarding the removal of the exclusion?
9 A Not that I recall.
10 Q So the first time after your brief exchange in
11 July of 2016 with Ms. Ellinger that you next heard
12 about this issue was when you received
13 Deposition Exhibit 4; is that accurate?
14 A I believe so, yes.
15 Q I believe you testified earlier that between the
16 mid-July 2016 e-mail communication and the
17 December 2016 e-mail, you did not complete any
18 additional research on your own, did you?
19 A I don't know for certain --
20 Q Okay.
21 A -- if I did any additional research between
22 July and December.
23 Q I should have been clearer there. Research
24 regarding either the cost impact or the exclusion
25 of coverage, generally speaking.

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1 A Yes. I don't know for certain that I did no
2 additional research.
3 Q Did you have an opportunity to speak with anyone
4 from DOJ regarding the opinion that's set forth in
5 the August 10th, 2016, memorandum?
6 A I believe -- I believe DOJ representation was
7 there for one of the subsequent meetings. I think
8 it was the August meeting. But I can't say for
9 certain. But I do recall DOJ having
10 representation at the Group Insurance Board
11 meeting, being on hand for questions.
12 Q Is it your recollection that you received
13 Deposition Exhibit 4 immediately prior to a board
14 meeting in August of 2016?
15 A Yes, I believe it was received in advance of the
16 August 2016 board meeting.
17 Q Do you recall if any vote or other action was
18 taken by the board at the August 2016 meeting as
19 it relates to the transgender benefit?
20 A As I recall, there was no vote on this matter at
21 the August '16 meeting.
22 Q Did you personally have questions of the DOJ
23 representative when he or she came to the
24 August 2016 meeting?
25 A I don't believe I did.

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1 Q Do you recall anything about the substance of the
2 conversation with the DOJ representative at that
3 August 2016 meeting?
4 MR. ROTH: I'm just going to
5 object. I think he testified he wasn't sure
6 if it was the August 2016 meeting, but I'll
7 leave that aside.
8 A Can you repeat that? Sorry.
9 Q Well, let me start over.
10 So you recall, in relation to
11 Deposition Exhibit 4, that there was a meeting in
12 August of 2016 to discuss the transgender
13 exclusion issue; is that right?
14 A I assume there was, based on the timing, yes.
15 Q Do you recall having a conversation or anyone on
16 the board having a conversation with a DOJ
17 representative in August of 2016 regarding the
18 issues discussed in the DOJ's memo?
19 A I don't remember for certain if it was the
20 August 2016 meeting where DOJ was present or if it
21 was a subsequent 2016 meeting.
22 Q What do you recall about the board's response or
23 reaction to the receipt of this memo, that is
24 other members of the board, if anything?
25 A I don't -- I don't recall the conversation.

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1 Q If you could, take a look at the DOJ memo, which
2 is Attachment A. The first page, the second
3 paragraph, it states, "To the extent the board
4 believes that the new HHS rules compel it to
5 accept ETF's recommended changes, it should
6 reconsider for two reasons."
7 Did I read that correctly?
8 A Yes.
9 Q So is it your understanding that the DOJ is asking
10 the GIB to reconsider its acceptance of the ETF's
11 recommendation as of August 10th, 2016?
12 MR. ROTH: Objection. The document
13 speaks for itself.
14 Q You can answer.
15 A Could you restate? Sorry.
16 Q I read the portion of the paragraph correctly;
17 true?
18 A Yes.
19 Q Is it your understanding that the DOJ memo is
20 requesting that the board reconsider its
21 acceptance of ETF's recommended changes as of
22 August 10th, 2016?
23 A I guess it seems conditional to me. To the extent
24 the board believes, then we should reconsider. So
25 I read it as more of an "if then" than a firm

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1 recommendation from DOJ to reconsider.
2 Q But as of August 10th, 2016, the board had already
3 voted to remove the exclusion; true?
4 A Yes.
5 Q DOJ was asking you to reconsider that action; true?
6 MR. ROTH: Objection; asked and
7 answered.
8 Q Is that true?
9 A I don't know that DOJ was requesting a
10 reconsideration.
11 Q Attachment B to Deposition Exhibit 4 was another
12 correspondence memorandum.
13 Do you see that?
14 A Yes.
15 Q Do you recall receiving this in August of 2016?
16 A Yes.
17 Q Do you recall whether you received it prior to a
18 board meeting in August of 2016?
19 A Yes. I assume so.
20 Q Do you recall at any point during August of 2016
21 any representatives of DOJ stating that the
22 procedures at issue here were never medically
23 necessary?
24 A I do not recall that.
25 Q Do you recall that being an issue raised by any

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1 DOJ representative at any point during 2016?
 2 A I do not recall.
 3 Q Now, between the August 2016 meeting and the end
 4 of 2016, what do you recall about actions the
 5 board took on this specific issue?
 6 A The only action on this matter from the board's
 7 perspective occurred at the December 30th, 2016,
 8 meeting.
 9 Q What happened at that meeting?
 10 A A vote was taken to reinstate -- to conditionally
 11 reinstate the exclusion of transgender services
 12 and benefits.
 13 (Exhibit No. 5 marked
 14 for identification)
 15 Q You've got a document marked Deposition Exhibit 5
 16 in front of you. I'll give you a minute to take a
 17 look at that.
 18 What is Deposition Exhibit 5?
 19 A These are meeting minutes.
 20 Q If you look at the first page of the exhibit,
 21 upper left-hand corner, it says, "Draft."
 22 Do you see that?
 23 A I do.
 24 Q Are the minutes typically marked "Draft" until
 25 you've signed off on them as the secretary?

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1 A I believe so.
 2 Q Can I have you take a look at page 8 of the
 3 document? The very last sentence of the document,
 4 "The DOJ" -- do you see that?
 5 A Yes.
 6 Q -- "previously submitted a memorandum in regard to
 7 the July 12th, 2016, board action to approve
 8 changes to the guidelines, contract, and uniform
 9 benefits for 2017."
 10 Did I read that correctly?
 11 A Yes.
 12 Q And it goes on in the minutes to state,
 13 "Mr. Potter stated that the August 10, 2016,
 14 memorandum was authored by the DOJ at the request
 15 of the governor's office for the benefit of the
 16 board."
 17 Did I read that correctly?
 18 A Yes.
 19 Q Is that your understanding of what the discussion
 20 was at the December 13th, 2016, meeting regarding
 21 the creation of the August 10th, 2016, DOJ
 22 memorandum?
 23 A Yes, I believe so.
 24 Q Do you recall any discussion at the
 25 December 13th, 2016, meeting about why the

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1 governor's office had requested DOJ to draft the
 2 August 10th, 2016, memorandum?
 3 A I do not.
 4 Q If you move past the paragraph stating "Mr. Potter
 5 noted" onto the next one, "Mr. Potter stated that
 6 the DOJ recommends the board follow the law as it
 7 currently stands."
 8 Did I read that correctly?
 9 A Yes.
 10 Q Do you have any recollection about what your
 11 understanding was of that at that time?
 12 A Yes. As best I recall, the guidance from DOJ was
 13 to continue with the removal of the exclusion at
 14 that point in time.
 15 Q Your recollection was that DOJ was recommending
 16 that you continue with the removal of the
 17 exclusion or reinstate the exclusion?
 18 A As best I recall, the guidance was to continue
 19 with the removal of the exclusion at that meeting.
 20 Q Do you know who Mr. Potter is?
 21 A I assume Mr. Potter is a DOJ employee, but I am
 22 not certain.
 23 Q I'll represent to you that page 2 of
 24 Deposition Exhibit 5 has Kevin Potter and
 25 Colin Roth listed as Department of Justice

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1 representatives.
 2 Does that confirm your recollection of who
 3 was there?
 4 A Yes.
 5 Q Do you recall if the board took any action at this
 6 December 13th, 2016, meeting as it relates to the
 7 status of the exclusion we've been discussing here
 8 today?
 9 A I do not recall any action at the December 13th
 10 meeting, and the minutes seem to support that.
 11 Q Do you recall any action later in the month of
 12 December 2016?
 13 A I do.
 14 (Exhibit No. 6 marked
 15 for identification)
 16 Q I'll give you a minute to take a look at that.
 17 Do you recognize Deposition Exhibit 6?
 18 A I do.
 19 Q What is it?
 20 A Meeting minutes from December 30th, the board
 21 meeting on December 30th.
 22 Q What do you recall with respect to discussion
 23 relating to the exclusion that we've been
 24 discussing here today at the December 30th, 2016,
 25 meeting?

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1 MR. ROTH: Objection. Again, there
2 was a closed session portion of this meeting,
3 which contains attorney/client-privileged
4 communication. So I'm going to instruct the
5 witness not to answer to the extent the
6 answer is based on the discussion during that
7 closed discussion.
8 Q Can you do that?
9 A I -- I cannot recall what was closed and open in
10 that meeting.
11 Q So out of all the discussions that were had at the
12 December 30th, 2016, board meeting regarding the
13 exclusion for transgender services and procedures,
14 you don't recall what was discussed in open
15 session versus what was discussed in closed
16 session; is that right?
17 A I do not recall the specifics.
18 Q Do you recall discussion about a set of
19 contingencies that must be put in place prior to
20 reinstating the exclusion?
21 A I do.
22 Q What do you recall about that discussion, that is,
23 relating to the contingencies?
24 MR. ROTH: Again, I'll instruct the
25 witness not to answer to the extent his

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1 recollection is based on discussion that was
2 during the closed session portion of the
3 meeting.
4 MR. DUPUIS: Can I just raise an
5 issue about this? I think you've produced
6 and have not attempted to claw back the
7 closed-session meeting minutes.
8 MR. ROTH: Well, if that's the
9 case, then I'm going to put that on the
10 record, that we would request those be
11 returned. That was not our intent to produce
12 those.
13 MR. DUPUIS: They may be on the
14 website.
15 MR. ROTH: If that's the case,
16 then -- I do not believe they're on the
17 website. If they were produced as part of
18 the document production, we would request
19 that they at least be sequestered and subject
20 to any further --
21 MR. DUPUIS: Okay.
22 MR. ROTH: What are the documents
23 that they're attached to?
24 MR. DUPUIS: A whole bunch.
25 MR. FAIRWEATHER: It's ETF 00570.

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1 MR. DUPUIS: And attached to
2 GIB 00711.
3 MR. ROTH: Any others that you're
4 aware of?
5 MR. DUPUIS: Well, there were
6 minutes attached to a whole bunch of --
7 MR. ROTH: Well, I understand
8 there's a lot of minutes attached. I'm
9 specifically asking about -- so you think
10 those minutes were attached to other
11 documents?
12 MR. DUPUIS: Possibly.
13 MR. FAIRWEATHER: They were
14 attached to an e-mail from --
15 MR. ROTH: Let me see it, please.
16 I'll hand it back to you, obviously.
17 MR. FAIRWEATHER: I know. I'm just
18 taking my notes off.
19 MR. ROTH: Yes. I would -- okay.
20 It's one of approximately 20 attachments.
21 Well, in any event --
22 MR. FAIRWEATHER: And it was also
23 produced outside of an attachment that was
24 one of 20-plus.
25 MR. ROTH: Okay.

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1 MR. FAIRWEATHER: Okay.
2 Q Do you recall a vote taking place at the
3 December 30th, 2016, board meeting as it relates
4 to the exclusion?
5 A Yes.
6 Q I'll have you take a look at Deposition Exhibit 6,
7 the third page.
8 Do you recall any discussion about the motion
9 that's described at the bottom of page 3 regarding
10 the reinstatement of the current exclusion outside
11 of closed session?
12 A I do not.
13 Q So there was no discussion about Mr. Hurlburt's
14 motion after he made the motion but prior to the
15 vote?
16 A I don't recall.
17 Q But there may have been. You just don't recall;
18 is that right?
19 A Correct.
20 Q Do you recall where the four contingencies listed
21 in Mr. Hurlburt's motion came from?
22 MR. ROTH: Object to the extent it
23 calls for attorney/client-privileged
24 communication during the closed session of
25 the board. He can disclose the attorney that

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1 it came from if he remembers, but --
 2 Q I mean, I don't want you to answer as if an
 3 attorney gave you those four contingencies. Do
 4 you recall where the contingencies came from?
 5 A I -- I just remember it was from discussion in
 6 closed session.
 7 Q Was legal counsel in closed session?
 8 A Yes.
 9 Q That was DOJ attorney Kevin Potter; is that right?
 10 A I don't know for certain. I was not present at
 11 this meeting physically. I was on the phone.
 12 Q Were you present in the closed session?
 13 A On the phone.
 14 Q On the phone?
 15 A Yes.
 16 Q You don't recall any of the discussion in the
 17 closed session about the creation or formulation
 18 of these four contingencies; is that right?
 19 A I do recall some of the discussion.
 20 Q What do you recall about the discussion, subject
 21 to the ongoing objection of Mr. Roth as to
 22 attorney/client privilege, if you can do that?
 23 A It was all in closed session.
 24 Q So all of the discussion about the four
 25 contingencies occurred in a closed session on

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1 December 30th, 2016. Is that your recollection?
 2 A As far as I recall, yes.
 3 Q You don't recall who proposed the contingencies?
 4 A I do not.
 5 Q Did you propose any portion of the contingencies?
 6 A I did not.
 7 Q Do you recall if any other board members proposed
 8 them or any portion of them?
 9 A I recall that it was board members. I don't
 10 recall who specifically.
 11 Q You recall that it was board members who came up
 12 with the four contingencies. Is that what your
 13 testimony is?
 14 A That is my recollection.
 15 Q But you did not personally have any part in
 16 creating those four contingencies; is that right?
 17 A Yes.
 18 Q Do you recall any discussion about additional
 19 contingencies, that is beyond the four that were
 20 agreed upon and voted on, in open session?
 21 A I do not.
 22 Q Do you recall if any ETF staff participated in the
 23 discussions that resulted in the four
 24 contingencies later voted on by the board?
 25 A I recall that ETF staff was present. I don't

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1 recall who, if anyone, spoke from ETF during the
 2 discussion.
 3 Q Did you take notes during the closed session?
 4 A I don't believe so.
 5 Q That is the closed session that took place on
 6 December 30th, 2016; is that right?
 7 A Correct, correct.
 8 Q Did you take notes during the open session of that
 9 meeting?
 10 A I don't believe so.
 11 Q Was that unusual, that you wouldn't have taken
 12 your own notes during a meeting of the board?
 13 A Somewhat unusual. But I was at my mother-in-law's
 14 house for Christmas and didn't have -- didn't have
 15 a notebook, pen, just didn't really think about
 16 it.
 17 Q You voted nay in response to the motion proposed
 18 by Mr. Hurlburt at the end of the
 19 December 30th, 2016, meeting; is that right?
 20 A Yes.
 21 Q Why did you vote that way?
 22 A Oh, as I previously stated, I just -- I believe,
 23 in part, that these are discriminatory in nature
 24 and personally feel that covering these benefits
 25 can potentially impact the lives of transgender

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1 individuals. So that, first and foremost, is the
 2 reason I voted nay.
 3 Secondary to that, the removal of the
 4 exclusion had already been communicated to members
 5 and I didn't want -- I was concerned about
 6 confusion that would be created amongst the
 7 membership by now reinstating the exclusion with
 8 these criteria.
 9 And lastly, I didn't -- I didn't like that
 10 this had no end date; that it was basically when
 11 these are met, then the exclusion is reinstated.
 12 It gave no -- it gave no certainty to transgender
 13 individuals who were counting on these benefits
 14 1/1. Yes, I was concerned about all three of
 15 those.
 16 Q Did you communicate those concerns to anyone?
 17 A I did raise concerns.
 18 Q To whom did you communicate those concerns?
 19 A I raised concerns in closed session.
 20 Q Did any other board members raise concerns in
 21 closed session?
 22 MR. ROTH: Object to the extent
 23 that calls for attorney/client-privileged
 24 communication by a board member to counsel
 25 during a closed board session. I'd instruct

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1 the witness not to answer to the extent
2 that's what you're remembering.
3 Q Do you recall any concerns that were raised
4 outside of those expressed to the board's legal
5 counsel in closed session?
6 A Sorry. Can you --
7 Q Sure.
8 Your attorney objected because he doesn't
9 want you to talk about any communications that
10 were made to the board's legal counsel. Do you
11 recall any concerns that were raised that were not
12 directed to legal counsel in closed session?
13 A Yes.
14 Q What were those?
15 A I don't recall the specific comments. I seem to
16 recall concerns about the communication that I had
17 mentioned previously.
18 Q Anything else?
19 A I can't -- I can't recall other comments made by
20 board members.
21 Q Did you have concern at any point while the board
22 was voting to reinstate the exclusion that you may
23 have been violating a fiduciary duty you had to
24 the board or to its members or to those covered by
25 the insurance plan?

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1 A Personally, I mean, yes, I had concern.
2 Q What were your concerns?
3 A My concern was that we weren't acting in the best
4 interests of our members.
5 Q Beyond the reasons that you've described already
6 today about your concerns generally, what were
7 those fiduciary duty concerns you had?
8 A I don't know that it goes far beyond what I've
9 outlined already.
10 Q What is your understanding as to why fiduciary
11 duty might be implicated by the concerns you had
12 about the exclusion?
13 MR. ROTH: Object to the extent it
14 calls for attorney/client-privileged
15 communication and instruct the witness not to
16 answer accordingly.
17 Q Can you do that?
18 A I can't.
19 Q Well, the fiduciary duty issue, when did that
20 first arise for you as it relates to the vote on
21 this exclusion?
22 A I don't know for certain.
23 Q Was it after the vote took place on
24 December 30th, 2016?
25 A I don't know for certain. I do recall that was an

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1 element of the contingencies --
2 Q Right.
3 A -- on the December 30th or from the December 30th
4 meeting.
5 Q So there was some discussion about fiduciary
6 duties prior to Mr. Hurlburt making his motion on
7 December 30th, 2016; is that right?
8 A Yes.
9 Q As of that time, did you personally have concerns
10 about whether the action taken does or does not
11 constitute a breach of board members' fiduciary
12 duties?
13 MR. ROTH: Objection; asked and
14 answered.
15 You can answer.
16 A I'm not sure if before that point I -- I had
17 considered it as completely, maybe, as I did in
18 that moment. I -- I'm sorry.
19 Q Generally, what's your understanding of the nature
20 of the fiduciary issue at issue as of
21 December 30th, 2016, and the motion with the four
22 contingencies?
23 MR. ROTH: I'm going to interpose
24 my attorney/client privilege objection that
25 I've raised a number of times.

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1 It might make sense to go off the record
2 for just a second.
3 (Discussion held off the record)
4 MR. FAIRWEATHER: Go back on.
5 Q Let me back way up.
6 Earlier today you had talked about training
7 you had as a board member. Do you recall that?
8 A Yes.
9 Q Do you recall one topic being the nature of your
10 fiduciary duties?
11 A Yes.
12 Q What do you recall about that training?
13 A I recall that we are the board. You know, to work
14 to the best of our ability and to rely on the
15 expertise with others that we're in accordance
16 with state and federal law. And I guess I have
17 this kind of, you know, sense of fairness to all
18 coming -- stemming from our fiduciary duties that
19 we're not discriminatory or partial or anything
20 like that.
21 Q Do you recall a time at which you came up with the
22 idea that your fiduciary duty may be implicated by
23 the votes that were taking place regarding the
24 transgender exclusion?
25 A I recall actually receiving the ETF memo that

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1 responded to the DOJ memo in August of 2016. I
2 recall reading that memo and having the sense that
3 the HHS non-discrimination law was the law of the
4 land and feeling compelled, myself, to follow the
5 law of the land.
6 Q So that was in August of 2016; correct?
7 A Correct.
8 Q What did you do personally to address that
9 question that you then had about whether not
10 following the law of the land was a breach of your
11 fiduciary duty?
12 A Because following the August discussion, I
13 didn't -- I didn't think this would come back
14 before the board. In all honesty, I somewhat
15 dismissed it at that point because it had come
16 back before the board. We did not take any
17 action. I don't recall giving it significant
18 thought afterwards because I thought the issue was
19 over until, of course, late December.
20 Q So the board did not take any action in
21 August of 2016; is that right?
22 A On this matter, correct.
23 Q Right. On this matter.
24 A Yes.
25 Q And it was your conclusion at that point that the

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1 issue was not a live issue anymore; is that right?
2 A That was my sense at that point in time.
3 Q Was it not until December of that year that you
4 learned that it was going to be a live issue
5 again?
6 A Yes.
7 Q Did that, then, renew your concern, whether acting
8 consistent with the way the DOJ was recommending,
9 that you would be implicating your fiduciary
10 duties?
11 A Yes. I -- I was -- yes, I was concerned about not
12 following the law.
13 Q So after the vote on December 30th of 2016, what
14 did you do to further address this issue as it
15 related to the transgender services coverage?
16 A I recall sending a follow-up note to Lisa. I was
17 concerned about members and how they might be
18 affected. I was especially concerned, given there
19 was no, kind of, clear end date, that once the
20 contingencies were met, that this would be assumed
21 to be reinstated, that individual members may
22 begin coverage and then be forced to suddenly end
23 it in the middle of their treatment.
24 And I -- again, I didn't think that was
25 right. And so I wanted to identify if there were

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1 members who had started treatment or had received
2 any services, so I had reached out to Lisa. She
3 was, again, kind of the main conduit for all of my
4 questions or inquiries about the plan, just to see
5 if anybody had sought services, where were we at,
6 yes, trying to make sure that members -- to the
7 best of my ability, trying to protect members
8 against any further adverse, kind of, implications
9 of this.
10 (Exhibit No. 7 marked
11 for identification)
12 Q You testified about follow-up you had following
13 the December 30th, 2016, vote, specifically a
14 communication with Lisa Ellinger; is that right?
15 A Yes.
16 Q Is this e-mail, Deposition Exhibit 7, part of that
17 follow-up that you had with her?
18 A Yes.
19 Q Were these answered to your satisfaction by either
20 Lisa Ellinger or ETF staff?
21 A To my satisfaction, not necessarily.
22 Q What portion of that was not to your satisfaction?
23 A The portion that it was just going to be
24 reinstated at the flip of a switch, that somebody
25 else was going to make that call, that ETF was

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1 going to make that call and not -- it wasn't going
2 to come before the board again.
3 Q So was it your understanding, as of
4 January 31st, 2017, that the four contingencies
5 voted on at the December 30th meeting had been met
6 or had occurred?
7 A I'm not sure that I felt they had been met at that
8 stage.
9 Q But either way, Ms. Ellinger was telling you that
10 that agency was moving forward with a directive
11 from the board that ETF was to determine whether
12 contingencies had been met; is that right?
13 A Yes.
14 Q And that's what caused you some concern as of
15 January 2017; is that right?
16 A Yes.
17 Q Outside of e-mailing Lisa Ellinger, what else did
18 you do to voice that concern?
19 A I can't think of any other actions I took. I
20 mean, I know I spoke up at the following meeting
21 in February.
22 Q What did you say when you spoke up in February 2017?
23 A At the February 2017 meeting, a memo was presented
24 to the board saying that the contingencies had
25 been satisfied, and I remember challenging some of

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1 those -- some of the assumptions in the memo.
 2 Q Which assumptions did you challenge?
 3 A Well, I remember asking questions about the Texas
 4 case and what it meant, that a stay had been
 5 issued. Because, if I recall, in the conditions
 6 that were part of the motion on December 30th was
 7 the HHS rule had to be rescinded or invalidated.
 8 And I remember asking questions that were -- I
 9 don't remember the exact questions, but had the
 10 rule actually been invalidated because a stay was
 11 issued in the Texas case or not.
 12 Of course, I defer to legal's opinion on
 13 that. I'm not the expert there. I remember being
 14 told that the stay meant that there was a strong
 15 probability, that the case would continue or the
 16 stay would be in place. I had a hard time
 17 discerning what that meant relative to the
 18 conditions.
 19 Q Did you voice any other concerns at that
 20 February 2017 meeting aside from the stay
 21 contingency?
 22 A I don't remember if I voiced concern about the
 23 reduction in premium or not.
 24 Q Did the reduction in premium issue relate to the
 25 transgender procedure services exclusion?

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1 A Yes.
 2 Q How so?
 3 A Part of the condition in the December 30th vote
 4 was that this would reduce or maintain premiums.
 5 Q You're referencing the third contingency in the --
 6 A Yes.
 7 Q You had concerns about whether that one had been
 8 met as of February 2017?
 9 A The actuarial consultant had provided an estimate
 10 for that February 2017 meeting, as I recall, and
 11 it did show a reduction, from their perspective.
 12 MR. FAIRWEATHER: Can we take a
 13 short break?
 14 THE WITNESS: Sure.
 15 (Recess)
 16 (Exhibit No. 8 marked
 17 for identification)
 18 Q Mr. Day, Deposition Exhibit 8 is in front of you,
 19 which are minutes of a Group Insurance Board
 20 meeting. I'll have you take a look at page 4 and
 21 page 5 of the document.
 22 Have you seen these minutes before today?
 23 A Yes.
 24 Q You ultimately signed off on them; is that right?
 25 A Yes.

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1 Q I'll have you take a look at pages 4 and 5. Let
 2 me know after you've had a chance to review that.
 3 Is that consistent with how you described the
 4 meeting just before we took a break this
 5 afternoon?
 6 A Yes.
 7 Q On page 5, just before the break, so the bottom
 8 half of the page, there's a portion that says,
 9 "The board took a break due to audience
 10 disruption."
 11 Do you see that?
 12 A Yes.
 13 Q Immediately before that, it states, "Mr. Farrell
 14 noted that the board's December 30th, 2016,
 15 decision can be revisited at any date in the
 16 future as desired by the board."
 17 Did I read that correctly?
 18 A Yes.
 19 Q Was the December 30th, 2016, decision resisted by
 20 the board at any point after that vote?
 21 A Yes.
 22 Q When was that?
 23 A I believe at the May 2017 meeting.
 24 (Exhibit No. 9 marked
 25 for identification)

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1 Q Turn to page 8. First of all, are these the
 2 minutes from the meeting that you just referenced,
 3 the May 2017 meeting of the board?
 4 A Yes.
 5 Q Did you make a motion regarding the transgender
 6 coverage issue at that meeting?
 7 A I did.
 8 Q What was your motion?
 9 A I wanted to remove the exclusion for transgender
 10 benefits and services.
 11 Q Was this the first meeting that you had following
 12 the February 2017 meeting at which you discussed
 13 whether the contingencies had been met?
 14 A Yes, I believe so.
 15 Q Why did you make the motion at the May 24th, 2017,
 16 meeting?
 17 A I think the minutes summarize it pretty well,
 18 actually. I, again, felt this could make a
 19 positive impact on members' lives. I didn't see
 20 it as a high-cost item. I guess that's not in
 21 there. I did -- I did want the burden of proof in
 22 terms of medical necessity to be returned to
 23 patients and doctors and not the
 24 Group Insurance Board. That medical necessity is
 25 always tied to benefits that members receive, and

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1 I felt that reinstating the benefits meant that
2 doctors and their patients would determine what is
3 medically necessary and not the board.
4 Q Did that motion pass?
5 A It did not.
6 Q Just give me one minute here.
7 With respect to the reinstating the benefit
8 that we talked about, Mr. Farrell mentioning it at
9 the February 2017 meeting, are you aware of any
10 reason why the board could not reinstate that
11 benefit for transgender individuals at any point?
12 A I'm not.
13 MR. FAIRWEATHER: I have nothing
14 further.
15 MR. ROTH: We do intend to ask a
16 few questions on cross, if that's okay and
17 everyone has time. Can we just take
18 five minutes? I have an idea of what I want
19 to ask, but I just want to confirm with Jody
20 for a couple minutes.
21 MR. FAIRWEATHER: Sure.
22 (Recess)
23 EXAMINATION
24 By Mr. Roth:
25 Q Good afternoon, Mr. Day. Obviously we've met, but

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1 I'm Colin Roth and I'm going to be asking you some
2 questions on behalf of my client, the
3 Group Insurance Board, Department of Employee
4 Trust Funds, and a variety of other State
5 defendants.
6 Do you understand my position and what we'll
7 be doing?
8 A Yes.
9 Q So I believe you testified that one of the reasons
10 that you voted to remove the coverage exclusion
11 that we've been discussing this afternoon is that,
12 in your personal opinion, the exclusion was
13 discriminatory toward transgender individuals.
14 Is that a fair summary?
15 A Yes.
16 Q Did any other Group Insurance Board members
17 express to you at any time, whether in open
18 session, outside of a Group Insurance Board
19 meeting, the view that the coverage exclusion at
20 issue was discriminatory towards transgender
21 individuals?
22 A No, not that I recall.
23 Q I believe you also testified that you voted to
24 remove the coverage exclusion at issue because it
25 was -- and I believe these were your words -- not

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1 costly; is that correct?
2 A Yes.
3 Q Do you agree that providing coverage for these
4 kinds of procedures do impose some cost on an
5 insurance plan?
6 A In the short-term, yes.
7 Q Was it the conclusion of the
8 Group Insurance Board's actuarial consultant that
9 providing these benefits would impose some cost on
10 the plan?
11 A Yes, it was.
12 Q That was the conclusion of Segal Consulting that
13 was presented to the board at its February of 2017
14 meeting; is that correct?
15 A Yes.
16 Q When considering, in your role on the
17 Group Insurance Board, whether or not to add
18 coverage for a certain kind of procedure or class
19 of procedures, is it your practice to always vote
20 in favor of providing coverage if those procedures
21 are not costly?
22 A I don't -- I don't know that I have established a
23 pattern on that.
24 Q Do you agree that if the Group Insurance Board
25 voted to provide coverage for multiple procedures

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1 or classes of procedures, each of which
2 individually was not costly, in your terms, that
3 eventually it could impose an aggregate, a
4 significant, substantial, or a large cost?
5 MR. FAIRWEATHER: Objection to
6 form.
7 Q You can answer, if you understand the question.
8 A Did you say could impose?
9 Q Correct.
10 A Yes, it could.
11 Q Is it correct that you testified that in
12 researching the potential cost of these procedures
13 that we've been discussing this afternoon in the
14 group health insurance plan, you did your own
15 literature review of publicly available studies
16 that looked at other entities, states, or
17 municipalities, et cetera, that covered these
18 kinds of procedures?
19 A Yes.
20 Q And did you do any other kind of research to
21 determine the potential costs, aside from that
22 literature review? I think you answered this
23 question and the answer was no, but I just want
24 to --
25 A Not that I recall.

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1 Q As an actuary, if you were approaching the
 2 question of how to price a new benefit or class of
 3 benefits, are there other methods you would use to
 4 do that aside from a literature review of publicly
 5 available studies?
 6 A Yes.
 7 Q What might those methods be?
 8 A I might engage in a private study, for example, or
 9 ask a consultant to assist with the estimate.
 10 Q Can you explain what a private study might entail?
 11 A One where you would hire somebody to research the
 12 issue on your behalf, a consultant, in essence,
 13 that would review, perhaps, more data than you
 14 have and be able to estimate it based on a variety
 15 of sources that you don't have available to you.
 16 Q Would one of those sources of data potentially be
 17 actual claims data for other plans that provide
 18 the benefit at issue?
 19 A Potentially, yes.
 20 Q And that kind of claims data could be proprietary,
 21 right, not public?
 22 A Yes.
 23 Q Did you have access to any claims data,
 24 proprietary or otherwise, when you did your review
 25 of the potential cost of these benefits?

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1 A No, I did not.
 2 Q But you'd agree that would be one way to determine
 3 the potential cost of this coverage, is to look at
 4 claims data, proprietary or otherwise?
 5 A Yes, I do.
 6 Q Would that, in your opinion, provide a more
 7 accurate estimate of the cost of a benefit than
 8 simply conducting a review of publicly available
 9 literature?
 10 A Yes. I believe an analysis of claims data, actual
 11 data pertaining to the benefits, likely provides a
 12 better estimate.
 13 Q When you first joined the Group Insurance Board, I
 14 believe you testified, in 2013, did you then or
 15 any time shortly thereafter review the terms of
 16 the uniform benefits?
 17 A You're asking did I ever go through all of the
 18 uniform benefits and exclusions and --
 19 Q Correct.
 20 A At one point? No.
 21 Q Was it part of your job description of being on
 22 the Group Insurance Board to evaluate the package
 23 of health insurance benefits offered to State
 24 employees?
 25 A What do you mean by "evaluate the package"?

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1 Q Understand the benefits that were being provided
 2 so that the Group Insurance Board could determine
 3 what additional benefits to cover, what benefits
 4 are unnecessary, potentially, evaluate the uniform
 5 benefits with an eye toward, you know, potential
 6 action. As I understand it, that's the job of the
 7 board?
 8 A Sure. And if I can -- I went through -- I'm not
 9 sure what you mean by reviewing all the uniform
 10 benefits. I reviewed the benefit summaries that
 11 are part of the "It's Your Choice" packet that the
 12 ETF puts out. So I familiarized myself with the
 13 benefits that were covered.
 14 I didn't go through -- oftentimes in board
 15 meetings, there's a great level of detail provided
 16 with regard to the language surrounding certain
 17 benefits, and I did not review that language.
 18 Q Do you recall reviewing the exclusions in the
 19 uniform benefits at any time shortly thereafter
 20 when you joined the Group Insurance Board?
 21 A I believe so but only insofar as they were
 22 captured in the "It's Your Choice" materials.
 23 Q So if you had reviewed those exclusions, you would
 24 have seen the exclusion for procedure services
 25 associated with gender reassignment surgery;

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1 correct?
 2 MR. FAIRWEATHER: Objection; calls
 3 for speculation.
 4 You can answer.
 5 A Presumably so.
 6 Q But at no time before the July 2016
 7 Group Insurance Board meeting did you raise the
 8 issue of the exclusion being discriminatory
 9 towards transgender people; is that correct?
 10 A That's correct, at least as it pertains to
 11 public -- to my role as a board member.
 12 Q Could you refer back to what's been marked as
 13 Exhibit No. 4?
 14 A Okay.
 15 Q Again, I believe your testimony earlier was that
 16 this is a correspondence memorandum that was
 17 presented to the board, the Group Insurance Board,
 18 before the August 2016 meeting; is that correct?
 19 A Yes.
 20 Q Attachment A is a memorandum from the Wisconsin
 21 Department of Justice to the Group Insurance Board
 22 dated August 10th, 2016; is that correct?
 23 A Yes.
 24 Q And again, I'm not trying to trip you up. I just
 25 don't remember your testimony.

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1 Was it your testimony that you did at some
 2 point review this memorandum before the
 3 August 2016 Group Insurance Board meeting?
 4 A Yes.
 5 Q Can you turn to -- sorry.
 6 So do you think you read this entire
 7 memorandum before the August meeting?
 8 A I do think I read it, yes.
 9 Q Can you turn to page 4, please? Do you see the
 10 first full paragraph that reads, "ETF can easily
 11 clear that low bar"? Do you see where it says
 12 that in the first full paragraph?
 13 A Yes.
 14 Q Is it correct that the following sentence reads,
 15 "For instance, it can point to the high costs the
 16 State must bear for covering services and
 17 procedures related to gender transition or to
 18 medical research suggesting that such procedures,
 19 paren, especially sex transformation surgeries,
 20 closed paren, may, in fact, harm patients"? Do
 21 you see that sentence?
 22 A Yes.
 23 Q Do you remember reviewing that sentence before the
 24 August 2016 Group Insurance Board meeting?
 25 A I recall reading the memo. I can't say I would

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1 recall that sentence, in and of itself, or reading
 2 it.
 3 Q Are you an attorney, Mr. Day?
 4 A No.
 5 Q So your understanding of the nature of the
 6 Group Insurance Board's fiduciary duty is not
 7 based on any training you've received as an
 8 attorney; is that correct?
 9 A Correct.
 10 MR. ROTH: I have no further
 11 questions.
 12 MR. FAIRWEATHER: Just a couple of
 13 follow-up questions.
 14 EXAMINATION
 15 By Mr. Fairweather:
 16 Q Do you have Exhibit 4 in front of you still?
 17 A Yes.
 18 Q Page 4 is a paragraph, "ETF can easily clear that
 19 low bar." Mr. Roth asked you some questions about
 20 that.
 21 Do you recall those?
 22 A Yes.
 23 Q At any point, did ETF or DOJ or anyone in state
 24 government provide you with data reflecting high
 25 costs the State must bear for services and

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1 procedures related to gender transition?
 2 A I believe the word "high" is a relative term, and
 3 so I didn't consider any of the evidence provided
 4 to me to be high cost.
 5 Q Were you provided, by DOJ or ETF, any of the,
 6 quote, medical research suggesting that such
 7 procedures, paren, especially sex transformation
 8 surgeries, closed paren, may, in fact, harm
 9 patients?
 10 A I do not recall any.
 11 Q Were you provided with any medical research
 12 whatsoever regarding impact of these procedures on
 13 patients by DOJ or by ETF?
 14 A I do not recall any.
 15 Q Now, in doing the research following the
 16 July 12th, 2016, meeting, it was research of
 17 publicly available sources; is that right?
 18 A Yes.
 19 Q Did you review any publicly available claims data
 20 as well?
 21 A No, I don't believe so.
 22 Q You testified in response to a question from
 23 Mr. Roth that there would be some cost in the
 24 short-term to removing the exclusion for
 25 transgender benefits; is that right?

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1 A Yes.
 2 Q Do you have any opinion about long-term costs to
 3 removing that exclusion?
 4 A I don't have any expert opinion to offer on that.
 5 As an actuary, I don't -- I don't necessarily have
 6 an opinion that's been well-studied.
 7 Q How would you formulate such an opinion, if you
 8 could, as an actuary?
 9 A I would need to see the impacts over time. It
 10 would have to be more than a 12-month experience
 11 period that I looked at claims and saw what
 12 happened. I'd want to know if there are any
 13 longer-term benefits that may offset some of the
 14 short-term costs.
 15 Having said that, as an actuary and pricing
 16 these plans, you're pricing for the next year.
 17 And as actuaries, we have a responsibility that
 18 the rates be adequate and not excessive. And so
 19 as part of that adequacy test, I'd have to
 20 consider what the costs over the next 12 months
 21 were and ensure that the rates were adequate to
 22 cover that.
 23 Q Did anyone at ETF or DOJ provide you with any data
 24 regarding long-term benefits, whether with respect
 25 to this plan or any other plan?

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1 A Not that I recall.
2 Q Now, Mr. Roth asked you a series of questions
3 about costliness. Do you recall those questions?
4 A Yes.
5 Q In your opinion, is costliness the reason or one
6 of the reasons why the DOJ and the governor's
7 office were recommending that you reverse course
8 at the end of 2016?
9 MR. ROTH: Objection; vague, calls
10 for speculation.
11 A I -- I don't know.
12 MR. FAIRWEATHER: I don't have
13 anything further.
14 MR. ROTH: Just two questions on
15 recross. I have two questions, and very
16 strictly limited to what was just discussed.
17 EXAMINATION
18 By Mr. Roth:
19 Q Mr. Day, I think you testified that potentially to
20 judge long-term benefits of a particular class of
21 others, you may want to look at data from more
22 than a 12-month period; is that correct?
23 A Yes.
24 Q I want to make sure I understand your testimony.
25 As I understand it, you testified that looking at

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1 a 12-month period of costs for a certain type of
2 procedure is a reasonable or adequate basis on
3 which to estimate costs for the following 12-month
4 period when conducting an actuarial analysis to
5 determine pricing for the following period?
6 A It, of course, depends on the credibility of the
7 data that you have. But generally speaking,
8 examining your claims data and using that to
9 project future costs is a reasonable approach.
10 Q So examining claims data from 12 months and using
11 that claims data to project costs for the
12 following 12 months would, in your opinion, be a
13 reasonable approach as an actuary?
14 A Contingent upon the credibility of the data and
15 what you're trying to analyze.
16 MR. ROTH: No further questions.
17 MR. FAIRWEATHER: I've got nothing.
18 Thanks.
19 (Adjourning at 4:43 p.m.)
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1 STATE OF WISCONSIN)
2 COUNTY OF DANE) ss.
3 I, Rowan L. Bright, Registered Professional
4 Reporter and Notary Public in and for the State of
5 Wisconsin, do hereby certify that the foregoing
6 deposition of HERSCHEL E. DAY was taken before me on
7 April 2, 2018, and reduced to writing by me, a
8 professional court reporter and disinterested person,
9 approved by all parties in interest and thereafter
10 converted to typewriting using computer-aided
11 transcription.
12 I further certify that I am not related to
13 nor an employee of counsel or any of the parties to
14 the action, nor am I in any way financially
15 interested in the outcome of this case.
16 IN WITNESS WHEREOF, I have hereunto set my
17 hand and affixed my notarial seal of office at
18 Madison, Wisconsin, this 10th day of April 2018.
19
20
21
22 Notary Public, State of Wisconsin
23 My Commission Expires December 22, 2019
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