

UNITED STATES DEPARTMENT OF LABOR  
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

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HEARING ON PROPOSED AMENDMENT TO THE  
QUALIFIED PROFESSIONAL ASSET MANAGER EXEMPTION  
(PROHIBITED TRANSACTION CLASS EXEMPTION 84-14)

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THURSDAY  
NOVEMBER 17, 2022

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

DEPARTMENT OF LABOR HEARING MODERATORS:

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Benefits Security Administration (EBSA)  
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Program Operations, EBSA  
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ALLISON WIELOBOB, American Retirement Association  
DENNIS SIMMONS, Committee on Investment of  
Employee Benefit Assets  
KEVIN WALSH, Committee on Investment of Employee  
Benefit Assets  
ROBIN DIAMONTE, Committee on Investment of  
Employee Benefit Assets  
KENT MASON, American Benefits Council

**PANEL TWO**

ANDREAS FRANK  
JAMES HENRY  
DR. PAUL MORJANOFF, Financial Recovery and  
Consulting Services Pty Ltd  
JOHN CHRISTENSEN

**PANEL THREE**

SCOTT MAYLAND, Insured Retirement Institute  
CHANTEL SHEAKS, U.S. Chamber of Commerce  
ANDREW L. ORINGER, Dechert LLP  
STEVEN W. RABITZ, Dechert LLP

**PANEL FOUR**

MICHAEL SCOTT, National Coordinating Committee  
for Multiemployer Plans  
MICHAEL HADLEY, SPARK Institute, Inc.  
TIMOTHY E. KEEHAN, American Bankers Association

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## P R O C E E D I N G S

(9:00 a.m.)

1  
2  
3 MS. GOMEZ: The proposed amendment to  
4 prohibited transaction Exemption 84-14, which is  
5 commonly referred to as the QPAM exemption. I am  
6 Lisa Gomez and I'm the assistant secretary for  
7 the Employee Benefits Security Administration.  
8 And on behalf of everyone at EBSA, I want to  
9 thank those who submitted comments on the  
10 proposed amendment and those who we will hear  
11 from today. We really appreciate the time and  
12 thought that it takes to participate in the  
13 process, and we value the input that we receive  
14 from stakeholders. Your contributions to the  
15 process help us to provide a product that will  
16 best serve the participants in the employee  
17 benefit plans and their families. So thank you.

18 Before we get started with testimony,  
19 I want to provide some background on the proposed  
20 amendment and say a few words about why we're  
21 here today and then cover a few housekeeping and  
22 procedural matters. There have been substantial

1 changes in the financial services industry since  
2 the department first granted the QPAM exemption  
3 in 1984. These changes include industry  
4 consolidation that was caused by a variety of  
5 factors and an increasingly global reach for  
6 financial services institutions, both in their  
7 affiliations and in their investment strategies,  
8 including those for plan assets.

9 The last QPAM amendment -- exemption  
10 amendment was in 2010, and the proposed exemption  
11 -- excuse me, imposed -- proposed amendment that  
12 we're discussing today, the intent of the  
13 department is to ensure that the exemption  
14 continues to provide an appropriate level of  
15 protection for plans and their participants and  
16 beneficiaries as the financial services industry  
17 continues to change and evolve.

18 So in the proposed amendment that was  
19 published on July 27th, 2022, the department  
20 sought to accomplish this objective with the  
21 following: addressing perceived ambiguity as to  
22 whether foreign convictions are included in the

1 scope of the exemption's ineligibility provision;  
2 expanding the ineligibility provision to include  
3 certain additional types of serious misconduct;  
4 focusing on mitigating potential costs and  
5 disruption to plans and IRAs when a QPAM becomes  
6 ineligible due to a conviction or other serious  
7 misconduct; updating asset management and equity  
8 thresholds in the definition of a qualified  
9 professional asset manager; adding a standard  
10 record-keeping requirement that the exemption  
11 currently lacks; and clarifying and reemphasizing  
12 the required independence and control that a QPAM  
13 must have with respect to the investment  
14 decisions and transactions.

15           So we look forward to hearing from you  
16 all today as your comments and feedback -- as to  
17 your comments and feedback with respect to the  
18 proposed amendment. Now with respect to the  
19 timing, the proposed amendment initially had a  
20 60-day comment period that was scheduled to  
21 expire on September 26th of 2022. The department  
22 later published a Federal Register notice on

1 September 7th, 2022, extending the initial  
2 comment period until October 11th of this year.  
3 The notice also announced the date of the virtual  
4 public hearing that we're having today and the  
5 deadline for submitting requests to testify, and  
6 we also published a supplemental initial  
7 regulatory flexibility analysis in the Federal  
8 Register in September of 2022, for which the  
9 public comment period closed on October 11th of  
10 2022.

11 We received 31 comments on the  
12 proposal during the comment period, and we look  
13 forward to continuing that dialogue with the  
14 regulated community on the proposed amendment  
15 during today's hearing. We're grateful for the  
16 valuable input that we've received as part of the  
17 public notice and comment process, and we've  
18 posted on the department's web page the public  
19 comments that have been submitted on the  
20 proposal, the request to testify, and the agenda  
21 for today's hearing. In the hearing notice, we  
22 announced that the comment period for the

1 proposed amendment would reopen with today's  
2 hearing. Today's hearing is being transcribed.  
3 We expect that the transcript for today's hearing  
4 will be available on EBSA's web page  
5 approximately three weeks after today. The  
6 hearing transcript will be added to the public  
7 record for the proposed amendment.

8 Now, some news. We previously stated  
9 that the reopened comment period would remain  
10 open until approximately 14 days after the  
11 department publishes the hearing transcript on  
12 EBSA's web page. Please note that we are  
13 confirming that timing now. The reopened comment  
14 period closing date will be December 16th, 2022,  
15 which is 30 days after today's hearing date. The  
16 department will publish a Federal Register notice  
17 notifying the public when the transcript has been  
18 posted on EBSA's web page, and that the reopened  
19 comment period will close on December 16th. And  
20 I encourage stakeholders to submit additional  
21 comments during the reopened comment period that  
22 starts today.



1           So today we will have four panels of  
2 witnesses. One panel will include four witnesses  
3 and the other three panels will each include  
4 three witnesses. Each organization or individual  
5 that's listed on the agenda has 10 minutes to  
6 present testimony. If multiple individuals are  
7 presenting on behalf of a single organization, it  
8 is up to those individuals to determine how to  
9 allocate their 10 minutes. And the total  
10 allotted time for each panel includes times for  
11 questions and answers. We have a full agenda,  
12 and so we are going to try to stick as closely to  
13 the schedule as -- as possible.

14           We will not be taking questions from  
15 the audience during the hearing. Need to ask  
16 that you please do not draw any inferences or  
17 conclusions based on how the government panelists  
18 frame a particular question or series of  
19 questions. Our goal today is just to develop the  
20 public record for the proposed amendment and to  
21 learn from all of you the information that is  
22 conveyed in the testimony. So to help ensure a

1 smooth-running hearing, we have several requests  
2 for those of you who are testifying. Please  
3 first identify yourself, and if applicable,  
4 identify the organization that you're  
5 representing before you begin your testimony.

6 Second, please remember to speak  
7 directly into your phone or computer microphone  
8 so that we can clearly hear you, hear your  
9 testimony and the court reporter can transcribe  
10 accurately. Finally, if we run into technical  
11 difficulties with any witness, we will move on to  
12 other witnesses while those technical issues are  
13 resolved. Please make sure that you're not on  
14 mute when you're going to testify.

15 With those formalities out of the way,  
16 I would like to now introduce the members of the  
17 government panel that will moderate today's  
18 hearing. We have Tim Hauser, who is EBSA's  
19 Deputy Assistant Secretary for Program  
20 Operations; Chris Cosby, the Director of the  
21 Office of Exemption Determinations; Chris Motta,  
22 who's the Chief of Individual Exemptions Division

1 in the Office of Exemption Determinations; Erin  
2 Hesse, Senior Employee Benefits Law Specialist in  
3 the Office of Exemption Determinations; James  
4 Butikofer, the Acting Division Chief of the  
5 Division of Regulatory Policy Analysis in the  
6 Office of Research and Analysis; and we have  
7 Martha Frydl, who is Counsel for Regulations in  
8 the Plan Benefits Security Division of the DOL's  
9 Office of the Solicitor.

10 In addition to those individuals,  
11 there are several other dedicated EBSA staff who  
12 are working diligently on this project,  
13 particularly the staff of the Office of Exemption  
14 Determinations and the Office of Research and  
15 Analysis. I want to thank all of the absentee  
16 members who are working on this project for all  
17 of the time and efforts that they've put into  
18 this. And I also again thank today's witnesses  
19 for taking the time to engage with the department  
20 on this important proposed rule. So, phew.  
21 Well, with that, I'm going to turn it over to  
22 Erin for a few tips regarding the Webex that

1 we're using today before we start the first  
2 panel. Thank you, everyone.

3 MR. HESSE: Thank you Secretary Gomez.  
4 So the first thing is just kind of a courtesy  
5 thing. We ask that witnesses keep their video  
6 off and their microphones on mute for panels  
7 other than the one that you're scheduled for.  
8 And then additionally, if you're using a keyboard  
9 key to mute yourself at any point in time, that  
10 key may not unmute you in the Webex program. So  
11 if you are muted from a -- from a keyboard, just  
12 make sure that you try and focus on using the  
13 Webex interface. Or if you are muted both  
14 places, when you're -- when you're speaking, make  
15 sure that both of those are not on mute.

16 And then the last thing is just the  
17 timekeeping. Susan Wilker will be monitoring  
18 time. She's got some signs up to let you know  
19 when your time is, you know, starting to run low.  
20 Additionally, when we get close to the end of  
21 your time, she will probably raise her hand using  
22 the feature in the Webex software to let you know

1 that that's the time to say your last few words  
2 and wrap up so that we can move on to the next  
3 witness or Q&A. So with that, unless -- Chris  
4 Cosby, unless you have any more to say, I think  
5 we can probably get started with panel one.

6 MR. COSBY: I think Allison's going to  
7 kick it off for the testimony. So Allison, you  
8 have the floor. Thank you.

9 MS. WIELOBOB: All right. Thanks.  
10 Good morning, everyone. My name is Allison  
11 Wielobob. I'm the general counsel of the  
12 American Retirement Association. The ARA is an  
13 umbrella organization of five affiliate  
14 organizations that represent the full spectrum of  
15 professionals who support America's private  
16 retirement system, including business owners,  
17 actuaries, consultants and administrators,  
18 insurance professionals, financial advisors,  
19 accountants (audio interference). Thank you,  
20 Assistant Secretary Gomez (audio interference)  
21 explains the objective for the proposal as the  
22 exemption continues.

1           The ARA shares this objective, aware  
2 of the potential dangers of improper influence  
3 over decision-making with regard to plan assets  
4 in service of competing financial interests, all  
5 at the expense of plans, participants, and  
6 beneficiaries. The ARA supports conditions for  
7 prohibited transaction relief, which provide  
8 necessary protections to plans and clarity to the  
9 investment selection and management process  
10 without unduly disrupting and interfering with  
11 business relationships that otherwise function  
12 well.

13           My testimony today highlights the  
14 proposal's potential direct impacts on employer-  
15 sponsored plans, their sponsors, and  
16 participants. We are concerned at the ARA that  
17 the proposal would needlessly disrupt some plan  
18 relationships and consequently increase costs.  
19 Our view is that plans of the participants  
20 benefit from and rely on professional management  
21 of plan assets. We're concerned that the  
22 proposal, in some ways, would make it harder for

1 many plans and participants to have access to  
2 professional asset management, something they  
3 value.

4           If being a QPAM becomes too onerous,  
5 many asset managers may not offer QPAM services.  
6 The ARA urges the department to keep these  
7 impacts on plan sponsors and participants top of  
8 mind as it works on the QPAM exemption. I'll  
9 cover the main points made in our comment letter.  
10 First, our first recommendation concerns  
11 involvement and investment decisions by parties  
12 in interest to a transaction, what many call the  
13 exclusive authority requirement. We believe this  
14 condition should be modified so as not to  
15 preclude many routine business interactions.

16           This condition concerns involvement  
17 investment decisions by parties in interest to a  
18 plan. We understand that this may be intended in  
19 part to address situation where it appears that a  
20 QPAM is brought in to approve an already  
21 negotiated transaction, and is therefore not  
22 acting as an independent fiduciary in the

1 particular transaction. And the proposed change  
2 seems intended to ensure that QPAM has sole  
3 responsibility for the terms of a transaction and  
4 any associated negotiations. Any transaction  
5 planned, negotiated, or initiated by the party  
6 interest in whole or in part would not meet the  
7 conditions for exemptive relief under the  
8 amendment. It can't be involved in any aspect of  
9 a transaction, aside from certain ministerial  
10 duties and oversight, such as providing general  
11 investment guidelines to the QPAM.

12 As the department explains, a premise  
13 underlying the existing QPAM exemption is that an  
14 independent professional asset manager be  
15 responsible for discretionary management of plan  
16 assets that are placed in its control and that --  
17 and as the asset -- and that the asset manager be  
18 the decision maker with no less than ultimate  
19 discretion over acquisitions for an investment  
20 fund that it manages. However, we understand  
21 that the department discerns possible ambiguity  
22 in this language.



1           The ARA's view is that it should not  
2 matter whether a party in interest, such as a  
3 plan sponsor, identifies a potential transaction  
4 with final approval, and the terms of the  
5 transaction are ultimately negotiated by and are  
6 the ultimate responsibility of a QPAM. The QPAM  
7 determines whether the transaction goes forward  
8 and on terms. Indeed, it's common practice for  
9 plan sponsors and other plan fiduciaries to  
10 identify or present investment opportunities to a  
11 QPAM, while still fully relying on and accepting  
12 independence of the QPAM's judgment for approval  
13 of a transaction.

14           Indeed, it's easy to imagine that in  
15 some cases it would be imprudent for a plan  
16 sponsor not to initiate a conversation about an  
17 investment. Plan sponsors, in fact, have duties  
18 to bring suggestions. In this way, we see the  
19 proposal as a somewhat blunt instrument that  
20 would prohibit a wide variety of routine prudent  
21 interactions by precluding all involvement.  
22 Where this ultimately goes is plans will end up

1 losing out on favorable investment opportunities.  
2 And the ARA believes that practices which  
3 preserve the QPAM's ultimate discretion, yet  
4 permit some degree of involvement by sponsors  
5 should be permitted.

6 Second, we recommend that during the  
7 one-year winding down period, contemplated under  
8 the proposal, should permit -- during the one-  
9 year winding down period, the exemption should  
10 permit new transactions in existing accounts,  
11 which may be required for a prudent winding down  
12 process. Under the proposals, the QPAM becomes  
13 ineligible to rely on the exemption that plan can  
14 terminate the relationship over a one-year  
15 winding down period without penalties. This is  
16 intended to accommodate a plan's ability to wind  
17 down its relationship with a QPAM and to mitigate  
18 costs and disruptions.

19 Asset manager transitions typically  
20 cause plans to incur costs in time and attention,  
21 which are hard to quantify. Also, are -- they  
22 are disruptive in terms of resources that would

1 need to be directed away from activities that are  
2 otherwise necessarily -- necessary for the  
3 functioning of a plan. The ARA is concerned that  
4 under the proposal, a winding down period may  
5 only be used to transition existing clients out  
6 of existing investments. That is, it does not  
7 appear that new transactions in existing accounts  
8 would be permitted.

9 This seems to raise the possibility of  
10 risks of violations of otherwise applicable  
11 fiduciary duties, because QPAM cannot enter new  
12 transactions, including transactions that might  
13 be required for prudent unwinding of existing  
14 transactions. The ARA believes that QPAMs should  
15 be able to engage in transactions involved in  
16 prudent winding down. Our third recommendation  
17 is that the department provide at least 18 months  
18 for affected parties to come into compliance with  
19 conditions of an amended QPAM exemption.

20 Qualifying for the amended exemption  
21 would require specified provisions in written  
22 management contracts. So in addition to imposing

1 these conditions on all QPAMs, including every  
2 single existing and future QPAM, the proposal  
3 requires indemnification of plan losses that  
4 result. If the QPAM becomes ineligible for  
5 exemptive relief, it must agree to restore actual  
6 losses to the plan. These potential liabilities  
7 may not be priced into current agreements, and  
8 they could be significant. And the cost of QPAM  
9 services may increase, and the costs will  
10 ultimately be passed onto plans.

11 The proposal would also require  
12 investment management agreements to include terms  
13 addressing potential future ineligibility of the  
14 QPAM. And this means that every investment  
15 manager agreement that is currently in place  
16 between an ERISA plan and a QPAM will need to be  
17 amended. Because the proposal does not provide a  
18 transition period for existing agreements, plan  
19 sponsors and QPAMs appear to only have 60 days  
20 after publication of a final exemption to add  
21 these provisions. And we believe that would be  
22 prohibitively difficult for plans to complete the

1 required amendments in such a brief timeframe.  
2 Some plan sponsors have management agreements  
3 with multiple QPAMs. We believe at least 18  
4 months are needed to bring QPAM agreements into  
5 compliance with these extensive changes.

6 And the last thing that I'm going to  
7 mention is just to highlight some impact on plan  
8 investments from the plan sponsor perspective.

9 So we're concerned about the impact on some  
10 particular investments, and in turn on the plans  
11 that offer them. And of particular concern are  
12 target-date funds, which are frequently selected  
13 to be QDIAs. According to a 2020 survey  
14 conducted by one of our affiliate organizations,  
15 the Plan Sponsor Counsel of America, two-thirds  
16 of employer-sponsored defined contribution plans  
17 include QDIAs, and where those plans have more  
18 than 5,000 participants that percentage goes up  
19 to 81 percent. And target-date funds are the  
20 favored choice for QDIAs among plan sponsors.

21 So -- and as with many other types of  
22 managed funds, the proposal, we believe, would

1        disrupt the operation of target-date funds. And  
2        that disruption would be acutely felt in  
3        employer-sponsored plans where target-date funds  
4        are heavily used. We urge the department to  
5        recognize these collateral impacts as it  
6        considers revisions to the QPAM exemption. The  
7        ARA appreciates the department's commitment to  
8        safeguarding American workers' retirement  
9        savings, and we share this (audio interference).

10                MR. HESSE: All right. Thank you,  
11        Allison. I guess we can now move on to the  
12        Committee on Investment of Employee Benefit  
13        Assets.

14                MR. SIMMONS: Can you -- I assume you  
15        can hear me okay. My name is Dennis Simmons.  
16        I'm the Executive Director of CIEBA, and CIEBA  
17        stands for the Committee on Investment of  
18        Employee Benefit Assets. Again, thanks to the  
19        department, thanks to Assistant Secretary Gomez  
20        for her opening comments, and thanks for holding  
21        the hearing and giving CIEBA an opportunity to  
22        testify.

1                   CIEBA is an association of in-house  
2 plan fiduciaries. Our members collectively  
3 oversee the investment of \$2.6 trillion in plans  
4 covering more than 16 million participants and  
5 retirees. Pleased to be joined by one of our  
6 members, Robin Diamonte from Raytheon  
7 Technologies, and Kevin Walsh, principal at Groom  
8 Law Group. Just a couple of real quick comments  
9 before I turn it over to Robin. As we stated in  
10 our written comments that CIEBA submitted on the  
11 issue, we are respectfully requesting that the  
12 department withdraw the proposed changes.  
13 Because essentially, our view is that fundamental  
14 changes are not needed. The QPAM exemption  
15 works, and it's been working well to protect  
16 plans and their participants for decades.

17                   And then importantly, while on the  
18 surface, you know, it appears that the QPAM  
19 protections are primarily protective of  
20 investment managers. We felt an important aspect  
21 of our testimony today is to emphasize that the  
22 QPAM exemption, again, as it's been working for

1 decades, is also a very important tool for  
2 protecting plan fiduciaries, and importantly for  
3 easing the administrative burden on pension  
4 fiduciaries who might otherwise have to comb  
5 through many transactions and investments to  
6 determine whether certain transactions may or may  
7 not raise technical risks of party and inter-  
8 affiliation concerns. So those are a few opening  
9 thoughts. Let me turn it over to Robin from  
10 Raytheon, who will talk about CIEBA's comments  
11 and Raytheon's practical experience in this area.

12 MS. DIAMONTE: Good morning. My name  
13 is Robin Diamonte, and I'm a CIEBA board member  
14 and a former chair. Currently, I'm also the  
15 Chief Investment Officer for Raytheon  
16 Technologies. Raytheon has over 90 billion in  
17 retirement assets, covering 300,000 DB  
18 participants, and 220,000 DC plan participants.  
19 As the department is aware, CIEBA members and  
20 most pension investment fiduciaries rely heavily  
21 on the QPAM exemption. Our employees and plans  
22 have thousands and thousands of parties interest,



1 and it's simply not possible for us to identify  
2 and track those relationships in any cost-  
3 efficient manner.

4           Consequently, we typically use  
5 investment managers who qualify as QPAMs to help  
6 us navigate and avoid inadvertently running afoul  
7 of technical ERISA-prohibited transaction rules.  
8 In CIEBA's written comments in our letter to the  
9 DOL, dated on October 11, 2022, we expressed  
10 concerns with the department's proposed changes  
11 to the QPAM exemption and ask for the department  
12 to withdraw the proposal. The high-level issue  
13 is that the proposal isn't addressing a problem  
14 that, in our view, needs to be solved. We  
15 understand that there has been issues with  
16 financial institutions getting disqualified from  
17 QPAM status because they or their affiliates were  
18 convicted of crimes.

19           However, CIEBA members are experienced  
20 qualified investment fiduciaries, and thus are  
21 entirely capable of looking at the conduct of our  
22 managers and deciding for ourselves whether the

1       conduct impacts our faith in their ability to  
2       manage our plan assets. Experienced plan  
3       fiduciaries who select and retain investment  
4       managers use a formal established due diligence  
5       process for evaluating candidates and then  
6       monitoring the managers they hire for the  
7       purposes of both compliance and performance. So  
8       that includes continually monitoring for any  
9       events or changes that may impact the managers'  
10      qualifications, their reputation, their  
11      operations, as well as their performance.

12                We simply don't need changes or  
13      additional protections in this regard. We  
14      wouldn't have to disqualify a potentially  
15      effective asset manager because an uninvolved  
16      subsidiary may have engaged in crime-related  
17      activity. Again, as responsible fiduciaries,  
18      we're very capable of determining the materiality  
19      of any given situation with one of our investment  
20      managers. So we identified three specific  
21      concerns in our comment letter. Our first  
22      concern is that changes would require an

1 investment manager to contractually agree to  
2 indemnify plan clients for damages if a manager  
3 were to become ineligible to continue as a QPAM.

4 We appreciate the department's desire  
5 to provide protection to plans in weird  
6 circumstances where an entity loses the ability  
7 to rely on a QPAM exemption. But CIEBA members  
8 are sophisticated actors who can negotiate for  
9 their own contractual -- contractual protections.  
10 We're concerned that the proposal is effectively  
11 trying to override our fiduciary discretion and  
12 substitute the department's views for -- for the  
13 -- those of the fiduciaries managing the plans.

14 Our second concern is that proposed  
15 changes would require a wind down period that is  
16 so restrictive that it would harm plans rather  
17 than protect them. In particular, the proposed  
18 changes would prohibit the manager from making  
19 any new investments, even for existing plan  
20 clients during the wind down period. But that  
21 effectively makes the transition period  
22 illusory. Third, the proposal would not allow

1 QPAMs to use the exemption for transactions  
2 planned, negotiated, or initiated by party  
3 interest and present it to the QPAM for approval.  
4 This essentially undoes the relief provided by  
5 the QPAM exemption.

6 We rely on this exemption because we  
7 do not necessarily know, nor do we need to know,  
8 the full list of parties who may meet the  
9 technical definition of party interest under  
10 ERISA. Simply put, this sole responsibility  
11 language could limit or hamper investment  
12 opportunities for our plans. So thank you for  
13 listening to us, and I'll hand it over to Kevin  
14 to add a few more comments.

15 MR. WALSH: I'm Kevin Walsh, I'm a  
16 principal at Groom Law Group Chartered. I'm here  
17 on behalf of CIEBA and their plan sponsor  
18 membership. You know, thank you Secretary Gomez,  
19 Deputy Assistant Secretary Hauser, Chris Motta,  
20 and everyone else here today from EBSA. It's a  
21 really great sign, so much of EBSA's leadership  
22 is engaging on this important topic. You know,

1 as Robin and Dennis mentioned, our view is that  
2 the proposed changes present serious practical  
3 concerns. And so, again, you know, respectfully,  
4 we ask that the department withdraw the proposed  
5 amendments.

6 You know, as an alternative, we could  
7 suggest a re-proposal that -- that would provide  
8 instead, you know, a clear framework on two  
9 issues that, you know, seem to come up from time  
10 to time with QPAM. I think first, a clear  
11 framework for when individual exemptions are  
12 needed under, you know, section I(g) for foreign  
13 convictions. I mean, I think we'd all agree the  
14 current scope can be perceived as overly broad.  
15 You know, with the risk that, you know, states  
16 that are hostile towards the U.S. could possibly  
17 have the ability to disqualify financial  
18 institutions from providing services to plans. I  
19 mean, it seems kind of troubling.

20 And second, a process for more  
21 expeditiously evaluating individual exemption  
22 applications for QPAMs. So, I mean, you know, I

1 think there's frustration on the part of the  
2 department on behalf of plan sponsors, on behalf  
3 of, you know, asset managers about the process  
4 for getting those individual exemptions for the  
5 past few years. Where, you know, applications  
6 have taken years to process. You know, our  
7 thought is that if the department were able to  
8 streamline that process and narrow the scope of  
9 when those applications are needed, that this  
10 could -- that could be a positive outcome,  
11 allowing plan sponsors and investment  
12 professionals, you know, to best meet the needs  
13 of participants and beneficiaries.

14 So in sum, you know, we think the  
15 department -- we think the department's -- we  
16 think department would be better to focus its  
17 efforts on a more targeted basis, rather than  
18 through the broad and sweeping changes that are  
19 proposed in the current QPAM exemption proposal.  
20 And we would, you know, be happy to engage on,  
21 you know, building out a more effective approach  
22 for both plan investment professionals,

1 professional asset managers, and you know, the  
2 way services are provided, so as to best serve  
3 participants and beneficiaries. Dennis?

4 MR. SIMMONS: Yeah, great. Thanks,  
5 Kevin. I mean, I'll just wrap up by, again,  
6 thanking the department. We wanted to make sure  
7 CIEBA was here, you know, to provide our  
8 practical experience. And we'd also be pleased  
9 to serve as a resource if the department would  
10 like to discuss more about how chief investment  
11 officers and other fiduciaries make investment  
12 manager-related decisions. So that concludes our  
13 comments. Thanks.

14 MR. HESSE: All right. Thank you.  
15 Next up is Mr. Kent Mason.

16 MR. MASON: And yes, my name really is  
17 Kent Mason. And I'm a partner in the law firm of  
18 Davis & Harman. And I've already learned one  
19 thing I need to work on, my background here. I'm  
20 shamed by Allison and Dennis. I need to put  
21 Davis & Harman in my background somehow, but  
22 probably not for this call. I'm here today on

1       behalf of the American Benefits Council. And,  
2       you know, like others -- like, you know, we'd  
3       like to thank you for holding this hearing and  
4       for the opportunity to testify.

5                 First, just to put some context here,  
6       the American Benefits Council has both plan  
7       sponsor members as well as service provider  
8       members, many of whom serve as QPAMs. But we  
9       made the decision that for purposes of this  
10      hearing, we would be wearing exclusively our  
11      plan-sponsor hat. We would sort of determine our  
12      positions exclusively based on the input of our  
13      plan sponsors. And, you know, I think similar to  
14      the prior two witnesses, you know, the core  
15      message from our plan sponsors is they do not  
16      want to be forced to get rid of their investment  
17      managers at great cost and disruption, if those  
18      investment managers, in their fiduciary opinion,  
19      are serving the plan and the plan participants  
20      well.

21                 And so if they're -- so essentially,  
22      our view is there should be no new conditions on



1       qualifying as a QPAM.  If there is conduct that  
2       the department feels is sort of a question,  
3       require that conduct to be disclosed to the plan  
4       sponsor, just so, just as Robin said, the plan  
5       sponsor can exercise its fiduciary expertise to  
6       determine whether to retain that investment  
7       manager.  And I think part of it -- and I think I  
8       want to just emphasize one other point that came  
9       up in our discussions, and that is the prohibited  
10      transactions that are involved here, for which  
11      QPAM gives relief, are really completely benign  
12      transactions.

13                   In other words, there is no self-  
14      dealing, there is no conflict of interest, there  
15      is no excessive fees.  What these are -- are  
16      hyper-technical prohibited transactions, such as  
17      a QPAM.  So it buys the bond from a financial  
18      institution that just happens to provide check-  
19      writing services to a plan.  That's a prohibited  
20      transaction.  That's what it is.  Why, if that  
21      bond is in the best interest of the client, of  
22      the plan sponsor, should that not be permitted?

1 These are not the sort of prohibited transactions  
2 that give rise to significant policy issues.

3 Other people say, well what about an  
4 individual exemption? We have a robust  
5 individual exemption process, that's the fall  
6 back if you get disqualified. Well, our plan  
7 sponsors feel very strongly that that was too  
8 speculative, too uncertain. And we didn't know  
9 whether the investment manager would get that  
10 individual exemption or what the terms would be.  
11 And that is especially true -- I mean, there's an  
12 interaction here -- because of the significantly  
13 increased difficulty that would be faced by any  
14 applicant under the new prohibited transaction  
15 proposal that's for individual exemptions.

16 So now I want to turn to a few  
17 substantive issues. The first, you know, you've  
18 heard a couple of times about, but I'll, you  
19 know, give my own sort of two cents on it, which  
20 is that the proposal would prohibit any  
21 transaction that has been planned, negotiated or  
22 initiated by a party interest. We see this --

1 this needs to be removed. We see no reason for  
2 this, in the sense that the QPAM bears the  
3 ultimate responsibility as to whether to enter  
4 into a transaction. Why should it matter who  
5 initiated it? Because look what this would --  
6 this language would do. And I think has been  
7 discussed by the other witnesses.

8 For example, if the plan sponsor were  
9 to make a suggestion to the -- to the -- to the  
10 QPAM about a possible investment idea that could  
11 complement the rest of the portfolio, that would  
12 be prohibited. Why? And it's -- the results are  
13 even more devastating in the fixed income and  
14 derivative context. Now, these two contexts are  
15 very important to controlling risk. And frankly,  
16 in the derivative and fixed income markets, most  
17 of the ideas, most of the products are initiated  
18 by the dealers. Not by the investment manager,  
19 because the investment manager doesn't know  
20 what's available. So you'd be doing devastating  
21 things to the fixed income and derivatives  
22 markets.

1           A couple of things that have not been  
2 discussed so far. You know, we looked at the  
3 disqualifying events for non-prosecution and  
4 deferred prosecution agreements. And the  
5 question from our plan sponsors was, why should  
6 conduct that has not been determined to be  
7 illegal be -- disqualify our investment manager?  
8 If you want to alert us, require that the  
9 investment manager alert us to these -- these  
10 events, that would be fine. Then we can exercise  
11 our fiduciary judgment as to whether these are  
12 disqualifying in our view.

13           Same thing, really for the written  
14 ineligibility notices. Not illegal, and in fact,  
15 we were sort of very surprised that there was no  
16 notice and comment involved here. This was a  
17 very, sort of, you know -- you know, backdoor,  
18 you know, dark room determination. All of a  
19 sudden somebody could lose their QPAM status. No  
20 public discussion, no public hearing, nothing,  
21 just out of the blue. And again, if there's  
22 something that concerns the department, require

1 disclosure of it so the plan sponsor can make its  
2 own fiduciary determination.

3           Again, echoing a theory that -- a  
4 concern that has been discussed, we see no reason  
5 to allow, to sort of require additional terms in  
6 the investment management agreement. For  
7 example, this indemnification requirement, that  
8 is going to be very expensive, very expensive for  
9 -- in terms of adding cost to investment  
10 management agreements. And that cost may or may  
11 not be prudent. So why is the department  
12 substituting its judgment and saying, even if  
13 this is not a prudent cost, we're going to force  
14 plans to incur that cost? That really is not  
15 consistent with the fiduciary structure.

16           And I'll just very briefly mention the  
17 economic analysis. The economic analysis assumes  
18 that these agreements can be amended in one hour  
19 by the investment manager, and assumes explicitly  
20 that there will be no review by the plan sponsor.  
21 I think the answer really is, between the two,  
22 they will take hundreds of hours to negotiate,

1 and it would be a fiduciary breach. Contrary to  
2 the economic analysis for the plan sponsor not to  
3 review the indemnification provision drafted by  
4 the investment manager.

5 The winding down period, again, you  
6 know, Robin's talked about that very effectively.  
7 There is no winding down period. Because you  
8 can't engage in new transactions during the  
9 winding down period. The investment manager  
10 can't. So our plan sponsors were very clear with  
11 us. There is no winding down period under this  
12 proposal. It's immediate disqualification, full  
13 disqualification. And they also said to us it  
14 takes at least two years to replace an investment  
15 manager.

16 Finally, you know, on the effective  
17 date two points. One is, you know, you  
18 essentially give us two months. I think -- you  
19 know, I think -- I think Alison may have said 18  
20 months. I'm going to err on the side of 24  
21 months, two years. It's what we've been hearing.  
22 This is how long -- if it stays as is, that's how

1 long it would take us to -- to amend. One other  
2 thing. On the effective date, if there are any  
3 new disqualifying events, any disqualifying event  
4 that occurs before the effective date -- any new  
5 disqualifying event that occurs before the  
6 effective date should be disregarded. So, for  
7 example, if a non-prosecution agreement is  
8 entered into tomorrow and the effective date is  
9 two years from now, that non-prosecution  
10 agreement would be -- would not have any effect  
11 on the qualification of the QPAM.

12           Lastly, I think we would -- you know,  
13 in our comment letter we also asked for the  
14 proposal to be withdrawn. We, you know, like  
15 CIEBA, but don't see the purpose. What is the  
16 problem being solved? Really what this does is  
17 by taking away the ability of plan sponsors to  
18 use their fiduciary discretion as to who to hire  
19 and as an investment manager, it's hurting  
20 participants and it's hurting plans. And we urge  
21 you to rethink this. And I still haven't come up  
22 with my better background, but that's it for me.

1 Thank you.

2 MR. HESSE: So I guess now is time for  
3 some -- some Q&A. You know, I guess I'll start  
4 off with maybe some low-hanging fruit here. If  
5 we were to simply, you know, remove the  
6 restriction on no new transactions for the  
7 winding down period, does that restore at least a  
8 core utility for plans that would, you know,  
9 decide to withdraw from such an arrangement?

10 MR. MASON: I mean, I'll give you a  
11 sort of -- just what our plans -- we asked our  
12 plan sponsors and they were very clear. One year  
13 would just not do it. They sort of walked  
14 through the -- the amount of work that it takes  
15 to replace an investment manager. They were  
16 saying, look, we would aim for two years and we  
17 think that would be difficult, but two years  
18 would be the minimum time that they said.  
19 Because we asked that question very explicitly,  
20 and they said both things had to be changed.

21 MS. DIAMONTE: In our perspective on  
22 -- you know, we need to -- we would want to make



1 the decision on whether we even had to wind down  
2 an asset manager. Because in many cases, you  
3 know, we wouldn't feel that that was necessary.  
4 And then if we did, it really would depend on --  
5 the asset class on where it was in the defined  
6 benefit plan, the defined contribution plan -- on  
7 how long it would take to do that and in what  
8 cost-effective way; right? Because a lot of  
9 times when you're selling assets, you need to put  
10 on future as not to get out of the market. It's  
11 very complicated. And it can take a long time,  
12 or it can be done quickly depending on the asset  
13 class.

14 MR. WALSH: So just building on that,  
15 the no new transaction provision, I think when we  
16 look at it, it actively harms participants. So  
17 we were surprised to see it, you know, in the  
18 proposal. It doesn't fix the wind down period,  
19 but it removes at least one element that we view  
20 as -- as hurting participants.

21 MR. HESSE: There may have been -- it  
22 may have been Allison that -- that mentioned this

1 kind of relatedly. I can't remember if you -- if  
2 you said that you thought that new clients should  
3 also be able to be signed up during that period  
4 of time or not. Maybe -- maybe I misheard. New  
5 transactions and new accounts, I think is what I  
6 heard. I wasn't sure if that was something that  
7 you had -- you had mentioned or if I just  
8 misheard.

9 MS. WIELOBOB: That's not what I  
10 intended to convey. I think I was talking about  
11 just whatever put into winding down as a key  
12 concept. And I think that they should be able to  
13 take the necessary steps to effectuate that. If  
14 that involves new things -- certainly not --  
15 didn't involve the QPAM taking on new clients, if  
16 that's what you heard.

17 MS. DIAMONTE: Come up with an idea of  
18 why they would even want a QPAM to come up with  
19 new clients. You know, you can have a client  
20 that doesn't require QPAM, and then the  
21 investment manager can actually transition your  
22 assets to that new client. And that's the most

1 cost-effective way to wind down. So they  
2 basically take on those positions. So there's a  
3 lot of nuances to this.

4 MR. HESSE: When -- when we're  
5 thinking about or talking about transitioning  
6 assets, do you -- do you -- could you, like, kind  
7 of lay out the way that that process would look  
8 for the plan sponsor? Like what's the starting  
9 point, and, like, what are some of the pieces  
10 that are involved outside of, you know, just  
11 purely effectuating the transfer of assets.  
12 We're -- we're interested in understanding that  
13 as thoroughly as possible as well, but I'm  
14 curious what are the other components and pieces  
15 such as, you know, like a RFP that goes out when  
16 something like that happens as part of a  
17 transition process. If that's first thing, if  
18 it's a later thing, the timing on those types of  
19 things as well.

20 MS. DIAMONTE: Right.

21 MR. SIMMONS: And this is Dennis,  
22 before you jump in. Just so we put this into

1 context, I know we're responding to specific  
2 questions on the wind down, but, you know, this -  
3 - and Robin, I'm sure you're going to chime in.  
4 This happens all the time in terms of, you know -  
5 - and there's a really thoughtful, methodical way  
6 to go through this with an investment manager. I  
7 just want to, you know, just put back into  
8 context the reason why this would -- might be  
9 happening is maybe some technical concern on the  
10 -- on the -- you know, the definition of QPAM as  
11 opposed to something substantive happening with  
12 the portfolio.

13 So just -- I don't want to lose sight  
14 of, you know, our fundamental comment that, you  
15 know, this is really going to cause major  
16 concerns and cause these types of transactions,  
17 maybe to unwind, that, you know, we're not sure  
18 that really needs -- needs to happen. But Robin,  
19 go ahead. Sorry.

20 MS. DIAMONTE: Yeah, Dennis, you're  
21 absolutely right. I mean, we do not want to  
22 eliminate, fire, get rid of a manager, unless we

1 really feel that we don't have any confidence in  
2 them anymore. Because it is a very cost-  
3 effective and timely process. And it really  
4 depends on -- depends, again, on the asset class  
5 and where -- and where this portfolio resides in  
6 the DB or the DC world. But typically, you would  
7 have to do an RFP or do some kind of a search for  
8 another manager if you didn't already have one  
9 sort of on the bench. And then once you do that,  
10 you have to negotiate on all types of investment  
11 management agreements with that manager. And  
12 then you seem to -- and sometimes you have to  
13 hire a transition manager.

14           And again, it depends on the asset  
15 class. You have to decide what you want to turn  
16 into cash, what types of assets you want to  
17 transfer sort of in kind to another manager, and  
18 what kind -- and there are sometimes even assets  
19 that stay -- have to stay on the manager's books  
20 for a very long period of time because they're  
21 not tradable anymore; right? So you can't  
22 actually make a market for it. So sometimes when

1 we eliminate a manager, we have an account open  
2 for years to try to sort of sell off those last  
3 remaining few securities. So it's really time-  
4 intensive and can be very costly. Because if you  
5 have to sell out of a trade and then buy it  
6 somewhere else, you have to incur those round-  
7 trip transaction costs, which can be very  
8 expensive.

9 MR. WALSH: Robin, you did a great job  
10 of highlighting a lot of the operational costs.  
11 But I think there's another cost of, you know,  
12 the wind down period with the transition. Which  
13 is that, you know, the plan producers have  
14 identified a manager who they like managing their  
15 assets and who they can evaluate, you know, what  
16 the disclosed event is. And if it's a manager  
17 that they still have a lot of confidence in, then  
18 there's a disruptive aspect where they're losing  
19 the manager that they have confidence in  
20 providing services to their plan.

21 MS. DIAMONTE: Yes. I mean,  
22 absolutely, that is so important. Because, you

1 know, we do do these. We lost confidence in a  
2 manager, we freeze their assets, and we  
3 transition them. You know, we do that, you know,  
4 often when we lose confidence. But we would  
5 never want to be forced to transition a manager  
6 that we have done complete due diligence on  
7 monitoring and feel extremely comfortable with.

8 MR. HAUSER: I appreciate all that.  
9 But maybe we should talk for a minute about just  
10 what the events are that trigger ineligibility.  
11 And if you could comment on whether you think  
12 those are legitimate bases for disqualifying.  
13 You know, the list is -- I don't have it right in  
14 front of me, but, it's, you know, committing  
15 specified crimes, including substantially similar  
16 foreign crimes. It's, you know, essentially  
17 misleading the department about eligibility  
18 criteria and conditions and the exemption. It's  
19 engaging in systemic violations of the exemption  
20 and the exemptions conditions. I mean, is it  
21 your view that in the -- that when QPAMS engage  
22 in systemic violations of these conditions that

1 engage in enumerated felonies?

2 I mean, let's just -- I understand  
3 there's a separate issue about, like, the scope  
4 of the disqualification when it comes to  
5 affiliates. But just for the sake of the  
6 hypothetical, let's talk about the QPAM itself.  
7 I mean, do you -- do you -- do you think there  
8 should be no ineligibility consequence if the  
9 QPAM itself lies to the department about  
10 conditions, if it engages in systemic violation  
11 of the conditions of the exemption, or if it  
12 engages in this sort of enumerated felonies  
13 listed from the exemptions, such as embezzlement  
14 and conversion and tax evasion and all the rest?  
15 Is the testimony kind of, nah, we should just let  
16 that go and trust your expert fiduciary judgment  
17 to let these people continue doing their business  
18 with plans?

19 MR. WALSH: That's a great question.  
20 And I -- you know, I think when people look at  
21 the re-proposal, I think there was a hope that  
22 there'd be, you know, analysis of section YG --



1 I(g), which, you know, already contains broad  
2 disqualification provisions. And that brings up  
3 the issue that you raised with respect to foreign  
4 affiliates. So I think that when folks look at  
5 the re-proposal, there's a sense of, you know,  
6 are we moving in the right direction or the wrong  
7 direction in terms of scope as opposed to looking  
8 at absolutes?

9 And the list in I(g) was -- I think it  
10 was already perceived as too broad with respect  
11 to substantially analogous foreign convictions.  
12 Where first off, I think that's a pretty tough  
13 nut to crack. And then, you know, as I think  
14 people have highlighted, I think they're -- it  
15 runs the risk that you could have, you know, a  
16 hostile state essentially convict affiliates of  
17 U.S. banks pretty easily of crimes just for the  
18 sake of it. And then they would look  
19 substantially similar. In terms of the direction  
20 --

21 MR. HAUSER: Can we stop there just  
22 for a moment, though? Because that really wasn't

1 my question, I guess. I mean, the -- I mean, the  
2 question I have I suppose is -- I mean -- well, I  
3 mean, actually, let's just follow up on your  
4 question. So, I mean -- and the foreign  
5 convictions we've had -- have you seen this? I  
6 mean, I appreciate the hypothetical about the  
7 hostile foreign state, but is that what we've  
8 seen in the foreign convictions that have been  
9 issued? I think by and large they've been --  
10 they've been species of price fixing, they've --  
11 they've been -- I mean, the crimes that we've  
12 seen have been things like price fixing, you  
13 know, and Libor, foreign exchange transactions,  
14 corrupt practices kind of things. We have not  
15 seen the kind of hypotheticals you're talking  
16 about thus far.

17 MR. WALSH: Well, so I mean, I think  
18 the difficulty there is that the hypotheticals --  
19 you know, we're not seeing the hypotheticals, but  
20 some of that's coming down to discretion. But  
21 just pivoting back to the current proposal, I  
22 think -- you know, we talked about lying

1 department. I think when we looked at the  
2 current broadening of the scope, also, it raises  
3 some due process concerns that we find troubling.  
4 So it's tough to say, you know, should we scrap  
5 section I(g) in its entirety? But directionally,  
6 it seems like section YG is going -- I(g) is  
7 going in the wrong direction.

8 MR. HAUSER: If I could just say one  
9 more thing here, because I just want to -- I'm  
10 trying to probe the -- just what the position is  
11 that's being advocated here. I'm -- I certainly  
12 understand an argument that folks would like more  
13 process, you know, before they're -- they're  
14 disqualified. I understand an argument about,  
15 you know, some concerns about foreign  
16 convictions. But I guess, you know, if you put  
17 aside those issues for a moment and just say if,  
18 in fact, the entity engaged in this conduct, if  
19 that's been established in some fair way, is the  
20 -- is the position nevertheless that, you know,  
21 notwithstanding the prohibited transaction rules  
22 and notwithstanding the fact that we have, you

1 know, conditions in this exemption in that, that  
2 really we should just defer to the plan  
3 fiduciaries to decide whether they want to  
4 continue dealing with these folks.

5 MR. MASON: I guess I would turn the  
6 question around here, Tim. And -- and I know  
7 you're going to say I'm not answering your  
8 question. But I think the -- I think the  
9 framework here is what's best for plan  
10 participants and the plan? I mean, that really  
11 has to be the driving force here. And, you know,  
12 we can sort of talk about the whole range of  
13 disqualifying events. And they go from the  
14 completely benign under this thing to the sort of  
15 egregious. But I think the key here is, it would  
16 need to be pretty egregious to -- to override the  
17 plan fiduciary's sort of judgment that this plan  
18 -- this investment manager is effectively serving  
19 the plan participants.

20 And the disruption and cost to plan  
21 participants and the plan for changing, it's a  
22 high burden. It's not just, you know, in the

1 backroom, Department of Labor decides we -- you  
2 know, this guy hasn't been forthright with us, or  
3 to save money we have entered into a deferred  
4 prosecution agreement. Those are not  
5 justifications, and I think we can sort of and  
6 hopefully agree on those points. Now, is there a  
7 point at which it becomes egregious enough that -  
8 - yes, that there's a public policy interest in  
9 saying, you know, that maybe this this entity  
10 should be punished? We have not talked about  
11 that issue with our -- with our plan sponsors and  
12 we'd be happy to think about that more and  
13 supplement on -- you know, the record on that  
14 point. But I think this is tilted way too far  
15 against plan participants by taking a lot of  
16 sorts of things which are really not harmful and  
17 saying, we're going to -- because of these  
18 unharmful events, we're going to harm  
19 participants.

20 MR. HAUSER: The disqualification  
21 provisions -- and I don't mean to be  
22 argumentative, so please, by all means follow up,

1 tell us what you think. But they're -- the  
2 things that are disqualifying, you know, that  
3 gets you to a point of ineligibility are intended  
4 to be egregious. So they're -- it's intentional  
5 violations, not inadvertent intentional  
6 violation.

7 MR. MASON: Judged by who? I mean,  
8 that's --

9 MR. HAUSER: No, I understand, but --  
10 you have a process issue. But I'm asking a  
11 question. I'm still where I started, which is  
12 assume that we've resolved your process issues  
13 about how the determination is made. Do you  
14 still have an issue even with saying that people  
15 are ineligible based on this kind of misconduct?  
16 On intentional -- intentional violations of it,  
17 systemic violations of the conditions of the  
18 exemption? Of embezzlement, fraudulent  
19 conversion, or misappropriation of funds? You  
20 know, all of the enumerated crimes there. I  
21 mean, assuming that we answered your process  
22 issues, is it still the case that the position

1 you all are taking is that even then, these  
2 things should not be disqualifying? I mean, and  
3 what -- what -- why are these things not  
4 egregious enough?

5 MR. WALSH: So, I mean --

6 MR. MASON: We owe you -- just to sort  
7 of follow up, and then I'm sorry, I'll leave it  
8 over to you, Kevin -- is we see the spectrum as -  
9 - under the proposal as taking a lot of things  
10 which are clearly not egregious and converting  
11 them to egregious. If, you know, we will  
12 supplement our comments with sort of a discussion  
13 of, are there things within the group that are  
14 sufficiently egregious?

15 MR. HAUSER: Well, Kent, just as a  
16 preview, could you maybe highlight -- you know,  
17 and I appreciate your points about DPAs and NPAs,  
18 but putting aside those, which -- which of the  
19 disqualifying things do you think are the not  
20 egregious things that we've elevated? Or could  
21 you give me an example or two?

22 MR. WALSH: Can I chime in here? I

1 mean, I just -- I think we -- it's tough to go  
2 through this just verbally, but I think there's  
3 kind of two things. Which is without seeing this  
4 in writing, you know, what -- what the, you know,  
5 counter -- what the position would look like,  
6 it's tough to look at in the fly -- on the fly.  
7 I think there's a couple of components, which is  
8 the foreign element and the affiliate element,  
9 when we're looking at the list of crimes. I  
10 mean, I think we'd be happy to go back to our  
11 plan sponsor clients and talk about, you know, a  
12 different list or a re-proposal. But on the fly  
13 to -- I think it's where we are at best is  
14 telling you directionally this is the wrong  
15 direction.

16 MR. MASON: I agree completely, Kevin.

17 MR. HAUSER: Okay. I'll just --

18 MS. DIAMONTE: Tim, let me just answer  
19 your question from my perspective; right?  
20 Because we've had -- we've had instances over the  
21 years where there was maybe egregious behavior  
22 and -- you know, or things like an entire team



1 lifts out of the investment management firm;  
2 right? And we are like, okay, we need to get rid  
3 of this manager; right? So if, however, our  
4 manager or their team or their affiliate is  
5 involved in embezzling or any of those egregious  
6 crimes, absolutely we would want to terminate and  
7 wind down that manager. However, take Goldman  
8 Sachs or JP Morgan. And let's just suppose that  
9 they had a foreign subsidiary that was in  
10 Malaysia that got convicted of embezzlement. I  
11 definitely do not want to have my U.S. based  
12 fixed income portfolio that's a billion dollars  
13 and, you know, long corporate credit that is so  
14 expensive to unwind and have to unwind that.

15 So that's -- that's sort of my  
16 concern. My concern is we would get on the phone  
17 with JP Morgan, in my example, understand why  
18 there was embezzlement, who was it, what are the  
19 controls, what are the compliance issues, what  
20 are the fixes that they're going to do to make  
21 sure that doesn't happen again? And if we're  
22 satisfied with all that, then we want them to

1 continue, in my example, this U.S. fixed income  
2 portfolio that had nothing to do with the team,  
3 the management, the practices of that portfolio.  
4 And the way that I read it, that's what I would  
5 be concerned about. That I would have to do that  
6 because of this rule. So I think -- does that  
7 make sense?

8 MR. HAUSER: I understand what you're  
9 saying, certainly. But I mean, I guess -- I  
10 guess a question I have here is -- is, I mean, is  
11 it your expectation that each -- each fiduciary  
12 for each of the plans that are dealing with  
13 Goldman Sachs would essentially be engaging in  
14 that -- that same exercise in a circumstance  
15 where you have the foreign affiliate engaging  
16 and, you know, fairly significant criminal  
17 conduct that may or may not be a reflection of  
18 what the culture is? And what would be the cost  
19 associated with having each of those investment  
20 managers doing the -- you know, each of those  
21 fiduciaries doing it system-wide as opposed to  
22 essentially saying to that entity, look, you no

1 longer can just rely on the QPAM exemption as a  
2 matter of routine.

3 If you want to continue to rely on it,  
4 you'd have to go to the department, apply for an  
5 individual exemption, and there would be -- you  
6 know, the federal government would take a look as  
7 well at what was the conduct, what are its  
8 implications? Is there an argument that having  
9 the government in a position to do that when you  
10 have sufficiently egregious conduct is an  
11 effective, more efficient way of dealing with the  
12 problem than asking each and every plan fiduciary  
13 to engage in a similar exercise? And which of  
14 these two approaches would better vindicate the  
15 purposes of the statute and the private  
16 transaction rules, do you think?

17 MS. DIAMONTE: Well, Tim, in I should  
18 say, my perspective, I think that's normal  
19 fiduciary duties. We're constantly monitoring  
20 these managers for behavior and compliance, and  
21 we have questionnaires and annual due diligence  
22 and -- and contracts that they need to report

1 these types of incidents. So it's much easier  
2 for me to get on the phone, get immediate -- you  
3 know, immediate access to this and make a  
4 determination on whether it has to do with my own  
5 investment portfolio. If these were frozen and I  
6 had to wait for the government to determine that,  
7 that could really sort of interrupt my investment  
8 process and my assets.

9 MR. MASON: And let's be clear also,  
10 here, that the individual exemption process under  
11 the new proposal would not be a particularly  
12 workable proposal. In other words, that's not a  
13 workable process. So in other words, if you hold  
14 that out as the answer here, that's not the  
15 answer. So it is not efficient, and it is not a  
16 workable answer.

17 MR. WALSH: And I think your question  
18 was, you know, which is more burdensome for plan  
19 -- for plan sponsors? And I mean, I think if we  
20 look at it, you know, plan sponsors are already  
21 going to have experience with the manager.  
22 They're going to have a new piece of information

1 and they're going to be incorporating that into  
2 their ongoing, you know, monitoring framework.

3 With disqualification, plan  
4 fiduciaries are stuck, you know, performing a  
5 brand-new manager search. So if I'm looking at  
6 it from a plan sponsor perspective or a plan  
7 fiduciary perspective, it's going to be a whole  
8 lot less work to monitor a manager who, you know,  
9 you know and you can contact than it is to go out  
10 and conduct a brand new RFI for a portfolio that  
11 may need now to be realigned as a result of you  
12 know, not something that they would -- would want  
13 to have moved.

14 MR. HAUSER: Yeah. To me I guess, I  
15 mean -- and we'll move off this topic and I think  
16 probably I've spent more time on it than we  
17 really needed to. But to me an important  
18 question here is the egregiousness of these  
19 particular disqualifying items. And if you think  
20 they're not sufficiently egregious, you know -- I  
21 mean, my presumption is that these are not  
22 routine things. I would not expect the

1 investment managers that you deal with on a  
2 routine basis and are comfortable dealing with to  
3 kind of routinely, you know, intentionally  
4 violate the conditions of the exemption  
5 engagement system, systemic violations of the  
6 exemption -- or commit the enumerated felonies  
7 here. And assuming that's the case, the question  
8 is kind of, well, when that does happen, you  
9 know, on a less-than-routine basis, what should  
10 be the consequences?

11 And if your answer in part is, really,  
12 we just don't think these things are so bad that  
13 you should do an automatic wind down, and we  
14 would prefer just to let each individual  
15 fiduciary kind of decide for themselves whether  
16 they want to continue with that, that's fine.  
17 But if when you're responding, you know,  
18 supplementing the record, if you could just kind  
19 of address the definitional issue about whether  
20 or not you even agree that these things are the  
21 sorts of things that should be disqualifying, I'd  
22 appreciate that.

1                   Then the other question I had, and  
2                   this is strictly kind of the mechanics of -- I  
3                   assume when you say that you'd have to  
4                   renegotiate with investment managers, you know,  
5                   to get the indemnification provisions and the  
6                   like and the agreements, that the thought is not  
7                   that the problem is negotiations over whether or  
8                   not the plans will accept those additional  
9                   protections, it's that it changes the -- kind of  
10                  the cost calculus for the investment manager, the  
11                  risk associated with the contract.

12                  And they're going to want to  
13                  renegotiate other provisions as well. But I  
14                  wanted to make sure I've got that right. And  
15                  then the second thing I wanted to understand is,  
16                  what are the current practices with respect to  
17                  renegotiations? How often are these contracts  
18                  renegotiated? To what extent are changes in  
19                  terms such as fees handled by essentially,  
20                  defaults? You know, notice of a change in term  
21                  subject to a right to opt out, but otherwise  
22                  you'd default in. And like that, if you could

1 just explain a little bit of the mechanics of how  
2 these, the contracting process works, it'd  
3 probably be helpful for us. And maybe, Robin,  
4 I'll direct that to you in the first instance.

5 MS. DIAMONTE: Sure. So when we have  
6 to renegotiate any kind of contract, I mean,  
7 first of all, you don't want to do this. Because  
8 if you open it up, it's like opening up a can of  
9 worms; right? So if you have a contract that's  
10 in place for five years and you say you want to  
11 renegotiate it, then all of a sudden they want to  
12 renegotiate other things; right? And other  
13 provisions that they have updated, which actually  
14 usually provides more protections for them;  
15 right? And more cost for them. So the first  
16 hand, you do not want to open up a contract  
17 unless you have to. But it does happen quite  
18 often when you change a benchmark. You know, you  
19 try to always do amendments, you change a  
20 benchmark, you somehow reach the threshold, and  
21 you want to renegotiate better fees.

22 So you'd open up the contract. Or



1       there's just some kind of a market environment  
2       change. But you're absolutely correct that you  
3       would have to go back, open up the contract, open  
4       up this can of worms, and you're asking them --  
5       and in some cases, if the proposal stands -- to  
6       provide indemnification for the cost for this.  
7       They would definitely increase the fees. So any  
8       time you're asking them to take on any kind of  
9       indemnification, cost, you know, it increased.  
10      You know, they're always looking for a reason,  
11      right, to increase their fees.

12                   And the legal -- and the legal process  
13      is not easy; right? Because I have my internal  
14      ERISA lawyer, their lawyer, they go back and  
15      forth on, like, every individual word. So it --  
16      it takes a long time. It's not a -- it's not a  
17      fun or, you know, a simple non-expensive, you  
18      know, transaction.

19                   MR. HAUSER: Yep. And is it the case,  
20      then for, in your agreements with your QPAMs and  
21      your investment managers, that there is no such  
22      thing as their sending you a -- you know, the

1 equivalent of, like I get at home, you know, a  
2 rider saying I get -- you know, all my insurance  
3 contracts I'm -- every quarter I'll get -- it  
4 seems like I get something that says, hey, good  
5 news, we changed your contract. They don't --  
6 they don't look to negotiate with me. They don't  
7 -- they don't -- we don't have discussions.

8           It's a default, and unless I object  
9 and stop paying, that's it. Is it the case that  
10 you don't have any conditions like that? There's  
11 no -- there's no term under your agreements where  
12 they could just say, here, we've made a change,  
13 it's in your favor. Or maybe also we're  
14 adjusting your fees unless you affirmatively  
15 elect out. It's what happens.

16           MS. DIAMONTE: I'm not familiar with  
17 those riders with this, but I'm not familiar with  
18 any with my manager.

19           MR. SIMMONS: I tried that. But  
20 obviously, the indemnification I mean, you know,  
21 indemnification is at the core of, you know, if  
22 there's -- if there's a dispute and it can't not,

1 you know, have some impact on other aspects of  
2 the overall relationship between the fiduciary  
3 and the investment manager. So I don't think,  
4 even if maybe they have the capability to just  
5 send a rider, that most fiduciaries would just  
6 sign off and say, fine.

7 MR. MASON: Just adding my two cents,  
8 just agreeing with that. I mean, our plan  
9 sponsor said that they would accept something  
10 from the investment manager had drafted. Exactly  
11 what Robin said, that these things have -- a lot  
12 of times, haven't been touched in a few years.  
13 And by opening up one provision, you're opening  
14 up the whole agreement. And it would be a long  
15 and expensive process back and forth, and that's  
16 what we heard very consistently.

17 MR. HAUSER: So I guess another -- I'm  
18 going to stop asking questions, but it -- just  
19 another thing you might want to supplement with.  
20 So we have done a number of individual QPAM  
21 exemptions. You know, granting relief after  
22 QPAMs or affiliates have gotten in significant

1 criminal trouble. And those exemptions have had  
2 conditions for these kind of indemnification  
3 arrangements that look just like this one. And  
4 the -- life proceeded, contracts were executed,  
5 people moved on. But to the extent you think  
6 that, you know, the consequences were more severe  
7 than they looked -- looked like from the outside,  
8 from the plan's perspective, it'd be good to hear  
9 about that. It'd be good to hear generally,  
10 well, how mechanically did that happen in those  
11 cases, in all those individual exceptions where  
12 we've imposed this condition. And people did, in  
13 fact, continue to engage with the same customers  
14 they had before. And did it result in a cost  
15 increase, did it result in changes and other  
16 conditions? What were the consequences? Robin,  
17 if you dealt with Goldman Sachs, what -- what  
18 happened? You have experience with that, and I  
19 don't. Did you -- did your contract expire? Did  
20 -- did your fees go up?

21 MS. DIAMONTE: Yes.

22 MR. HAUSER: That's what I'm asking,

1 do you know?

2 MS. DIAMONTE: Oh, no. No. I --  
3 you're talking about in my example?

4 MR. HAUSER: Yeah.

5 MS. DIAMONTE: That was just an  
6 example, that actually didn't happen.

7 MR. HAUSER: They're not -- they're  
8 not one of your entities? Okay.

9 MS. DIAMONTE: No, no.

10 MR. HAUSER: All right. Okay. Well,  
11 thank you all.

12 MR. HESSE: We have pretty much  
13 reached the end of time for this panel. In the  
14 spirit of leaving you with one other question to  
15 possibly supplement the record with Allison, I  
16 think you had mentioned, you know, target-date  
17 funds and QDIAs. I was just hoping that there  
18 could be some additional supplementation with  
19 respect to how the involvement of the QPAM with  
20 respect to them being engaged to be a part of  
21 that from the plan sponsor perspective, how that  
22 occurs so that we kind of have a fuller picture

1 of that. That's kind of the last thing that I  
2 have to leave folks with. So unless anyone else  
3 --

4 MR. MOTTA: Can I chime in with  
5 something else?

6 MR. HESSE: Yeah.

7 MR. MOTTA: Yeah, can I chime in with  
8 one quick one? I'd just like to hear a little  
9 bit more, maybe in supplemental information. It  
10 seems to me that the essential premise of the  
11 QPAM exemption is the integrity of the parties  
12 that control the QPAM. And it seems like I'm  
13 hearing a lot of, like, the plan sponsor is the  
14 one that, you know, is best able to determine the  
15 integrity of the QPAM, or the parties that  
16 control the QPAM based on its own experience. It  
17 just -- it just seems at odds to me with the  
18 essential premise of the exemption. It's the  
19 department's expectation that the QPAM and those  
20 parties act with integrity, not the plan sponsor  
21 to look at its own facts and decide whether the  
22 QPAM acted with integrity. So if you -- if

1 someone could provide that and supplemental  
2 information, that would be helpful.

3 MR. MASON: So, Erin, same time  
4 tomorrow?

5 MR. HESSE: You can give me a call.  
6 But it's -- it's time for a 15-minute break. We  
7 went a little bit over. So if we can reconvene  
8 at 10:35 with panel two, that would be great. So  
9 we'll meet folks back here.

10 (Whereupon, the above-entitled matter  
11 briefly went off the record.)

12 MR. HESSE: It's time to reconvene and  
13 go back on the record. So now it's time for  
14 panel two. I understand that Andreas may be  
15 leading us off for this panel.

16 MR. FRANK: Yes.

17 MR. HESSE: So with that, let me turn  
18 it over to -- to him and the rest of you.

19 MR. FRANK: Okay. Just a second.  
20 Thank you for the floor. My name is Andreas  
21 Frank. In my first life, I was a banker with  
22 Goldman Sachs and HSBC. As Goldman Sachs was

1 mentioned in the conversation before, you know, I  
2 was with Goldman when it was a family business.  
3 Completely different outset than today. For more  
4 than 25 years, I served as an AML CFT. That  
5 means anti-money laundering, countering the  
6 financial terror expert, for various  
7 institutions, such as the Bundestag, the Council  
8 of Europe, and the European Parliament.

9           The speaker of this panel, to our  
10 group of independent experts from foreign nation.  
11 We have no financial stake in this hearing. As  
12 an AML CFT expert, I would like to point to the  
13 changed overall risk. We are in what makes it  
14 general rethinking imperative, also for the QPAM  
15 exemption. Hundred billions of Euros from Russia  
16 were laundered in the EU under the control of the  
17 Russian Secret Service FSB, with the help of EU  
18 banks, according to the 2019 Council of Europe,  
19 Resolution 2279. Money laundering on this scale  
20 is a serious threat to democratic stability, the  
21 rule of law, and human rights according to the  
22 Council of Europe.



1           The Ukraine did not -- the Ukraine War  
2 did not come as a surprise. Maybe some remember  
3 the DOL hearing from 2015 centered on Credit  
4 Suisse, and our conclusions have been proven  
5 right in the meantime. In 2013, the bilateral  
6 agreement between the DOJ and the Swiss Federal  
7 Department of Finance allowed Swiss banks to  
8 become clean. In 2016, the DOJ reported that  
9 under the Swiss bank program, around 100 Swiss  
10 banks, including Credit Suisse, admitted to  
11 potential or actual crimes. There are a total of  
12 243 banks, Swiss banks, according to the Swiss  
13 National Bank. That should mean that around 40  
14 percent of the Swiss banks confessed to potential  
15 or actual crime. The Swiss bank program did not  
16 prevent some banks from this bank program  
17 committing further crimes.

18           Profit margin in illicit -- in illicit  
19 financial transaction tend to be a multiple of  
20 the legal business. Law-abiding banks are  
21 clearly at a competitive disadvantage. Therefore  
22 the legal financial sector should support better

1 regulation also at this hearing. The existing  
2 regulatory system for QPAMs exemptions clearly  
3 failed. In 2012, Pictet, Switzerland's fourth  
4 largest bank, announced that it is under  
5 investigation by the DOJ. In 2022 Pictet is  
6 still under investigation under -- according to  
7 the Swiss news.

8 On a request, the DOL, the Department  
9 of Labor, confirmed that it does not know whether  
10 Pictet and/or affiliates have received QPAM  
11 exemptions. So we just don't know. QPAMs  
12 exemptions should be seen as privileges that have  
13 to be earned. Criminality should not be  
14 rewarded. Therefore, I support the proposal from  
15 the Department of Labor, that which has to  
16 include the civil society to reduce costs. In a  
17 self-disclosure, applicants of holders and  
18 holders of QPAMs exemptions should provide  
19 information on why they deserve QPAMs exemptions,  
20 including all possible conviction, deferred  
21 prosecution agreement, and equivalence in a  
22 transparent and publicly, similar to the SEC

1 filings.

2 All financial -- all financial actors  
3 involved in QPAMs must be identifiable by a  
4 public register, including the financial sector  
5 self-disclosures. Actors that fail their  
6 obligation or submit -- or submit false business  
7 records could be placed on the financial action  
8 task force-style name and shame list. Further,  
9 whistleblower protection would be helpful. Thank  
10 you for your attention. Quick and dirty.

11 MR. HESSE: All right. Thank you.  
12 Whoever is next is free to begin.

13 MR. HENRY: James Henry, I'm an  
14 economist and lawyer, former chief economist at  
15 McKinsey and Company. I've had a long history of  
16 looking at banks and financial institutions in  
17 general around the planet. I listened to the  
18 earlier panel criticizing your proposal, which I  
19 and our panel more than support, we really  
20 welcome. And the hard thing for me was to figure  
21 out why they wouldn't want to see QPAM regulation  
22 abolished. I mean, essentially they're saying

1 that we could do without any regulation in this  
2 area at all.

3 I think in contrast to that, what we  
4 are saying is we -- first of all, we need to  
5 establish the list as a minimum. It's -- it's  
6 unbelievable that we don't know even the  
7 identities of QPAMs in particular, and that  
8 there's no updated public registry for that. And  
9 secondly, just the focus on having serious  
10 misconduct be potentially an object for, you  
11 know, please-explain letters from the Department  
12 of Labor. I think it's a very reasonable  
13 request. I think it's, you know, essentially the  
14 idea that we can see -- we can leave it to the  
15 pension managers themselves, you know, the funds  
16 themselves to do this kind of monitoring of  
17 global institutions.

18 You know, we have a very powerful  
19 industry on our hands. And \$132 trillion of  
20 assets. About 71 trillion managed by the top 30  
21 firms. And when we go down the list of those  
22 companies, I was involved in this 2015 hearing in

1       which we asked for you to deny Credit Suisse a  
2       waiver.  Instead, the Department of Labor decided  
3       to give them a five-year waiver, and then they  
4       extended that in 2019.  We're seeing the  
5       consequences of that in just the last two years.  
6       Credit Suisse pled guilty in Mozambique, in the  
7       United -- in the United -- to defrauding  
8       Mozambique in the Justice Department case in  
9       November 2021.

10                 It has been revealed to be engaged in  
11       all kinds of other activities -- misbehavior  
12       since 2015, most recently lacking compliance with  
13       its own deferred prosecution agreement, which was  
14       signed in 2014.  But now, Credit Suisse is down  
15       to number 51 on the list of international pension  
16       sort of asset managers, and is only running about  
17       \$800 billion of funds.  The other names on the  
18       list of the top 30 include some firms that we are  
19       very concerned about, as people who have spent a  
20       great deal of time investigating what's the  
21       behavior of financial institutions around the  
22       planet.

1                   My favorites on the list are HSBC,  
2                   which I have written about their behavior in  
3                   South Africa, respective -- respective to the  
4                   Zuma Gate investigation. John can talk further  
5                   about his investigations of HSBC. Morgan  
6                   Stanley, I've recently investigated their  
7                   engagement in an outrageous case of facilitating  
8                   tax evasion from some of the wealthiest white  
9                   people in South Africa, setting up the schemes of  
10                  15 offshore companies to have a round trip  
11                  scheme. This is the kind of thing that I submit  
12                  ordinary pension fund managers are not going to  
13                  come across. We are talking about serious crimes  
14                  and serious patterns of misconduct by these  
15                  financial institutions. It's not isolated  
16                  events, it's not rogues. It's required  
17                  institutional systemic misbehavior. And that's  
18                  what I think your reform should be focusing on.

19                         The third thing I'm concerned about  
20                         here in addition to the list, in addition to  
21                         targeting this serious misconduct and making sure  
22                         that people in the industry understand that it

1 will be taken seriously, is the budget for the  
2 DOL to enforce this activity. I would -- I would  
3 hope that you would, in your considerations here,  
4 let us know what you have in mind for  
5 requirements, so we can go to work and defend the  
6 kind of increased resources that I see the  
7 Department of Labor needing to make this proposal  
8 actually effective.

9           This is, by our definition, a very  
10 conservative approach. This is about the rule of  
11 law. It is about enforcing very reasonable  
12 standards that have been in existence for a long  
13 time, that some of these organizations have  
14 systematically violated. And I would say that if  
15 we had had the kind of rules that you're  
16 suggesting in place, let's say in 1999 when  
17 Credit Suisse was involved in a huge tax evasion  
18 conviction in Japan, we might have avoided not  
19 only its involvement in the Enron matter in the  
20 tax dodging that we saw in 2014 and a lot of the  
21 other misbehavior, but we might actually have  
22 saved Credit Suisse itself from its demise.

1                   It may be that certain kinds of  
2                   activities that they were engaged in, they  
3                   thought were more profitable because they were  
4                   able to get away with them. But in the long run,  
5                   these things come to the surface. And no one  
6                   wants to work at those kinds of institutions. So  
7                   what we're suggesting is very reasonable, modest  
8                   regulation. It is -- you know, it is a good  
9                   answer to the question of why we don't want to  
10                  eliminate QPAM regulation. The industry actually  
11                  needs us to be more effective, not less. That's  
12                  my -- that's my remark. Thanks very much for the  
13                  opportunity to testify. We can submit and revise  
14                  our remarks accordingly. Happy to take  
15                  questions.

16                  MR. HESSE: Thank you. We have -- we  
17                  have two more -- two more presenters, right, on  
18                  the -- on the panel?

19                  MR. HENRY: Yes. John?

20                  MR. MORJANOFF: On the agenda?

21                  MR. HENRY: Okay. Doctor --

22                  MR. CHRISTENSEN: Go ahead.



1                   MR. MORJANOFF: All right. Thank you.  
2                   The DOL is responsible for oversight of QPAMs,  
3                   but it can't do this without a list and adequate  
4                   authority. For example, in 1999 Credit Suisse  
5                   was criminally convicted in Japan. It helped 60  
6                   banks and companies hide huge losses. Basically,  
7                   CS cooked the books. CS directed that documents  
8                   to be shredded, destroyed, or sent immediately to  
9                   the firm's offices in London, beyond the reach of  
10                  the regulators. Even during an audit by the  
11                  regulator. Credit Suisse didn't apologize. It  
12                  said it considered the punishment  
13                  disproportionate. The Japanese said that CS had  
14                  deeply undermined the soundness of Japanese  
15                  financial institutions. The bank's deceptions  
16                  were planned and systematic, involved the entire  
17                  organization in Tokyo, not just a few  
18                  individuals.

19                  There was obstruction of criminal  
20                  investigations, lying to the regulator, evidence  
21                  destruction, market manipulation, systematically  
22                  falsifying documentation, and conducting business

1 without a license. This pattern of wrongdoing  
2 has repeated multiple times since then. The CS  
3 division of Japan changed its name twice, finally  
4 to Credit Suisse International, or CSI. Remember  
5 that name, it will repeat.

6 Next year, Credit Suisse in India was  
7 caught in market manipulation. It confessed to a  
8 fraudulent scheme of synchronized, circular, and  
9 fictitious trades, which created artificial  
10 volumes, markets, and share prices. It was  
11 convicted from trading for two years, but the  
12 appeals tribunal stated this was unjustifiably  
13 lenient. This emphasizes that foreign  
14 convictions are more likely to be lenient, not  
15 severe. Next year, Credit Suisse in Switzerland  
16 was caught red-handed in market manipulation  
17 again, plus embezzlement and fraud for CST and  
18 case. Just like in the previous cases, it  
19 initially denied any wrongdoing. However, this  
20 time it was on home ground. There was a criminal  
21 investigation. The prosecutor asked for the  
22 documents, but CS simply refused to produce the

1 documents or destroyed documents, hid witnesses,  
2 lied, and even used bank secrecy to conceal its  
3 participation.

4           When any member of the investigation  
5 got too close to the truth, he disappeared from  
6 the case. Eventually, the prosecutor had no  
7 resources left and closed the case. He told us  
8 that there was not a single prosecutor in  
9 Switzerland who would go up against CS. I went  
10 to the Zurich Supreme Court and copied the  
11 criminal investigation files. This revealed  
12 shocking details of a criminal enterprise  
13 operating through multiple CS organizations in  
14 different countries. Terrifying conclusions, but  
15 later confirmed in other cases.

16           I met with CS' legal department  
17 several times. They refused to look at the  
18 documents, and even hacked into our website. I  
19 told them I knew what went on and that they had  
20 stolen the honest savings of thousands of hard-  
21 working taxpayers. I shared my investigation  
22 with every major law enforcement agency and

1 regulator. That is why criminal bank and QPAM  
2 Credit Suisse is in such a mess. There is worse  
3 to come for it, because I know their books are  
4 not true. Last quarter, they wrote down four  
5 billion dollars. They were deferred tax assets  
6 which have been logged as hard capital. Highest  
7 quality CET1 core capital. That was absurd and  
8 they knew it.

9 The bank's market cap is now only \$11  
10 billion. Continuing on, CS was skilled at not  
11 only cooking its own books, but for others too.  
12 CS hid losses for Enron, that became the US's  
13 biggest bankruptcy at the time. CS hid losses  
14 for the Parmalat. That was Europe's biggest  
15 bankruptcy. Thousands of pension funds and old  
16 people were damaged. CS should have been stopped  
17 after their Japanese criminal conviction. The  
18 DOL could have been instrumental.

19 There have been dozens of scandals,  
20 even financing Iran's nuclear program. That was  
21 a deferred prosecution agreement. You can't give  
22 QPAM privileges to a terrorist enabler. CS

1 Switzerland CS Security Europe were criminally  
2 convicted for defrauding investors with  
3 Mozambique's billion-dollar fake loans. The  
4 Mozambique economy collapsed. Two million people  
5 were trashed into abject poverty. This is how it  
6 was enabled. The head of CS Global Financing  
7 group rudely rejected a compliance request from a  
8 junior female compliance officer. He emailed,  
9 and I quote, "what the swear word this is about?  
10 There is some stupid UK regulatory requirement.  
11 She's going to be fired if she doesn't behave."  
12 Here, to behave in Credit Suisse meant to ignore  
13 compliance.

14 In March 2020, Sears lost \$200 million  
15 closing the hedge fund Malachite Capital.  
16 Managers warned that procedures needed urgent  
17 updating to prevent a repeat. These warnings  
18 were ignored, and there was a near identical  
19 recurrence, just 28 times bigger. The Archegos  
20 catastrophe. There was near zero effective risk  
21 management. Peak exposure was 24 billion. The  
22 U.S. operations were managed by CS Securities

1 Europe. Yes, the one criminally convicted for  
2 Mozambique. They are way out of their depth. So  
3 in December 2020, Archegos was migrated from CS  
4 Securities Europe to, wait for it, criminal bank  
5 CSI, the one that was criminally convicted in  
6 Japan.

7 Archegos collapsed. It was indicted  
8 for market manipulation, racketeering, having  
9 done \$100 billion of damage. Imagine what would  
10 be possible if the DOL had authority to act on  
11 foreign convictions, DPAs and so forth. Only  
12 then will it be possible for it to truly manage  
13 QPAM privileges. They can also alert the DOJ,  
14 SEC, Federal Reserve, Congress and so on, as well  
15 as working with delinquent QPAMs, if it is  
16 possible to do that. Two to three trillion  
17 dollars of criminal proceeds gets laundered  
18 annually, much of it through pension funds who  
19 are generally not equipped for AML.

20 Secretly, some big funds would not  
21 complain if laundered money made their results  
22 look good, as long as they didn't know.

1 Democracy is dying because corrupt money buys  
2 power and political influence, now on a scale  
3 greater than ever before. Credit Suisse shows  
4 that dirty money can destroy the bank. So what  
5 the DOL has asked is just the starting point. It  
6 needs -- it needs the funds to come back to the  
7 real world. They're living in a fantasy world,  
8 and as long as that fantasy world is propped up  
9 like a house of cards, they're going to whinge if  
10 anyone changes or imposes regulations, just like  
11 the -- before the global financial crisis.

12 When the crisis comes, the people they  
13 complain they want to get rid of, they're going  
14 to desperately need to come back to put it all  
15 back together. The world financial crisis is in  
16 a very fragile state. Leverages beyond what was  
17 there in the lead-up to the Great Recession, and  
18 there are several reasons why we can have what --  
19 so-called black swan events that can just knock  
20 the whole world's economy off its balance.

21 Share markets are not realistic.

22 People don't own the shares. It's all done on

1 leverage finance and we're moving from an era of  
2 low-interest debt to high-interest debt. The  
3 traditional outcome is what we could call  
4 stagflation with certainty. There's not even  
5 that much certainty these days. The only  
6 certainty is a bad result is coming. And unless  
7 we start to clean up our house, try and do the  
8 best we can to get rid of the criminal money out  
9 of the pension funds so that they can stay stable  
10 and can survive the next financial crisis, then  
11 we're going to be in a lot of trouble. Thank  
12 you.

13 MR. HESSE: Thank you as well. And I  
14 think it's John Christensen. He's our -- he's  
15 our last person on this panel.

16 MR. CHIRSTENSEN: Thank you, and good  
17 morning. And thank you for inviting me to submit  
18 to this hearing. My name is John Christensen.  
19 I'm attending this hearing from London, which is  
20 where I live and work. I'm the former chief  
21 executive of the -- and chair of the Board of the  
22 Tax Justice Network, which is an NGO established



1 to monitor and campaign for better regulation of  
2 financial services, particularly cross-border  
3 financial services. That's why I think that my  
4 experience is pertinent to this hearing. I  
5 practice as both a forensic auditor and an  
6 economist. And in the form of capacity, I laid  
7 on a number of major investigations into the  
8 banking fraud, including an investigation into an  
9 offshore subsidiary of Swiss banking giant UBS.  
10 And that's -- that investigation, after many  
11 years of denial of any malfeasance or wrongdoing,  
12 led to the subsidiary bank in question, which is  
13 called Cantrade Bank, pleading guilty to criminal  
14 recklessness in its treatment of its clients'  
15 affairs.

16 I also work as a documentary  
17 filmmaker, and Jim earlier talked about HSBC, one  
18 of the films I made with a French team -- French,  
19 sorry, French, German teams, called -- and this  
20 gives -- the title gives you the -- gives --  
21 tells you exactly what it does. The film's title  
22 was HSBC: the Gangsters of Finance, and that film

1 explores the role that HSBC played over many  
2 years and in many countries in facilitating money  
3 laundering and tax evasion on a global scale.  
4 And that included in the United States, where  
5 HSBC was investigated by the Department of  
6 Justice and paid a record out of court  
7 settlement.

8 Now, I'd like to make an observation  
9 flowing from there, because HSBC, in common with  
10 many of the big financial institutions, has made  
11 a habit of avoiding criminal prosecution through  
12 negotiation of non-prosecution agreements or  
13 deferred prosecution agreements in order to avoid  
14 having a criminal record. Sometimes they do  
15 actually get a criminal record, quite rightly,  
16 but they have a track record of going around the  
17 circuits here. And I think this is pertinent to  
18 this hearing because I feel very strongly that  
19 the Department of Labor needs to take account of  
20 all such agreements -- non-prosecution, delayed  
21 prosecution or whatever -- when it goes about the  
22 job of assessing whether a QPAM exemption remains

1 valid.

2 But also, I think DOL needs to look at  
3 qualifying QPAMS in the round and take account of  
4 prosecutions, non-prosecution agreements and  
5 deferred prosecution agreements, not just in the  
6 United States, but across the world, as Jim and  
7 Paul have just explained. Now, one of the most  
8 shocking insights I've gained from working  
9 international finance for over four decades now  
10 is that so much of the banking fraud and the  
11 monkey business that we investigate across the  
12 continents is, at root, caused by political  
13 failure and misunderstanding of basic economics.  
14 As I said, I'm --- I trained as an economist.

15 But I'm thinking in particular of the  
16 protracted periods of competitive deregulation  
17 that we've seen globally in the finance industry  
18 in the 1980s and 1990s, which inexorably led to  
19 the 2008 banking collapse. And I'm thinking that  
20 the lessons that were learned coming out of that  
21 collapse have subsequently been unlearned in  
22 recent years. And the lobbyists are back out

1       there saying, we don't recognize the need for  
2       regulation or, indeed, tight compliance  
3       procedures because, you know, we're doing fine at  
4       the moment. But as Paul just said, we are -- we  
5       are facing a period where -- of almost unrivaled  
6       -- I think the fragility of the financial sector  
7       is much, much worse than it was in the build up  
8       to the 2008 crisis.

9                       But unfortunately, this language of  
10       competitiveness has become so deeply rooted in  
11       our politically correct thinking that we seldom  
12       give a second thought to what it actually refers  
13       to. Okay. We hear financial advisors and  
14       politicians using this word, and everyone nods  
15       along in agreement because they think this is a  
16       crucial part of how markets work. But when I  
17       hear bankers and financial lobbyists and -- and  
18       politicians using that, competitiveness, more  
19       often than not they're talking about something  
20       entirely different from the type of microeconomic  
21       competition that occurs in other markets.

22                       For bankers, competitiveness involves

1 engaging in a race to the bottom that pits one  
2 jurisdiction against another in a process of  
3 competitive deregulation and tax competition.  
4 They don't think in terms of lowering fees to  
5 their clients or providing better services to  
6 their customers. When they lobby in the name of  
7 competitiveness, and I've heard this more and  
8 more often in the last few years, they're  
9 generally pushing back against regulation,  
10 against anti-money laundering regulation in many  
11 cases, or against progressive taxes like the  
12 financial transaction tax.

13           So for bankers, competitiveness  
14 translates into LAX, know-your-client regimes,  
15 weak compliance with anti-money laundering  
16 regimes, lower capital adequacy ratios, and  
17 inevitably, state-funded bailouts when the poo  
18 hits the fan, as it does all too regularly. And  
19 I agree with Paul, by the way. I think we're  
20 heading for the mother and father of all crises.  
21 But far too often, when banks are caught out in  
22 financial frauds or assisting clients with tax

1 cheating or other financial crimes, they've  
2 wriggled free from the consequences by settling  
3 out of court in order to avoid conviction and  
4 consequential reputational harm.

5 But here -- here in London,  
6 politicians interpret competitiveness to mean  
7 engaging in competitive deregulation to bring the  
8 city of London's financial regulations standards  
9 and compliance standards down to those of tax  
10 havens like Dubai or Singapore. For its part,  
11 the Bank of England, which of course is  
12 responsible for banking regulation in Britain,  
13 they've been flagging concerns up about the  
14 systemic threats that have been steadily building  
15 up for pension funds and other major asset  
16 managers as a result of poorly managed debt  
17 leverage and the lack of transparency about debt  
18 liabilities in the shadow banking sector. And I  
19 think this is relevant to this hearing.

20 Earlier this week, Senior Bank of  
21 England officials stated that the chaos facing  
22 pension funds in London in late September -- some

1 of you might have heard about the so-called mini  
2 budget crisis coming out of the government led by  
3 Prime Minister Liz Truss. That crisis for the  
4 pension sector arose from a liquidity crisis  
5 caused by overuse of leverage liability driven  
6 investment strategies. And these are widely used  
7 within the pension industry as a hedging  
8 mechanism. Now, as much as anything, that -- the  
9 chaos which came out of the mini budget pose an  
10 existential threat to some of the pension funds  
11 in operating out of London. And in many cases,  
12 they were saved by a huge, truly massive, æ65  
13 billion intervention by the Bank of England.

14 But the chaos can be attributed to  
15 poor risk management, lack of transparency and  
16 clarity about how the risks interlink across  
17 different financial institutions, and that led to  
18 an inability to adequately and comprehensively  
19 stress test the risk exposures of all the  
20 players, whether they were pension funds or banks  
21 and non-bank sector organizations. I think there  
22 are very, very important lessons to be learned,

1 but I've heard some of the interventions earlier  
2 from -- in the previous session. It struck me as  
3 being complacent to a very high degree. So I  
4 think that the dynamic of competitive  
5 deregulation dangerously undermines the interests  
6 of pension fund holders and other savers.

7           And with this in mind, I think it's  
8 important -- and I'd like to strongly endorse  
9 some of the recommendations that have been made.  
10 I strongly endorse that financial services  
11 providers wanting QPAM status should notify the  
12 DOL. And I think this should be an annual  
13 notification of its reliance on QPAM exemption.  
14 And I think the DOL should maintain an online  
15 listing of all the recognized QPAM exemptions.  
16 But I'd go further. I suggest that these  
17 exemptions are independently reviewed by experts  
18 to ensure that the exempted parties remain  
19 eligible for their QPAM status. And as part of  
20 that annual notification that I recommend, I  
21 think the principals of any exempted entities  
22 should sign a declaration stating that they have



1 not -- they have not engaged in any prohibited  
2 misconduct that might render them ineligible due  
3 to continued -- ineligible to continue to hold  
4 QPAM status. And I think that that declaration  
5 should not be exclusive to their activities  
6 within the U.S. It should be global.

7 Secondly, I strongly support --  
8 strongly support the suggestion that Andreas made  
9 about implementing a name and shame list. I'm  
10 convinced that nothing will deter bankers or  
11 others from -- from misconduct until such time as  
12 their reputation is, you know, firmly on the  
13 line. And thirdly --

14 MS. WILKER: Thank you. Wrap it up  
15 quickly with the third point.

16 MR. CHRISTENSEN: Yeah, my third point  
17 would be, more attention needs to be paid to the  
18 role of whistleblowers in flagging up concerns  
19 about misconduct in spaces and criminality. I  
20 know from my own experience that banks, fund  
21 managers, and pension funds, they're kind of  
22 prone to suppressing internal dissent to the

1 extent that whistleblowers put their careers and  
2 their livelihoods at risk by whistleblowing. And  
3 they need to be protected from that. And I think  
4 this needs to be built into -- one, into the  
5 safeguards that we put when dealing with QPAM.

6 Well, thank you for that time and I look forward  
7 to questions.

8 MR. HESSE: Thank you. So, you know,  
9 why don't I kick this off with -- with the  
10 suggestion from some of our other commenters with  
11 respect to, instead of there being ineligibility,  
12 that the requirement should be that QPAM clients  
13 are notified of this type of misconduct so that  
14 the fiduciaries of those plans are able to make a  
15 determination and assess the overall kind of  
16 scenario and whether or not they should be moving  
17 to another asset manager. Is that -- is that  
18 sufficient, from your perspective, to at least  
19 start addressing some of these concerns with the  
20 -- you know, this larger scope, corporate, you  
21 know, misconduct?

22 MR. MORJANOFF: I'd say absolutely

1 not. I think the honest ones are looking to you  
2 for guidance to make the choice for them. The  
3 details of these criminal convictions and DPAs  
4 and so forth are so complex. What I read out --  
5 I mean, it's truly horrendous, but it's only a  
6 tiny fraction of the -- of the horrendous  
7 behavior in that bank. And the bank's not alone.  
8 It goes on in a lot of banks. And untrained  
9 people are just not up to making a decision for  
10 that. They'll just go with the flow. So it  
11 defeats the purpose of the ERISA protections.

12 MR. HENRY: I think that the  
13 Department of Labor has a chance to really  
14 aggregate its experience in this area, and to  
15 proactively identify the kind of concerns and  
16 misbehavior that ordinary pension fund managers'  
17 funds are not in a -- in a position to do with  
18 this kind of decentralized approach. I would  
19 call that legalized dueling, effectively. You  
20 know, it's -- it's just naive. And, you know,  
21 this is not a matter where we don't have history.  
22 History tells us that Credit Suisse is a glaring

1 example, but there are many others. You know  
2 this -- it's not as if the DOL has created a huge  
3 burden with this kind of concern.

4 Just the opposite, it's been far too  
5 inactive. So I think we have to swing back in  
6 the direction of having DOL more active in  
7 actually monitoring the kind of serious systemic  
8 misbehavior that we're talking about. That's not  
9 going to be a burden to pension fund managers,  
10 it's going to be a great help when they have to  
11 defend the decisions they're making to, you know,  
12 their -- their colleagues and the incredibly  
13 influential people that they're trying to fire.

14 MR. MORJANOFF: I would go further and  
15 say that the DOL needs the ability to levy --  
16 levy financial penalties to pay for the resources  
17 to do the job properly. Properly managed  
18 financial penalties and oversight is one of the  
19 best investments the country can make to weed out  
20 corruption and keep things straight. And in the  
21 long term, the honest operators will just be so  
22 grateful for it.

1           MR. HESSE:  If we don't have the  
2           ability to levy penalties, you know, what -- what  
3           are the alternatives then?  Is -- is getting this  
4           out into the light of -- this information out  
5           into the light of day, whether it's to, say, the  
6           plan clients, the QPAM's plan clients, or  
7           possibly notification to DOL.  Is that -- is that  
8           sufficient to at least move -- you know, keep --  
9           keep things with -- in line with what the QPAM  
10          exemption itself is about?

11          MR. CHRISTENSEN:  You do have the  
12          capacity for naming and shaming, as Andreas  
13          suggested.  And I think that's a very powerful  
14          disciplinary mechanism.  And I know from within  
15          the financial services industry, they are -- they  
16          are very concerned about reputational issues.  So  
17          you have a powerful tool there.

18          MR. HENRY:  I think that the idea of  
19          having -- you know, the SEC has had a success in  
20          terms of having the industry fund this kind of  
21          enforcement program.  And, you know, it does that  
22          partly with a kind of financial transactions tax

1 that most people don't know about. But secondly,  
2 you know, the idea of actually having the  
3 misbehavior paid for by those who are caught  
4 doing it is not a bad suggestion. But I think  
5 the idea of having levels of QPAM status, like in  
6 other words, let's have trial periods where  
7 people come into the program and they're sort of  
8 on probation, you know, but there is some notion  
9 that you're -- good behavior will be rewarded.

10 You'll have kind of a frequent flyer  
11 list. And then there'll be a gray list where  
12 people are -- you know, this is the approach  
13 that's been taken with tax havens to some extent.  
14 There have been blacklists and gray lists and  
15 white-lists, and sort of segmenting the QPAMs  
16 and, you know, reserving absolute condemnation  
17 for a tiny fraction that are just, you know,  
18 relentless. But you know, I think that there's  
19 much more the DOL could do with creative  
20 regulation that would not be of great burden to  
21 the -- to the industry. We'd be happy to think  
22 with you on designing that system.

1           MR. MORJANOFF: I think it's realistic  
2 to accept that the DOL does not yet have the  
3 power or the authority, even after these things  
4 are hopefully all passed, to do what it needs to  
5 do. And that's not your fault. But I think  
6 realistically, there's likely to be a financial  
7 crisis. It needs to do the best it can to help  
8 the pension fund survive the next financial  
9 crisis. I think it needs a regime where whenever  
10 bad behavior is notified by a QPAM, it is obliged  
11 to immediately notify you -- first of all, that  
12 it's notified -- it's found bad behavior, maybe  
13 criminal behavior. And secondly, then advise of  
14 this program to correct that.

15           Risk management is not about  
16 eliminating criminal activity. That's impossible  
17 for large organizations. But it is about  
18 managing it and keeping it at a level where it  
19 doesn't affect the stability of the system. And  
20 that's what's not happening. The -- the --

21           MR. HENRY: Our overall point here is  
22 that some of these organizations that we're

1 dealing with are very large and very, very  
2 difficult to -- to manage. They have internal  
3 cultures which I would describe, having worked at  
4 several major financial institutions, as a -- as  
5 a kind of higher immorality. You know, once  
6 you're inside, it's very hard not to comply, not  
7 to go along to complain. And it's important, for  
8 that reason, to have the Department of Labor able  
9 to have an independent perspective on -- on these  
10 matters. So --

11 MR. MORJANOFF: That's why the  
12 whistleblower program is so important. That's  
13 the most efficient way of getting inside  
14 information what's going on. People are -- with  
15 the Wells Fargo case, there were 700  
16 whistleblower reports that were ignored before  
17 the final thing blew open after about six or  
18 seven years. I mean, that's shocking. If the  
19 DOL could get the reports, and then at least  
20 they're not going to get ignored. Don't think of  
21 the perfect answer. The current situation is  
22 dangerous. And the DOL, in my opinion, is one of



1 the best organizations to take a balanced, sane  
2 view on what's going on.

3 I mean, for God's sake, they rescued  
4 teenage kids out of meat factories that have been  
5 -- that have been child exploitation. They're at  
6 the coalface of doing stuff for real people. I  
7 deal with agents at -- with law enforcement in  
8 every country that's significant at all levels,  
9 from the very highest to the very lowest. And  
10 it's extraordinary, the different attitudes that  
11 they have. But in the DOL, you do have a much  
12 better opportunity to provide a balanced response  
13 when you do get real reports of bad behavior in  
14 an organization.

15 MR. HENRY: I would say one more  
16 thing. Being a regulator, especially these days,  
17 is never going to be a popularity contest that  
18 you can win. In fact, if you're doing your job,  
19 you're going to have vociferous complaints from  
20 the -- from the industry. That's part of knowing  
21 that you're effective. You know, when -- when  
22 Roosevelt appointed Joe Kennedy to come in from

1 Wall Street and run the SEC, there was an uproar  
2 on the part of his former colleagues.

3 Joe Kennedy actually knew about the  
4 mispractice -- misbehavior, and we resulted -- we  
5 -- we ended up having regulations that we have  
6 benefited from, requirements of -- elementary  
7 reporting requirements, financial reporting, that  
8 has been nothing but constructive for -- for  
9 investors. So that's a great example of  
10 successful regulation. That's the kind of tough  
11 regulatory approach that can be constructed that  
12 can actually save financial institutions from  
13 their worst -- their worst propensities.

14 MR. ANDREAS: May I add something  
15 here? You know, from my perspective as an AML  
16 expert, you know, the enforcement of your  
17 regulation will be difficult. You know, for  
18 example, in the European Union, there is an anti-  
19 money laundering directive. It was enacted in  
20 1991. It's still not enforced in 2022. It's a  
21 serious problem with how to enforce laws and  
22 regulation. And I think this is a tough one on

1 the Department of Labor.

2 MR. CHRISTENSEN: May I come in on  
3 that, and just add a couple of comments? A few  
4 years ago, I talked -- I was part of a research  
5 program I was involved in for the European Union.  
6 I talked with financial institutions across all  
7 the major financial centers in Europe, and  
8 talking to -- off the record to the senior  
9 principals, they all said that they would prefer  
10 to be working in an environment of strong  
11 regulation and strong enforcement, because the  
12 race to the bottom was undermining the standards  
13 that -- including the ethical standards, getting  
14 back to what was said about ethics earlier on.

15 They say it's the lack of compliance  
16 and the lack of enforcement that drives the race  
17 to the bottom in standards across the sector. So  
18 their personal view -- not the institutional  
19 view, but the personal view -- was they preferred  
20 to have stronger standards and to have strong  
21 compliance and enforcement of those standards.  
22 All of that was written up in a book about

1 financial fraud published in 2017.

2 MR. HENRY: There's no question that  
3 you're up against a very powerful industry. I  
4 added up the political contributions and the  
5 money spent on lobbying by the top 30 pension  
6 fund managers, firms we described, companies like  
7 HSBC and JP Morgan, BlackRock, of course. And  
8 it's \$1.4 billion since 2012 on lobbying and  
9 politics. And just this year, it's a total of 92  
10 billion -- \$92 million from these institutions.  
11 So there's no question that they have voice. And  
12 they have many of us concerned.

13 You know, we're outside experts, we  
14 don't get paid for this. All of the people on  
15 the panel this morning, I think, we're -- we're  
16 there by virtue of working for their industry.  
17 And you know, I'm -- I'm not questioning their  
18 good faith, but I think that you have to have an  
19 outside analysis of the impact of these  
20 regulations and not just listen to the industry.  
21 Because you know, the industry has a history of  
22 buying influence. And you know, not all the

1 players that we're talking about can be trusted.

2 MR. COSBY: The comment that we heard  
3 earlier about the fact that if our -- if QPAMS  
4 become ineligible due to foreign convictions,  
5 that it might subject them to rogue actions by  
6 countries in a way that they interpret their laws  
7 and find the QPAM has violated them. I was just  
8 wondering if you had any reaction to that  
9 statement from the prior panel.

10 MR. HENRY: -- hypothetical. You  
11 know, there's -- there are so many cases in which  
12 the Department of Labor could have benefited by  
13 looking at respectable foreign convictions. We  
14 pointed out the one in Japan. There have been  
15 many others. And we're unable to do so within  
16 the current QPAM. You know, the idea that  
17 Russia, for example, would convict -- I mean,  
18 you'd have to really come down to some very  
19 specific hypotheticals. And I can't -- I can't  
20 imagine -- you know, we have to really, I think,  
21 dismiss that. Is China going to, you know, blind  
22 us by dumbing up some conviction of a U.S. bank?

1 You know, that's just --

2 MR. MORJANOFF: Then on top of that,  
3 the DOL has to believe them. I mean, you may --  
4 don't have to believe everything.

5 MR. HENRY: I think that's incredibly  
6 insulting to DOL. I mean, I just can't -- you  
7 know, that you wouldn't be able to discern the  
8 difference between a credible -- you know,  
9 nobody's requiring you to rubber stamp the  
10 foreign conviction or foreign deferred  
11 prosecution or any piece of evidence. All we're  
12 doing is allowing you to look and use it in  
13 assessing -- making an independent assessment.  
14 And that's just what the federal government does  
15 all the time.

16 MR. CHRISTENSEN: If I could just  
17 comment on that. When I heard it earlier on, I -  
18 - honestly, I can't think of a single example,  
19 but I can think of an example which turns that  
20 argument on its head. Earlier, I talked about an  
21 investigation into a subsidiary of the Swiss bank  
22 UBS, which was operating out of the Channel

1 Island of Jersey -- that's the British Channel  
2 Island of Jersey -- under a subsidiary called  
3 Cantrade. And when Cantrade was investigated by  
4 a team, the Jersey courts actually chose to not  
5 prosecute. So the investigating team and the  
6 lawyers for the plaintiffs, many of whom were  
7 U.S. citizens who had lost a lot of money as a  
8 result of churning and banking fraud, currency  
9 frauds, they turned to the second divisional  
10 court of New York.

11 And when UBS heard that the second  
12 divisional court in New York was going to go for  
13 it and prosecute them in New York, UBS said, no,  
14 we would be -- we would prefer to be prosecuted  
15 in Jersey. So it's the exact opposite. And I  
16 kind of thought, where do these people come from  
17 when they think -- and of course, the Jersey  
18 Court was particularly lenient and UBS pleaded  
19 guilty to criminal recklessness and had a final  
20 four million, which was peanuts, whereas New York  
21 courts would have given a very much more severe,  
22 I think, fine, and might well have looked twice

1 at the license arrangements with UBS. So I  
2 honestly can't imagine where that comment came  
3 from. My experience suggests it's the opposite  
4 that happens.

5 MR. HAUSER: If I could maybe just, I  
6 don't know what, set expectations a little bit  
7 here, or say a little something about the way we  
8 look at the world. I mean, in listening to your  
9 comments, I -- it feels a little bit like you  
10 think our remit is a little broader than -- than  
11 what it is sometimes. I mean, we -- we don't --  
12 we regulate the pension plan universe and we're  
13 responsible for protecting the interests of  
14 private retirement plans. And I think the  
15 premise behind the QPAM exemption is -- you know,  
16 it's a class exemption, and if you're the kind of  
17 financial institution that falls within its  
18 parameters, you're -- you get a pass from one  
19 category of transactions that would otherwise be  
20 illegal.

21 And before we give folks that pass, we  
22 -- we want to make sure that they're the kind of



1 institutions that can be trusted to act in a way  
2 that's protective of the plan participant's  
3 interests and isn't -- isn't going to make us  
4 regret the fact that they -- they were given a  
5 pass from -- from rules that were intended to  
6 protect plan participants. But our focus is  
7 entirely on what is the interest of plans. You  
8 know, we're not -- we're not here to -- our job  
9 is not to second-guess whether prosecutors impose  
10 the right penalties, whether other financial  
11 regulators, you know, got the right kind of  
12 recoveries, or to kind of supplement the criminal  
13 provisions or anything else. It's strictly about  
14 protecting plans.

15 And I think a lot of the arguments --  
16 yeah, I mean, obviously, they're focused on very  
17 specific provisions. But a lot of the argument  
18 of the -- of the prior panel was, in their view  
19 at least, however well-intentioned we might be in  
20 this exemption, we are in the end going to impose  
21 some significant additional costs on plans. And  
22 -- well, first on the investment managers, but

1 then secondarily on the plans without necessarily  
2 getting much benefit. In particular, they're  
3 concerned about the indemnification provisions.  
4 And liken them -- yeah, that's kind of what I'm  
5 looking for. I mean, what -- how do you think --  
6 how do you think that?

7 MR. HENRY: First of all, we're not  
8 trying to make you into the Justice Department.

9 MR. HAUSER: Appreciate it.

10 MR. HENRY: We're actually trying to  
11 figure out what your role should be, short of the  
12 libertarian proposal that you be abolished. And  
13 I think you were suggesting, in your very astute  
14 questions to that panel this morning, that, look,  
15 we are talking about highly -- you know, a thin  
16 slice of extreme behavior by institutions that  
17 have engaged in systematic recurrent behavior.  
18 That's a pretty -- pretty clear. Now, I would  
19 submit that in the case of Credit Suisse, we also  
20 have a dramatic example of where the Department  
21 of Labor could have acted earlier, to be much  
22 stricter than it was. And we were right. I hate

1 to say that. It gives me no -- no satisfaction  
2 whatsoever to say that we warned you. We told  
3 you so in January 2015. Ralph Nader, myself,  
4 Andreas, and Dr. Paul were all on that call. And  
5 we were there.

6 MR. CHRISTENSEN: And they did the  
7 same things, then, against us as they're saying  
8 now.

9 MR. HENRY: They could not be trusted.  
10 So I'm saying in these rare events, in these rare  
11 cases, you should have authority to act. That's  
12 all. And I think that their track record is that  
13 this will send a message to the industry, it will  
14 help prevent misbehavior going forward, the kind  
15 of financial crisis that we are talking about  
16 here on the margin. You know, people are very  
17 concerned about the way major corporations and  
18 banks are treating the assets involved in the  
19 fossil fuel industry. Are they appropriately  
20 reserving for the day that those fossil fuel and  
21 coal expenditures, you know, are not -- not going  
22 to be any of any value?

1           BlackRock, it turns out, is one of the  
2 biggest investors in fossil fuels. They're --  
3 they have a \$10 trillion fund. And they're --  
4 you know, Global Witness this week exposed the  
5 fact that they have eight billion dollars of  
6 exposure to deforestation in Brazil. I mean,  
7 this isn't good, but it isn't take -- you know,  
8 it doesn't take much imagination to say the  
9 Department of Labor has a role to play in  
10 protecting pension funds against these extreme  
11 forms of behavior. That's all we're talking  
12 about.

13           MR. HAUSER: And how about with --  
14 with respect to, you know, deferred prosecution  
15 agreements and non-prosecution agreements in  
16 particular? The argument is that, you know,  
17 criminal liability, at least in those cases,  
18 remains to be proven whether anybody did anything  
19 egregious. And so, I guess the argument is that  
20 maybe a notice should go out to the plans and the  
21 participants, and they should be informed of the  
22 -- of the facts, but it shouldn't be kind of an

1 automatic disqualification from being able to  
2 take advantage of the general QPAM exemption,  
3 just as a matter of fairness, as I was hearing  
4 the argument. Do you have -- do you have  
5 thoughts on that?

6 MR. HENRY: I'll defer to my  
7 colleagues as well, that the quickly -- look, I  
8 think there are deferred -- DPAs and DPAs and the  
9 industry in general. If you go back to 1998 and  
10 you look at the number of deferred prosecution  
11 agreements by the top 30 pension funds, we're  
12 talking about 390 such agreements. You know, in  
13 the case of Credit Suisse, we had 35. If in the  
14 case of Deutsche Bank, we had 40. In the case of  
15 UBS, 50. Morgan Stanley, 60. UB -- HSBC, 28.

16 So I don't think it's any particular  
17 deferred prosecution agreement that we're talking  
18 about paying attention to that would set -- set  
19 off, you know, some kind of response by DOL.  
20 We're talking about the collective accumulated  
21 pattern that some of these institutions have  
22 engaged in over time. You know, JP Morgan, 66

1 such agreements. So when it begins to add up and  
2 there's -- it's more than just an occasional  
3 rogue trader in London, apologies to John. The -  
4 - it's always in London, isn't it, John? The  
5 City of London has its found history here.

6 MR. CHRISTENSEN: Yep.

7 MR. HENRY: We're talking about  
8 systematic behavior that cuts across borders and  
9 is, you know, bigger than a breadbox, more  
10 powerful than a locomotive. I mean, you just,  
11 you know -- you know it when you see it, as -- as  
12 one Supreme Court judge -- I think, Justice --  
13 Justice O'Connor once said. Yeah, that's what  
14 we're talking about, reserving this kind of --  
15 there ought to be some sanction for this kind of  
16 misbehavior. And it's outrageous that -- that it  
17 isn't, that there isn't.

18 MR. MORJANOFF: There's -- there's a  
19 bunch of things we can do to improve this  
20 situation. First of all, none of them are  
21 automatic. And look, I read through every  
22 submission that was there, 31, 38 or whatever.

1 And look, I was kind of shocked to the core about  
2 the attitude and the lack of competence. I'll  
3 say it quite bluntly that -- that they took what  
4 was -- what you regard as an adversarial approach  
5 to what is really an inquisitorial inquiry.

6 We're trying to find the facts here. We don't  
7 need people lying and making things up.

8 And I found it full of stuff that was  
9 unreliable. And I mean, there -- they were  
10 obviously some basis for legitimate comment, but  
11 it's too hard to separate the truth from the --  
12 what is called the manufactured outrage that's  
13 become common in the financial industry. And I  
14 think they need to take responsibility for that.  
15 If they're going to come here and waste your time  
16 with things which is unreliable, then they --  
17 they kind of got to take the consequences for  
18 that. The things are automatic. Even a criminal  
19 conviction. Credit Suisse got lots of extra  
20 second chances on its criminal conviction. As  
21 John said, it's the accumulated assessment of  
22 what's going on.

1           So you're assessing -- you got a  
2           better, more reliable database to look at. And  
3           the other thing is, if we -- if we turn the  
4           responsibility back to them where it should be,  
5           it's their job to stop criminal activity. It's  
6           their job to report to you criminal infractions  
7           before they become public. It's their job to  
8           tell you what they're doing to fix it. It's  
9           their job to persuade you that they are being  
10          responsible when they discover crime in their  
11          bank. It's not a -- it's not a capital offence  
12          to find there is crime in the bank. It is very  
13          serious when they protect crime in the bank.  
14          That's what's going on.

15                 MR. CHRISTENSEN: Yeah. Paul, also,  
16                 you know, I spoke about having a requirement to  
17                 make an annual declaration, because in too many  
18                 cases when it comes to declaring prohibited  
19                 misconduct or whatever information, materially  
20                 misleading information is provided, or simply  
21                 materially important information is withheld from  
22                 that -- from the DOL, which -- or whichever



1 authority is the reporting authority. It's the  
2 withholding of information and the systemic  
3 pattern of the -- the pattern of not providing  
4 information about systemic failures elsewhere or  
5 systemic misconduct elsewhere that should be of  
6 concern to the DOL.

7 And I think that -- that's why I think  
8 an annual declaration saying, here we are, we can  
9 confirm either that we've had no instances of --  
10 of prohibited misconduct or we've had the  
11 following instances. That allows at least the --  
12 allows the DOL to determine whether information  
13 is being provided willingly or is being withheld.

14 MR. MORJANOFF: See, there's another  
15 more severe danger, and I don't know how you're  
16 going to tackle it. And that is the highly  
17 complex financial products that are whizzed  
18 around the pension funds which I -- you could  
19 almost say no one understands them except the  
20 creators, and some of them are likely to be, you  
21 know, deceptive or illegal or fraudulent or  
22 whatever. But they're just too complicated to

1 pull apart. And the funds themselves don't  
2 understand them. And while things are stable,  
3 the stable economy, it's fine, but what they do  
4 is they calculate it to protect the issuer in  
5 that the cost is borne on the -- on the  
6 recipient. That is the pension fund.

7 And when things collapse, of course  
8 it's kind of too late to fix it, because, you  
9 know, with the hundred pages of legal print.  
10 The, you know, pension fund was likely to go  
11 bankrupt before it could get a court judgment.  
12 It was even able to do it with all that legal  
13 print. It's very complicated, what's going on in  
14 the financial world. And a lot of dubious  
15 justifications for it. It's not like the old  
16 days, where, you know, a share -- bought a share  
17 in a company. It's nothing like that anymore.

18 I don't know what you're going to do  
19 about it, but from my first thought, you know,  
20 somehow you got to sense the honesty of the  
21 corporation and give yourself some sort of  
22 honesty rating to -- to start to work out a

1 strategy to deal with it. Because in the next  
2 financial crisis, these are the things that are  
3 likely to collapse. And people have all sorts of  
4 explanations later on, but the --

5 MR. HENRY: Also --

6 MR. MORJANOFF: Sorry?

7 MR. HENRY: No, I was just going to  
8 underscore what you're saying, but also just draw  
9 the -- draw the thing to a point, which is that  
10 we are under -- we're living under fast  
11 capitalism. We just saw the FTX collapse, going  
12 from a \$32 billion market cap in February to  
13 zero. Lots of exposure there on the part of  
14 financial investors, including some pension funds  
15 like Louisiana. There's nothing the DOL could  
16 have done to prevent that kind of fast  
17 capitalism. But I think that that's what they --  
18 that's where they have -- that's why it's so  
19 important for them to raise the (audio  
20 interference) existing QPAM regulatory scheme.

21 But what is going to be necessary in  
22 the next five years to protect against some of

1 these, you know, sort of innovations that are  
2 just percolating across the globe? And I don't  
3 think they're prepared. I don't know that this -  
4 - this set of proposals is great. It's a good  
5 start. But it's, like, 200,000 tax lawyers at  
6 the bottom of the ocean. It's just a good start.

7 MR. MOTTA: Question. So we've heard  
8 from applicants, like, there may have been  
9 misconduct at one affiliate. But the QPAM itself  
10 had separate -- you know, wasn't involved, had  
11 separate compliance, separate legal, separate  
12 operations. They've -- they've come to us and  
13 said, well, if QPAM's completely insulated from  
14 the misconduct in the department, you should take  
15 that into consideration. And I just -- just  
16 wondering your thoughts on that, how meaningful  
17 that kind of representation is.

18 MR. HENRY: Paul, do you want to take  
19 that?

20 MR. MORJANOFF: Yeah, I've thought  
21 about this problem quite a bit. And look, let's  
22 look -- take an analogy in the normal world of

1 justice. Our -- our world of justice is very  
2 imperfect. U.S. has more people in jail per  
3 capita than almost anyone else. It's not very  
4 effective. But on the other hand, if you -- if  
5 you didn't put people in jail, you're liable to  
6 have a worse situation still. Scandinavian  
7 countries have a better system where they keep  
8 people out of jail, but they have a society  
9 that's way more friendly to each other. They  
10 don't have the entrenched racist and class  
11 problems that the USA have, and they don't have  
12 guns.

13 So there are things that are possible  
14 elsewhere, but not yet possible in the USA. So  
15 where you have a justice system, where you have  
16 law and order, you have to have some sort of  
17 consequences, and, you know, crime and  
18 punishment. It isn't going to be -- it's going  
19 to be imperfect. But without it, the chaos, the  
20 anarchy, is even worse.

21 MR. HENRY: But have they been able to  
22 insulate their QPAMS? That's the point of the

1 question, I think.

2 MR. MORJANOFF: Well, the thing is  
3 that they lie all the time. When Credit Suisse  
4 was the first meeting, I was talking to the  
5 assistant legal counsel at -- who employed Credit  
6 Suisse, and they said, look, they didn't know  
7 themselves which -- which entity they belonged  
8 to. At the hearing they swore that -- that they  
9 -- that this entity was -- was quarantined from  
10 the other entity. But the other guy said, no,  
11 they've got no clue themselves who they're  
12 working for. So -- and they -- they  
13 unfortunately -- to call them all liars is a  
14 little bit impolite, but honestly you can't  
15 believe what they say.

16 MR. HENRY: So I think the idea is  
17 that we would have a presumption that would be  
18 rebuttable, and, you know, that's a tricky fact  
19 question and how you get information in a  
20 particular case. But in principle, there could  
21 be, hypothetically, some QPAM that was insulated.  
22 You know, it just depends. But I think what

1 we're saying, generally speaking, is in the case  
2 of really serious systemic misbehavior like  
3 Credit Suisse, that you usually can tell from a  
4 slight distance that this institution is not  
5 trustworthy. And you look beyond any one  
6 particular set of facts. And, you know, I think  
7 the -- whether they've structured their QPAM one  
8 -- one way or another is just one piece of  
9 evidence.

10 MR. CHRISTENSEN: You talked earlier  
11 about a kind of moral laxness that infests many  
12 financial institutions, and I completely get  
13 that. Here in Britain, we talk about a fish  
14 rotting from the head. In other words, if you  
15 have a subsidiary of an organization which has  
16 gone off the rails, more often than not it's gone  
17 off the rails and the directors know it's gone  
18 off the rails, but it's gone off the rails  
19 largely because the directors want it to do that.  
20 There must be some kind of sanction against the  
21 people at the very top, the directors.

22 Within any international financial

1 institution, it must be the people at the very  
2 top who take responsibility for the failings of  
3 subsidiaries. So I don't think it's possible to  
4 answer your question. I really don't think it's  
5 possible to subsidiary -- to separate one  
6 activity from another, because I think they all  
7 intersect. They all work with one another, they  
8 work across borders in many, many ways. And I  
9 think that the -- the moral codes that operate  
10 within these organizations come from the very  
11 top.

12 MR. MORJANOFF: -- that you have to,  
13 you know, drive on one side of the road or the  
14 other. Now, under U.S. law, the racketeering  
15 statute, RICO, they specifically say that a  
16 subsidiary is not distinct from the parent  
17 company. They cannot form an enterprise in  
18 regard as one. Neither system is going to be  
19 perfect, but that's the U.S. law system. And you  
20 have to stick with some system, and the -- and  
21 you're in the USA, so that's the system you've  
22 got.



1                   MR. HENRY: I don't know whether  
2                   that's answered your question. Your question is  
3                   basically unanswerable.

4                   MR. MOTTA: I'm good at those.

5                   MR. HENRY: In the abstract. You're  
6                   -- yeah, you're good at those. So -- by the way,  
7                   I really do want to say that this is -- it is  
8                   great that the Department of Labor is holding  
9                   this hearing and that you are actually  
10                  entertaining -- we don't expect to win. We  
11                  expect the same result, basically, in 2015 in  
12                  terms of reform. I hope you're able to make all  
13                  this happen, but -- it would be a great victory,  
14                  but we're up against some very powerful  
15                  opponents, and they're technical experts. But it  
16                  is terrific to see you're at least asking the  
17                  right questions. What is -- fundamentally, what  
18                  value added does the Department of Labor QPAM  
19                  regime provide, and how are we going to reinvent  
20                  ourselves to be useful to all of these clients of  
21                  ours? Our customers, not just the -- ultimately  
22                  the pension fund recipients? So that's -- that's

1 the question. And the rest of the world now  
2 depends on the United States to get this right,  
3 because of these top 30 funds, asset managers,  
4 you know, 24 of them are U.S. based. The role of  
5 the dollar here has been a big factor in that, in  
6 the growth of the -- tremendous growth of U.S.  
7 based assets. And our, you know, very low  
8 interest rate policy. But I think we're now  
9 going to be expected on the part of the rest of  
10 the world to look to us to set standards like we  
11 did in 1977 with the Foreign Corrupt Practices  
12 Act in this tricky area of, how do you protect  
13 pension funds when you have corporate  
14 misbehavior? Good luck.

15 MR. CHRISTENSEN: Hear, hear.

16 MR. COSBY: Erin, is it time to bring  
17 this one to a close?

18 MR. HESSE: You know, I don't have any  
19 other questions unless others do. We're -- we're  
20 a couple minutes ahead of time, but this might be  
21 a great time to break for lunch. Unless, again,  
22 someone else from DOL has any additional

1 questions?

2 MR. COSBY: I don't have any  
3 additional questions. So what time will be  
4 reconvening, Erin?

5 MR. HESSE: We reconvene at 1:15. So  
6 we've got a nice long lunch for everyone. I do  
7 just want to point out very briefly that if  
8 people do reconvene early, to try and minimize  
9 any idle chitchat. We won't be on the record  
10 until 1:15, but it'll -- it'll just help us  
11 continue to move the hearing along if -- kind of  
12 wait for dialogue until the hearing reconvenes at  
13 1:15.

14 MR. HENRY: Are we going to have  
15 dialogue with other panelists later on, or is  
16 this our -- you know, sort of segmented by group?

17 MR. HESSE: Yeah. Not -- not through  
18 this interface. This is for us to interact with  
19 -- with you.

20 MR. HENRY: And just refresh our  
21 recollection about what the procedure is from  
22 here if we want to submit new comments or revise

1       comments.

2                   MR. HESSE:  Oh, yeah, sure, sure.  So  
3       the comment period is reopened as of now,  
4       effectively as of today.  I think -- I think some  
5       of you signed on a little bit late.  Assistant  
6       Secretary Gomez noted that the comment period  
7       will be open until December 16th.  That is  
8       subject to us getting the hearing transcript  
9       posted on time, but we will post a Federal  
10      Register notice letting folks know when the  
11      official comment period close date is going to  
12      be.  So you can start submitting comments as soon  
13      as you get off today's hearing if you desire, but  
14      it will be open for at least 30 days.

15                  MR. HENRY:  Right.  Well, personally,  
16      I'm taking a break, but we -- we are -- good luck  
17      with this, and again, thanks very much for  
18      holding it.

19                  MR. MORJANOFF:  Thank you.

20                  (Whereupon, the above-entitled matter  
21      briefly went off the record.)

22                  MR. HESSE:  It's the time listed for

1 the Insured Retirement Institute, so please  
2 begin, Scott.

3 MR. MAYLAND: Thanks, Erin. Good  
4 afternoon. My name is Scott Mayland. I'm an  
5 attorney with Groom Law Group in Washington D.C.  
6 and I'm here today to speak on behalf of the  
7 Insured Retirement Institute, or IRI. I'd like  
8 to thank the department for agreeing to hold  
9 hearings on the important subject of the proposed  
10 changes to the QPAM exemption, and to also say  
11 congratulations to Assistant Secretary Gomez on  
12 your new position.

13 When I look at all the regulations,  
14 exemptions, and guidance the department has  
15 issued under ERISA since 1974, the QPAM exemption  
16 is one of the most important. If you ask me,  
17 it's one of your greatest hits. The QPAM  
18 exemption provides an efficient means for asset  
19 managers to comply with the broad sweeping party  
20 in interest prohibited transaction provisions of  
21 section 406(a) of ERISA. I want to emphasize  
22 that the QPAM exemption is for and benefits plans

1 and their participants and beneficiaries as much  
2 as, if not more, than asset managers themselves.  
3 It allows transactions with the plan's parties in  
4 interest. It does not allow asset managers to  
5 engage in transactions where they have a conflict  
6 of interest that could affect their best judgment  
7 as fiduciaries.

8 Any particular plan could have at  
9 least thousands of parties in interest, and the  
10 list can change on a daily basis. Without the  
11 QPAM exemption, asset managers would constantly  
12 have to ask the plan sponsor other plan  
13 fiduciaries whether a counterparty to a potential  
14 investment is a party -- party in interest. They  
15 would also constantly seek representations from  
16 the plan that a transaction is not prohibited  
17 under ERISA.

18 Having to navigate the prohibited  
19 transaction rules without the QPAM exemption  
20 would significantly -- would significantly  
21 increase -- increase the resources and costs a  
22 plan sponsor would need to administer an ERISA

1 plan. Some of these costs could be charged  
2 directly to the plan itself, and many investment  
3 opportunities would have to be foregone. Any  
4 changes that department makes to the QPAM  
5 exemption will therefore affect plans and their  
6 participants and beneficiaries as much as they do  
7 asset managers.

8 A significant portion of the \$25  
9 trillion held in ERISA plans and IRAs is managed  
10 in compliance with the QPAM exemption, and any  
11 changes will necessarily affect the capital  
12 markets as a whole as well. IRI's members  
13 include both plan sponsors and asset managers.  
14 While we appreciate that the department's  
15 decisions require a careful and difficult  
16 balancing of the interests of all stakeholders,  
17 we would like to today -- we would like to today  
18 share three concerns that we have with the  
19 proposed changes to the QPAM exemption. Our  
20 comment letter includes additional issues, but  
21 we'd just like to focus on three of them today.

22 First, the proposed changes would

1 severely limit the types of transactions covered  
2 by the QPAM exemption. The proposed changes  
3 would provide the exemption is not available when  
4 a transaction has been planned, negotiated, or  
5 initiated by a party -- party in interest, in  
6 whole or in part, and presented to a QPAM for  
7 approval. They also provide that the QPAM must  
8 have sole responsibility. Our concern here is  
9 that many transactions currently conducted in  
10 reliance on the QPAM exemption could fall under  
11 this prohibition.

12 An example is underwritings of  
13 securities, where the offering might be planned,  
14 at least in part, by a party in interest broker  
15 dealer acting as an underwriter for the offering.  
16 QPAMs commonly used subadvisors, and we are  
17 concerned how they would be able to continue to  
18 do so if the requirement is simply that the QPAMs  
19 have sole responsibility -- sole responsibility.  
20 Similarly, the requirement that the QPAM agree  
21 not to restrict a plan's ability to withdraw or  
22 terminate in connection with the QPAM's



1       disqualification could also make real estate and  
2       private equity funds unavailable to plans.

3               We understand that the department does  
4       not believe the QPAM exemption should be  
5       available simply to have the QPAM bless a  
6       transaction that has already been arranged by the  
7       parties appointing the QPAM. The department  
8       could clarify its position on these QPAM-for-a-  
9       day transactions by using more tailored language  
10      we suggested in our comment letter that requires  
11      the QPAM to actively represent the interests of  
12      the plan. The section I(a) restriction on  
13      engaging in transactions with entities that  
14      appointed the QPAM, as well as example 5 under  
15      the department's 408(b)(2) regulation, also  
16      addressed this concern by preventing the QPAM  
17      from engaging in transactions where the QPAM has  
18      a conflict of interest related to the party that  
19      appointed the QPAM.

20              Second, the proposed amendments would  
21      increase the legal risk and costs associated with  
22      serving as a QPAM to an unwarranted degree. The

1 department has routinely recognized that the  
2 costs of transitioning from one asset manager to  
3 another as a result of QPAM disqualification is  
4 significant for one plan. The department is now  
5 proposing to require that a disqualified QPAM  
6 cover this cost for all of its clients -- all of  
7 its client plans, of which there may be many,  
8 especially if the QPAM manages a fund. No QPAM  
9 expects to be disqualified, but this is an  
10 underlying risk that QPAMs would have to account  
11 for, either in their decision to continue  
12 servicing the plan market or through the fees  
13 that they charge to plans. In addition to the  
14 substance of that risk, it would not be possible  
15 for QPAMs to amend all of their agreements within  
16 the 60-day time frame the amendments would appear  
17 to require.

18 Third, the proposed changes would  
19 unnecessarily diminish levels of confidence by  
20 plans and the uninterrupted provision of  
21 investment management services. We believe that  
22 the current disqualification provisions are

1 overbroad by allowing QPAMs to be disqualified in  
2 situations where there may not be any risk of  
3 harm to plans. For example, a conviction could  
4 disqualify a QPAM or the person or entity that is  
5 convicted only owns an indirect five percent  
6 ownership interest in the QPAM and does not play  
7 any role in the management of the QPAM or in its  
8 asset management activities.

9           The changes the department proposes to  
10 make would exacerbate the -- exacerbate this  
11 issue by adding new circumstances in which the  
12 QPAM may be disqualified. Some of these  
13 circumstances relating to a settlement agreement  
14 with a prosecutor are similarly not tied to any  
15 risk of harm to plans. Other circumstances,  
16 including a systematic pattern or practice of  
17 violations, could already be grounds for the --  
18 for the department to pursue an enforcement  
19 action even without the amendments. The changes  
20 would allow the department to disqualify a QPAM  
21 after one meeting, and we are concerned that the  
22 department's findings could be unpredictable or

1 inconsistent.

2           Disqualifying a QPAM is a highly  
3 disruptive event for plans, and the department  
4 must calibrate this carefully. Unfortunately, we  
5 don't believe the proposed amendments strike the  
6 right balance. In closing, we believe the  
7 proposed changes should be significantly  
8 reformulated. Rather than moving to a final  
9 proposal, we respectfully request that the  
10 department reissue the proposal to allow for  
11 additional comment from stakeholders.

12           But we do want to be helpful, and we  
13 would be very pleased to collaborate with the  
14 department and providing information and our  
15 perspective. If the department is interested in  
16 -- interested in hearing how the QPAM exemption  
17 is currently being used, then I think that is  
18 something we would like to pursue and help the  
19 department with. And I know you don't just want  
20 to hear from ERISA attorneys, so we'll try to get  
21 some actual investment professionals in.

22           If the department has specific

1 concerns about how the exemption is being used  
2 that we are not aware of, we may also be able to  
3 suggest ways to deal with those concerns or  
4 improve the exemption. However, we would be best  
5 able to collaborate by starting with the  
6 exemption in its current form rather than in  
7 reaction to the proposed amendments. Thank you  
8 very much for your time today.

9 MR. HESSE: Thank you, Scott. All  
10 right. I think next up is Chantel Sheaks from  
11 the U.S. Chamber of Commerce.

12 MS. SHEAKS: Thank you very much. I  
13 really appreciate it. As said, my name is  
14 Chantel Sheaks and I'm the Vice President of  
15 Retirement Policy at the U.S. Chamber of  
16 Commerce. The Chamber is rather unique amongst  
17 the trade associations because our members are  
18 made up of pretty much all of the retirement  
19 policy community. We represent virtually  
20 everyone, from plan sponsors to asset managers,  
21 service providers to contributing employers, and  
22 employer trustees of multiemployer plans.

1           My testimony today is going to reflect  
2           the impact that the proposed changes to the QPAM  
3           requirements will have on all these entities.

4           But before I go into some of our recommendations,  
5           one of the things that I wanted to do is kind of  
6           take us back to the basics. When I was doing my  
7           research, I was, you know, really looking. Like,  
8           why -- why did we -- why did the Department of  
9           Labor issue this in 1984? And I found a really  
10          good quotation from the preamble to the  
11          individual exemption for BNP that was issued in  
12          2015. I'm just going to read the quote, because  
13          I think this will kind of set the landscape and  
14          help get us back to why we're here today and the  
15          importance of it.

16                 So I quote, "PTE 84-14 was granted  
17          based on an effort to improve the administration  
18          of the prohibited transaction rules of ERISA,  
19          because the prohibited transaction rules sweep  
20          very broadly, and in some circumstances could  
21          work to prevent beneficial transactions. For  
22          example, large employers and funds necessarily

1 engage in a wide range of transactions with  
2 parties in interest that pose little danger to  
3 plan participants. For example, all of the  
4 different service providers to plans are  
5 technically parties in interest. Accordingly,  
6 Congress gave the department authority to issue  
7 exemptions from the broad reach of the prohibited  
8 transaction rules, where it has determined that  
9 such exemptions are in the interest of and  
10 protective of affected plans and the participants  
11 and beneficiaries thereof, as well as  
12 administrative feasible.

13           And prohibited transaction exemption  
14 84-14 is just one such exemption. Primarily, PTE  
15 84-14 simply permits QPAMS to engage in various  
16 arm-lengths transactions with parties and  
17 interests and obviates the need to undertake  
18 time-consuming compliance checks for parties in  
19 interest, forego investment opportunities, or  
20 seek an individual exemption for the department  
21 for each transaction. The conditions of the  
22 exemption were designed to ensure that the

1 transactions covered there and are protective of  
2 and beneficial to affected plans."

3 And for over 40 years, like you've  
4 heard from the other panelists, the QPAM  
5 exemption has worked, I think, pretty well, and  
6 it continues to serve its purpose. And one thing  
7 that I think is also really important is, the  
8 QPAM safeguards also have worked. If an asset  
9 manager actually loses their class status, it can  
10 apply for an individual exemption. And so I  
11 wanted to do a little bit of research and digging  
12 just to get some data. And I think my math is  
13 correct, but I'm a -- I'm another ERISA attorney,  
14 so, you know, watch out for my math.

15 But according to Eversheds  
16 Sutherland's paper, there were 18 individual QPAM  
17 PTEs that were granted since 1997 based on losing  
18 the class status because of the criminal  
19 convictions. There were 13 from the five-year  
20 period from 2016 to 2021. However, these applied  
21 just to 10 distinct asset managers. It wasn't 13  
22 asset managers, it was 10. And so we looked at



1 it, and that was about an average of two per  
2 year. So, assuming DOL's assessment in the  
3 preamble of the QPAM proposed amendment is  
4 correct, that there are about 1,600 -- 1,600 --  
5 616 QPAMs, this amounts to .32 percent of QPAMs  
6 being disqualified per year. Which, when I  
7 really looked at it, didn't really seem like  
8 enough to merit a wholesale change the system.

9           And I'm going to be honest, in fact,  
10 when the proposal came out, a number of my  
11 members were not only surprised by it, but they  
12 were also surprised by the scope. And for those  
13 of you who are on the call and who've worked with  
14 me before, you know that my members are not shy  
15 about asking me to come to you when there are  
16 issues that will help them effectively run their  
17 plan. And I did not hear from one member that  
18 QPAM was on their top list -- well, actually it  
19 wasn't even on their list at all of things that  
20 they needed from the Department of Labor at this  
21 time.

22           And finally, before I go into some of

1 my specific recommendations, I'd like to  
2 emphasize that any changes to the PTEs, the PTE  
3 exemption, really help rather than hinder plan  
4 sponsors and needs to cause the least disruption  
5 and provide plan sponsors -- and I think this is  
6 something that everyone has talked about. First  
7 panel and prior -- my prior speaker is providing  
8 plan sponsors the information that they need to  
9 make an informed decision regarding their asset  
10 managers. Because remember, they are the  
11 fiduciary who are in charge of selecting these  
12 asset managers.

13           And finally, I think it's important to  
14 assume that DOL shouldn't assume that everyone is  
15 a bad actor who's going to lose their QPAM  
16 status. As people have talked about today, this  
17 status is very important to people. And it's  
18 what -- something that people really strive to  
19 protect. No one is trying to lose their QPAM  
20 status. So instead of trying to base on the  
21 rationale of why we need to update the current  
22 QPAM status on, well, the individual class

1 exemptions, we should need to look at it  
2 differently. Because the individual class  
3 exemptions are because of conduct that occurred  
4 that made them lose their exemption. So to place  
5 those conditions on an actor who has not done any  
6 of those seems kind of inherently unfair.

7           So now I want to go on to a few of our  
8 recommendations. I'm not going to spend a lot of  
9 time on the first one. I think that you've heard  
10 quite a bit from everyone else. It's the issue  
11 of the sole discretion. We have more detail in  
12 our written testimony. We are concerned with  
13 some of the language in there, and it's the same  
14 language that everyone else has earlier talked  
15 about, that no relief is provided under the  
16 exemption for any transactions then plan  
17 negotiated or initiated by a party in interest,  
18 et cetera, et cetera. We also were concerned  
19 that this language will render the QPAM class  
20 exemption meaningless for both common  
21 transactions and situations that their unique  
22 investment needs, which will result in many asset

1 managers actually excluding ERISA plan clients  
2 from beneficial investments. Which, as I talked  
3 about at the very beginning, was the very reason  
4 that DOL issued this to begin with in 1984.

5 Second thing I'd like to talk about is  
6 the paragraph two that mandates what needs to be  
7 in a written management agreement between plan  
8 sponsors and asset managers. This is something  
9 that is very important to many of our members,  
10 both for the finance sponsors and for the asset  
11 managers. We believe that negotiating the terms  
12 of a written management agreement should be up to  
13 the parties and not dictated by the Department of  
14 Labor. As you've heard from other panelists,  
15 certain new requirements will increase the cost  
16 of being a QPAM. And this cost will inevitably  
17 be passed on to plans, plan sponsors, and  
18 ultimately, plan participants.

19 Our view is if a plan or a plan  
20 sponsor wants to pay for an increased cost, such  
21 as increased assurances through increased  
22 indemnity, that should be up to the plan sponsor

1 to decide and negotiate it, not have it dictated  
2 by Department of Labor. After all, it's the  
3 fiduciary who needs to make this decision, and we  
4 should let the fiduciaries do their job. On  
5 another aspect, there are three new requirements  
6 that must be in the written management agreement  
7 that -- it's one, the QPAM agrees not to restrict  
8 the plan from terminating, withdrawing from the  
9 arrangement, will not impose any fees, charge --  
10 charges or penalties for doing so with certain  
11 exceptions, will not employ or knowingly engage  
12 in any individual participant in the conduct  
13 that's subject to the criminal conviction or  
14 written ineligible notice.

15           Generally, we don't have a problem  
16 with these provisions, as you can go back and  
17 look at our written testimony. We do suggest a  
18 few little tweaks. But we don't understand why  
19 these need to be part of the written contract,  
20 and instead just part of the QPAM exemption  
21 themselves. And that's what we would suggest on  
22 there. And I will close out, this kind of

1 section of it is with respect to the indemnity.  
2 We suggest that these provisions be deleted in  
3 their entirety and instead, as many other people  
4 have suggested, leave that to the parties to  
5 negotiate.

6 Finally, I want to touch on the wind-  
7 down period. I'm in agreement with many of my  
8 other panelists that effectively not allowing  
9 someone to have the trade while the winding-down  
10 period makes it pretty meaningless. And I think  
11 it is interesting when the Department of Labor  
12 recognizes that you do need this period. I went  
13 back, looking at a lot of the individual  
14 exemptions, and these do take time. This is not  
15 something that can happen overnight. Your staff  
16 has a lot to review. And in many of the cases,  
17 you would get a conditional one year PTE  
18 individual exemption as the department would then  
19 look into having it go further. What we would  
20 suggest is that it would be up to the plan --  
21 plan sponsor to allow -- the trade should be  
22 allowed, but it should also be up to the plan

1 sponsor to extend it for up to two years.

2           Finally, I will just mention one of  
3 the things that we are also concerned with along  
4 with everyone else, are some of the conditions  
5 for losing QPAM status based on prohibited  
6 misconduct. In our view, many of these -- not  
7 all of these, but many of these -- should be a  
8 notice provision. It could be noticeable to the  
9 Department of Labor and to the individual, to the  
10 client member, and up to the client member to  
11 make the decision. After all, again, they are  
12 fiduciaries, and they have a fiduciary  
13 responsibility to monitor their service provider.  
14 And in that case, they do need the notification  
15 of conduct that may make them want to terminate  
16 that. I thank you for that, and I will give time  
17 to the next panelist.

18           MR. HESSE: All right. Thank you. So  
19 our last panelist is Andrew Oringer and Stephen  
20 Rabitz from Dechert.

21           MR. ORINGER: My name is Andrew  
22 Oringer. I'm a partner at Dechert, and chair

1       emeritus of Dechert's ERISA group. I know from  
2       interactions with the department the extent to  
3       which the department wants and values comments  
4       from the market generally and takes them so  
5       seriously. And I greatly appreciate this  
6       opportunity to comment on the department's  
7       efforts to amend the QPAM exemption. And thank  
8       you for that. Steve and I have many years of  
9       experience representing plan sponsors, other plan  
10      fiduciaries, plan managers, transaction  
11      counterparties, and financial institutions  
12      generally, that give us multiple perspectives  
13      that will help -- that -- that we really think  
14      will be helpful to the department, and we  
15      certainly hope so.

16                We see a lot, and we see it from many  
17      different angles. And we see the QPAM exemption  
18      as a critical one in that it permits transactions  
19      to go forward without regard to the kind of  
20      transaction at issue and without regard to the  
21      specific form of the investment vehicle that is  
22      investing in the plan assets. This one-two punch



1 of covering a broad range of transactions and not  
2 requiring any particular investment structure  
3 helps to make the QPAM exemption a real go-to  
4 exemption for a variety of managers engaging in a  
5 variety of investments. Our comment letter  
6 contains our detailed provision-by-provision  
7 comments. I wanted to use my brief time here to  
8 focus on several high-level contextual points  
9 before turning it over to Steve.

10 For me, at the heart of the QPAM  
11 exemption is the idea that plans are protected  
12 where transactions are directed by an experienced  
13 independent manager that is subject to other non-  
14 ERISA regulation -- non-ERISA regulation, and  
15 that has the wherewithal to stand behind its  
16 fiduciary responsibilities. The thrust, I think,  
17 is to have a manager that is less likely to be  
18 unduly influenced by the plan's transaction  
19 counterparty, while at the same time being  
20 sufficiently likely to be able to meet its  
21 responsibilities to the plan investor in the  
22 event that there is a breach.

1           Now, the department's efforts here to  
2 amend the exemption appear to have centered,  
3 initially, at least, on concerns associated with  
4 the anti-criminal provision of section I(g).

5       Based on comments by the department and  
6 department personnel in connection with the  
7 release of the proposal, it seems to me that the  
8 department now sees reason to focus on the  
9 integrity of managers that utilize the QPAM  
10 exemption. The result, then, is that the  
11 department now is proposing to expand the scope  
12 of section I(g) quite significantly. This focus  
13 on integrity seems to stem in large part from a  
14 perception by the department that QPAMs are out  
15 there presenting themselves as being the gold  
16 standard of fiduciaries by virtue of their QPAM  
17 status. That is not my experience.

18           Rather, my experience is that managers  
19 present the QPAM exemption as being the gold  
20 standard of exemptions. And that is because of  
21 the broad usability of the exemption I mentioned  
22 earlier, both in terms of the generally unlimited

1 breadth of covered transactions and in terms of  
2 the lack of a need to fit within the  
3 organizational structures that are contemplated  
4 by other narrower investment-based exemptions.  
5 Stated another way, I see the focus by managers  
6 as being on the broad and developed utility of  
7 the exemption, not on somehow presenting QPAM  
8 qualification as an indicator that the manager  
9 itself is operating on some kind of a higher  
10 plane.

11 As a result, I would respectfully  
12 suggest that a number of the changes being  
13 proposed to ramp up the exemption's integrity-  
14 type requirements go beyond what is necessary to  
15 ensure independence and freedom from undue  
16 influence, and indeed, may significantly  
17 dislocate the market with additional  
18 administrative requirements. The proposals, I  
19 think, overshoot the mark, so to speak. I am  
20 concerned that managers will be increasingly  
21 disqualified from being able to use the exemption  
22 and that some managers may turn to more

1       cumbersome and less efficient ways to get to the  
2       -- to get the transactions done, to the  
3       detriment, really, of all.

4               Thus, plan fiduciaries may find  
5       themselves having to choose between what, by  
6       hypothesis, would be the manager they want to use  
7       -- they chose them -- and a presumably second  
8       choice manager that, gee, can still use the QPAM  
9       exemption. And even if there are the anecdotal -  
10      - the anecdotal examples of managers who purport  
11      to elevate their status by uttering QPAM, I'd  
12      suggest that that's not a reason to overhaul  
13      completely, or at least thoroughly has been done  
14      or proposed, a tried and true, broadly-based  
15      exemption, broadly used exemption like the QPAM  
16      exemption.

17              So to sum up, I believe that it raises  
18      fundamental fiduciary requirements, together with  
19      existing conditions in section I(g), are  
20      sufficient for these purposes. For decades,  
21      we've had a critical and workable exemption that  
22      does precisely what the department intended,

1 allowing plans to benefit from a broad range of  
2 investment opportunities in a manner that is both  
3 advantageous to and protective of plans and their  
4 participants. There's always room for touching  
5 up around the edges, but I think that we don't  
6 need the basic changes that may have an uncertain  
7 -- an uncertain impact that can lead to  
8 unintended consequences to the possible detriment  
9 of all. Steve is now going to expand a bit on  
10 some of these points and hit upon a number of  
11 specific provisions. Steve, over to you.

12 MR. RABITZ: Thanks, Drew. My name is  
13 Steve Rabitz, and I'm co-chair of Dechert LLP's  
14 ERISA team. As Drew indicated, in our  
15 experience, the QPAM exemption is valued because  
16 of its functional utility, not because it  
17 represents some imprimatur of excellence. And  
18 there's a reason for that. Section 406(a)'s  
19 prohibited transaction rules are not focused on  
20 the QPAM's behavior. And likewise, neither is  
21 the QPAM exemption. Instead, it's about  
22 protecting plans from the other side of the

1 transaction, from the counterparties, the parties  
2 in interests with whom the plan transacts.

3 The exemption is premised on having  
4 the sophisticated, regulated fiduciary already  
5 duty-bound to act with an eye single to the  
6 interest of the plan that has the independence  
7 and wherewithal to withstand undue influence from  
8 those counterparties. With the exemption's  
9 utility viewed in that context, I wanted to  
10 highlight five specific items that I think are  
11 inconsistent with those premises.

12 First, I think the department should  
13 not expand the exemption's disqualification  
14 events beyond covered criminal convictions. In  
15 this regard, to my knowledge, the department has  
16 offered no empirical evidence that QPAMs have  
17 failed or would fail to avoid being subject to  
18 undue influence from unrelated counterparties.  
19 In addition, as we explained in our comment, I'm  
20 concerned about substantial due process issues  
21 that may arise.

22 Second, while I recognize that the

1 exemption as it currently stands calls for  
2 immediate disqualification for a covered  
3 conviction, the department should not build in a  
4 new mandatory winding-down period. Now, we  
5 understand the need for some period in which  
6 potentially troubling facts are assessed. But  
7 precluding relief for new transactions during the  
8 period could put plans in a terrible bind,  
9 especially if not addressed. Moreover, the term  
10 winding-down is itself charged, if not  
11 pejorative, suggesting that the department  
12 believes a fiduciary will want to, or even will  
13 need to fire a QPAM in the event of a  
14 disqualification event.

15 Third, the department should not  
16 compel QPAMs to agree to broad indemnification  
17 related rights up front. Our comment catalogs  
18 several potential commercial implications. But  
19 we also know that these rights go well beyond  
20 protecting plans from failures of the exemption.  
21 They extend to mere contractual breaches and even  
22 situations that are outside of ERISA.

1                   Fourth, the department should not  
2                   require QPAMs to register. If anything, this  
3                   requirement threatens to legitimize the  
4                   unwarranted perception that QPAM status confers  
5                   the departments imprimatur. Maybe even giving  
6                   rise to some kind of approved list. And finally,  
7                   we believe that the department and the exemption  
8                   should not presume that events occurring in  
9                   affiliates remote from the business operations  
10                  and personnel of the QPAM should automatically  
11                  cast a pall on the QPAM's ability to withstand  
12                  undue influence.

13                  To be clear, QPAMs are one thing, and  
14                  we agree that covered convictions at certain  
15                  affiliates would also merit disqualification.  
16                  But disqualification by attenuated association is  
17                  not in plans' interests. On this last point, I  
18                  recognize that the existing exemption casts a  
19                  wide net in defining affiliates. But I see an  
20                  opportunity for the department to improve upon  
21                  the exemption. When deciding which affiliates'  
22                  criminal convictions count for this purpose, the



1 department should look only to those that  
2 actually have the ability to oversee or otherwise  
3 influence the QPAM, or close affiliates engaged  
4 in the pension management business.

5 Now, I wish I could take credit for  
6 this idea, but it's actually the department's  
7 own, which it recently adopted in PTC 2020-02.  
8 There, the department was clear that affiliates  
9 engaged in unrelated services that happened to  
10 share a small amount of common ownership should  
11 not trigger disqualification. The department  
12 called this a narrowly tailored approach  
13 deliberately designed to pick up only other  
14 fiduciaries that share significant ownership.  
15 And this was deemed appropriate for an exemption  
16 under section 406(b)'s self-dealing rules. I  
17 think it's appropriate here with respect to  
18 section 406(a).

19 In addition to those five points, I  
20 just wanted to mention two others. As you know,  
21 the department currently has a separate proposal  
22 to change how applicants can obtain individual

1 prohibited transaction relief. I think it's  
2 important for the QPAM proposal be viewed in  
3 concert with that one, especially if the  
4 application procedures are ultimately finalized  
5 in a way that makes it more difficult for plans  
6 to obtain individual relief, including QPAM  
7 individual relief.

8 Finally, as we note in our comment,  
9 I'm extremely concerned that the true cost of  
10 plans and their fiduciaries, as well as the QPAMs  
11 and the -- and the plans' transaction  
12 counterparties, have not yet really been  
13 adequately addressed. I respectfully submit that  
14 the Department's Economic Analysis should be  
15 reconsidered before proceeding with this  
16 important initiative further. Thank you very  
17 much for the opportunity to speak today.

18 MR. HESSE: Thank you both so much.  
19 So now time for some Q&A. So you know, I do have  
20 some -- some questions related to an issue that  
21 we didn't get into on either -- either of the  
22 earlier panels, and I think it was (audio

1 interference) here. I welcome others that have  
2 provided testimony to supplement the record on  
3 this. But I'm very curious about the subadvisor  
4 relationship with respect to a QPAM. I think how  
5 I understand, at least the general way that it  
6 was presented to us and in comment letters, is  
7 that there's effectively a QPAM kind of sitting  
8 at the top managing assets. And they may engage  
9 subadvisors to assist them in managing the  
10 assets.

11 And I'm -- I'm very curious on a few  
12 different issues. One is, with respect to what  
13 the subadvisors are doing, how much involvement  
14 or direct oversight does the QPAM entity have?  
15 Somewhat related -- related to that is, are the  
16 subadvisors themselves purporting or representing  
17 that they are QPAMs? And then I think the last  
18 related thing is, with respect to the plan  
19 sponsors that are hiring the QPAMs, you know, how  
20 -- how much of the sub-advising are they aware of  
21 or approving themselves? Is the QPAM utilizing  
22 discretion without some pre-approval by the plan

1 sponsor to engage these subadvisors and these  
2 types of relationships? So I'm hoping that, you  
3 know, some -- some of you can provide some  
4 additional insight on -- on how those  
5 arrangements are set up.

6 MR. MAYLAND: Erin, I think there are  
7 a few different structures that might come into  
8 play with sub-advisory relationships. One is  
9 CITs, where it's very common that the trustee  
10 will represent that it's a QPAM. And under the  
11 banking law, the trustee is required to have  
12 exclusive management authority over the CIT's  
13 investments. But they -- they use the subadvisor  
14 to help them select investments. There -- there  
15 is other structures.

16 You know, in the previous panel,  
17 someone mentioned the target-date fund. And I'm  
18 not saying this is what they meant, but there  
19 could be a structure where a large plan is  
20 creating a custom target-date fund, and they  
21 might -- they might hire one investment manager  
22 who will represent that they're a QPAM, and then

1 that investment manager will bring in subadvisors  
2 to play a role. They -- they might manage  
3 different parts of the target-date funds. Like,  
4 you know, the -- like, part of the equity or part  
5 of the fixed income. And in those situations,  
6 you know, it could really vary. I think that,  
7 you know, for those plans, that -- like, a plan's  
8 investment committee would know who the  
9 subadvisors are. And they would want both --  
10 they would -- in that situation, they would want  
11 both. I think the top-level manager and also the  
12 subadvisors to the QPAMS.

13 MR. ORINGER: And if I could just jump  
14 in, I agree with much of what was said, but I  
15 take it from sort of a different perspective or  
16 different angle. I think that there are many  
17 sort of nuanced and technical points here  
18 regarding the way that I(c) applies in sort of  
19 this modern world with alternate different  
20 structures. The interaction between ERISA and  
21 other regulatory schemes that was just alluded  
22 to. I -- I think these are deeply embedded in

1 some of the structures.

2 And for that reason, my take on I(c)  
3 in this context is that I believe that if the  
4 department really wants to look at I(c), I would  
5 respectfully submit that that should be done in a  
6 separate proceeding. You know, this one was  
7 mostly informed by I(g) and then I(c) sort of  
8 came along. At least that's how it looks from  
9 the way that the press releases are -- are  
10 worded, and other things that I've seen and  
11 heard. So I think that I(c) is significant and  
12 complex enough in terms of its implications and  
13 the like that if the department really wants to  
14 dig into I(c) so that there are fewer unintended  
15 consequences, that that should be its own  
16 proceeding.

17 MR. HESSE: So if I can just -- I'll  
18 just -- I'll maybe add a point of clarification  
19 in terms of current section I(c). And not -- not  
20 what is in the proposal, but what's in the  
21 existing section I(c). We have a very limited, I  
22 would say, scope exception to the discretion that

1 the QPAM is anticipated to have for property  
2 management types of situations. And so I'm --  
3 I'm wondering if the sub-custodial issue is  
4 somewhat similar to that, in the sense that for  
5 property managers, the exception more or less  
6 still envisioned some explicit involvement by the  
7 QPAM with written guidelines. And is that  
8 compatible with the sub-custodial issue that  
9 we've now heard about through your comment  
10 letters?

11 MR. MAYLAND: I mean, the concern  
12 comes from the addition of the sole  
13 responsibility language and the phrase that, you  
14 know, the terms are negotiated under the  
15 authority and general direction of the QPAM, and  
16 the phrase, "under the authority and general  
17 direction of" isn't tied to the property manager.  
18 So that is providing the authority -- the -- you  
19 know, the basis for the sub-advisory  
20 relationships.

21 MR. HESSE: So if some language was  
22 added similar to that, indicating that section

1 I(c) wouldn't be considered violated if there  
2 were -- you know, there was proper involvement by  
3 the QPAM, you know, direction laid out for the  
4 subadvisors, is that -- is that something that  
5 would, at least for the sub-advisory issue, fix  
6 some of those concerns or address some of those  
7 concerns? Or does more need to be taken back out  
8 of the proposed wording to kind of holistically  
9 handle these issues?

10 MR. MAYLAND: Yeah, I mean, it's --  
11 it's hard to say, you know, if you're not -- if  
12 you're not willing just to go back to what was in  
13 the -- in the current -- you know, the -- you  
14 know, the -- not the proposed text, but the  
15 current text. But, you know, the current text  
16 before the amendment was -- was good for us.

17 MR. RABITZ: Scott, if I could -- if  
18 I could just jump in. Again, I think from our  
19 perspective, you know, the language is obvious  
20 and works the way it should work. And so, to the  
21 extent that there might be a concern about the  
22 so-called rent-a-QPAM or QPAM-for-a-day, perhaps



1 that could be addressed separately. We don't see  
2 honestly any need to deal with you know, I(c),  
3 certainly not through this project. As Drew  
4 mentioned before, look, this regulation  
5 presumably is about I(g), that's what's driving  
6 things. If this is sort of another look at I(c)  
7 for other reasons -- again, we would contend that  
8 there's no reason for that -- then it really  
9 should be something else separate.

10 So instead of looking at different  
11 language, which we'd have to kind of, you know,  
12 parse, we would submit that I(c), our clients,  
13 you know, certainly understand what it really  
14 means. And we just think that the attempt to  
15 kind of clarify might actually do the opposite.

16 MR. COSBY: About the sub-advisory  
17 issue -- excuse me if you already addressed it, I  
18 missed it -- but is the QPAM seeding its  
19 authority to the subadvisors -- its discretionary  
20 authority to the subadvisor or is it retaining it  
21 in its role as overseeing what the subadvisor --  
22 the information that the subadvisor is providing

1 to the QPAM?

2 MR. MAYLAND: Well, Chris, there are  
3 different structures. But the subadvisor is  
4 acting under the authority and general direction  
5 of the QPAM, as suggested by the current text.

6 MR. ORINGER: And I would just confirm  
7 what Scott just said, that -- that this analysis  
8 and these nuances are quite different from  
9 structure to structure. And it's very hard to  
10 generalize, which, again, leads to, you know,  
11 what Steve and I were saying, in terms of  
12 possibly having a separate proceeding to really  
13 examine the tentacles of I(c).

14 MR. RABITZ: And again, just first  
15 principals, you know, assuming that you're trying  
16 to solve for rent-a-QPAM okay or QPAM-for-a-day,  
17 we're not sure whether going down this path is  
18 really going to be more helpful or more harmful,  
19 especially given the many different areas and  
20 different structures that are there. So --

21 MR. COSBY: Yeah, I understood that  
22 point. But I was just wondering -- so I mean, it

1 sounds like you don't have a problem, though, if  
2 the QPAM is the ultimate decision maker, the  
3 ultimate authority for decision making. It seems  
4 like -- it seems like that's what you're okay  
5 with, if I'm not misunderstanding.

6 MR. RABITZ: The answer's -- the  
7 answer is yes. I mean, the whole -- we're -- the  
8 whole concept of the QPAM exemption is that the  
9 QPAM and only the QPAM has that determination.  
10 That's not -- that's not -- that shouldn't be  
11 controversial.

12 MR. COSBY: Okay. I also wanted to  
13 ask, you expressed some concern about the  
14 requirement for the QPAM to notify us when  
15 they're relying or using the exemption. I just  
16 wanted you -- I was wondering if you could expand  
17 on that. Because it seems like that'd be a  
18 useful data point for us, not only to know who's  
19 using the exemption, but it also -- there's a  
20 question about how many QPAMS are actually out  
21 there. So that would help us get a handle on  
22 that, because a lot of commenters have said that

1 we had understated that number.

2 MR. RABITZ: Yeah, I mean, I'll --  
3 I'll try to speak to that. I do think you've  
4 vastly understated the number. And again, I  
5 think we would approach it from the viewpoint of,  
6 if the Department of Labor is interested in  
7 learning more about QPAMs, that's great. If it  
8 wants to learn more about it for investigation or  
9 for just understanding how they operate, that's  
10 great. But making it as a predicate for  
11 continued relief under this exemption, I think is  
12 a challenge. Now, particularly where, as we've  
13 sort of tried to indicate, the last thing we hope  
14 that is intended by this is to create kind of an  
15 approved list. And we're worried about that that  
16 is sort of where this is going.

17 This is fundamental, I think,  
18 misperception, as Drew alluded to, between QPAM  
19 exemption and QPAM status. Look, not every QPAM  
20 is a registered investment advisor. Many, if not  
21 most, probably are. And presumably, looking  
22 through forms ADV, you know, which is readily

1 accessible, might give you, you know, a sense of  
2 who QPAMs are. But again, if people want to ask  
3 about that, that -- or for -- under a separate --  
4 you know, a separate, you know, program, I think  
5 that's fine. The challenge and the issue that we  
6 have is making it a condition for relief under  
7 the exemption. I think that conflates an  
8 investigation power with the relief power.  
9 That's not beneficial for plans.

10 MS. SHEAKS: Chris, if I can chime in  
11 on that as well, as we have put this in our  
12 comments, one of the things that we worried about  
13 is that, would this fall -- I'm looking at that  
14 list of, you know, prohibited misconduct. Say if  
15 you had a mistake and you have another entity  
16 that you didn't put in, we just wanted to make  
17 sure that, going into what was just said, that  
18 the registration is separate from your actually  
19 meeting the requirements of being a QPAM. We  
20 wouldn't want anything to fall in the way of  
21 that.

22 MR. HAUSER: So could I -- we could

1 certainly put in a correction provision. There  
2 are ways to deal with that particular issue that  
3 don't involve kind of depriving the department of  
4 the ability to know who all the QPAMS are in a --  
5 in a fairly simple way. Would that answer the  
6 problem, if we, you know, added some provision  
7 for inadvertent errors and an opportunity to  
8 correct without consequence? Just when it comes  
9 to disclosing your QPAM identity.

10 MR. RABITZ: Mr. Hauser, I think that  
11 the real question, again, is finding out who the  
12 QPAMS are hopefully ought to be fairly accessible  
13 already. Again, the concern is whether you're  
14 making that as a condition for relief under an  
15 exemption. And secondly, you know, I'm mindful  
16 of however this is floated. We're moving away  
17 from the primary purpose, we argue, of what the  
18 QPAM exemption is meant to be. It's not meant to  
19 be a gold standard. Gold -- QPAM status is not  
20 meant to be a gold standard or seal of approval.  
21 And that -- you know, that's what I would, you  
22 know, sort of urge the department to be thinking

1 about.

2 MR. HAUSER: I -- and I appreciate  
3 your repeating those points. But the -- I guess  
4 what I'm -- what I'm suggesting is that we would  
5 like to know who the QPAMs are. We don't have a  
6 ready mechanism right now for -- for keeping  
7 clear track of everybody who's saying they're a  
8 QPAM. And the requirement here amounts to little  
9 more than an e-mail to the department saying,  
10 here we are, we're using the QPAM. And I can  
11 certainly understand saying, look, if we make an  
12 inadvertent error on that, just like if we  
13 inadvertent -- you know, there are all kinds of  
14 filing requirements and reporting requirements,  
15 and sometimes people slip up, and there ought to  
16 be a provision for some forgiveness. I get that.

17 But, you know, it does feel a bit like  
18 at the same time, you're telling us that, you  
19 know, this is a bit of a problem in search of a  
20 solution. And, you know, you haven't shown there  
21 is an injury or an issue here. You're also  
22 saying, but we shouldn't even have ready access

1 to, like, knowledge of who the QPAMs are and how  
2 many there are.

3 MR. RABITZ: Well, but presumably --  
4 sorry, Andrew, I know you wanted to say  
5 something. Presumably, there's lots of  
6 information, as I mentioned through forms ADV,  
7 which the government has, as well as through, you  
8 know, 5500s, which you receive. And so, I think  
9 that a lot of the information is also ready --  
10 ready-made. I also am concerned about -- and I  
11 assume the department doesn't want to go down  
12 this path, but if we're starting with QPAMS -- is  
13 the next thing going to be banks? Okay, who are  
14 under 91-38? Or insurance companies under 95-60?  
15 Again, the real question is what's the purpose?  
16 If the ideas were really interested in QPAMS and  
17 learning more about them, that's great. But  
18 making them a predicate for relief I just don't  
19 think is protective of plans.

20 MR. HAUSER: So I think there's a --  
21 there's a common issue, or maybe just a  
22 difference in perspective here on some of these



1 issues. So we certainly do look at the QPAM  
2 exemption in connection with our responsibilities  
3 as a -- as a regulator. And -- and as an entity  
4 that's charged with making sure that, you know,  
5 when we give somebody a pass from the prohibited  
6 transaction rules that otherwise apply, we have  
7 reason to believe that they're -- they're going  
8 to act in a way that kind of vindicates the  
9 purpose of the prohibited transaction rules, and  
10 doesn't -- doesn't kind of compound the problems  
11 of conflicts and related party transactions and  
12 the like.

13           And you know, a lot of what I've heard  
14 at the hearing is that, well, you should just let  
15 the fiduciaries take care of that. But -- you  
16 know, but the problem is that, you know, from our  
17 standpoint, there's -- there's some things the  
18 department is just better situated to do. One of  
19 them is making sure that the folks we give these  
20 exemptions kind of complies with the law. But --  
21 but a fairly obvious predicate for our ability to  
22 do that is we know who's out there relying on the

1 exemption. And our ability to know who those  
2 folks are and to -- to take a look, kick the  
3 tires, have a sense of the number of people, the  
4 number of transactions, the -- you know, to do  
5 inquiries as appropriate, helps us make sure that  
6 -- that our premises are right and that there's  
7 compliance with the law.

8 Similarly, you know, I take the point  
9 a number of people have made -- I understand the  
10 argument that, you know, oftentimes, you know,  
11 the fiduciaries, the plan-level fiduciaries would  
12 like the ability to decide for themselves what's  
13 in the contract and also whether or not they want  
14 to continue engagement with somebody after  
15 they've committed one of the infractions that's  
16 laid out in the exemption. But from a system  
17 standpoint and from a standpoint of encouraging  
18 compliance, the plan fiduciary's position is a  
19 little bit different than ours.

20 You know, they're making that decision  
21 after a violation has occurred, after they're  
22 locked into a contract that's potentially going

1 to require them to unwind some transactions after  
2 they're going to be required to incur some  
3 expenses. The department has an interest kind of  
4 systemically in making sure that people are  
5 complying with their obligations under the  
6 exemption in the first place. And our -- our  
7 interest in making sure that happens, you know,  
8 we're in a very different position in a sense  
9 than a fiduciary is who's looking at, you know,  
10 whether to continue an engagement after the bad  
11 thing has happened. We like to make sure that  
12 there's compliance up front. We'd like to make  
13 sure that plan fiduciaries take these obligations  
14 seriously. And generally, the disqualification  
15 provisions go to things that are fairly serious  
16 violations of the exemption.

17 So it's just, there -- there is a  
18 regulatory component here. There is a, are we  
19 making sure, are we doing our job to make sure  
20 that the right people are -- are acting as QPAMs  
21 and that they're complying with the exemption the  
22 way they should? And there's something to be

1 said for giving the department the ability to  
2 engage in some oversight and to disqualify folks,  
3 as opposed to just relying on private actors to  
4 take care of that on a plan-by-plan-by-plan  
5 basis. And so any response is welcome.

6 MR. ORINGER: I mean, I think, Tim,  
7 that -- that there's always going to be room for  
8 the -- in the world of ERISA for things not to  
9 perfectly comply, whether it be avoiding  
10 prohibited transactions in the first instance,  
11 not complying with the condition of an exemption.  
12 But there are, you know, numerous rules and  
13 numerous exemptions where this issue comes up. I  
14 guess harkening back to some -- some of my  
15 earlier comments. I'm just concerned that, in  
16 this case, to add -- to overlay sort of a new  
17 reporting requirement, new interaction with the  
18 department, in a situation where what you've got  
19 right now is a very easily usable, very  
20 streamlined and efficient exemption in terms of  
21 activating it. Which -- which, I will tell you  
22 from the perspective of both plan sponsors that

1 I've represented as well as managers, is -- is a  
2 real positive.

3 I -- I think that there's just a  
4 concern with whether or not this additional  
5 overlay makes peculiar and particular sense in  
6 the QPAM exemption in terms of what the QPAM  
7 exemption is trying to accomplish. I take the  
8 point completely that there might just be  
9 different perspectives vis-a-vis policy and the  
10 like. I'm just trying to give you mine in terms  
11 of, you know, the potential lack of utility in  
12 overlaying new administrative reporting  
13 requirements on an exemption that, at least in  
14 our experience, seems to be generally working.

15 MR. RABITZ: Let me --

16 MR. HAUSER: Can I just -- I'm sorry,  
17 go ahead, please.

18 MR. RABITZ: No, I just -- Tim, I  
19 think we -- you know, there may be a difference  
20 of kind of perspectives here. The other thing I  
21 just want to point out, we haven't really talked  
22 about it that much, is, you know, you mentioning

1 the administrative additional overlay. There's  
2 also the, you know, negotiation overlay. We've  
3 mentioned it before, others have mentioned it  
4 before, between the plan and the QPAM. There's  
5 also the trading side with the counterparties and  
6 the parties in interests. I don't want there to  
7 be an assumption that simply adding a new  
8 condition doesn't then require renegotiation of  
9 many, you know, of those, you know, contracts  
10 that allow plans to get done what they need to  
11 get done. Many of those negotiations -- many of  
12 those provisions are highly nuanced, highly  
13 negotiated, and I just wouldn't underestimate the  
14 amount of time, energy and cost to fix those or  
15 to change them.

16 MR. HAUSER: At the moment, I'm  
17 focused just on the requirement that you raise  
18 your hand in the form of an e-mail and tell us,  
19 hey, we're going to rely on the exemption as a  
20 QPAM. Apart from the concern about that being a  
21 condition is, I mean, you're not -- you're not  
22 asserting that that requires renegotiation of

1 contracts or imposes some gross administrative  
2 cost, are you? Isn't it just a question of  
3 you're concerned about it being a condition and  
4 blowing the condition, potentially? Or is there  
5 something more here?

6 MR. RABITZ: It can depend, Tim. I  
7 mean, based on our experience, these tend --  
8 again, representing many different aspects of the  
9 capital markets -- these representations come in  
10 many different shapes and sizes for a variety of  
11 different reasons. Sometimes people are speaking  
12 about elements of the exemption; okay? And so,  
13 to the extent that this is now a new element, and  
14 where somebody says, well, part XYZ, J, whatever,  
15 is met, now this is another element. Or to the  
16 extent that that now needs to be revisited. So  
17 all I'm suggesting to you is when you think about  
18 the costs associated with this and the benefits,  
19 that's going to slow traffic quite a bit.

20 MR. HAUSER: Okay. But I'm -- and I  
21 understand that. And I certainly, you know,  
22 appreciate some of the observations you've --

1 you've all made about -- about I(c) and, you  
2 know, requesting that we take another look at the  
3 scope of disqualifying provisions and all of  
4 that. But here, I'm literally focused on this  
5 one provision, which is you tell us that you're  
6 relying on the QPAM exemption. And I'm just  
7 trying to understand, are you seriously  
8 maintaining there's any administrative cost  
9 associated with that provision that -- that  
10 should affect our analysis here, apart from the  
11 concern about potentially just running afoul of  
12 the condition?

13 MR. RABITZ: It's -- I mean, if you're  
14 talking about the cost to send an e-mail, the  
15 cost to send the e-mail of course isn't much.  
16 But the other collateral things that we're  
17 talking about, it's -- it's good that you're  
18 thinking about it -- that in isolation, Tim. But  
19 I think it's -- it's still necessary to look at  
20 the whole -- whole package. So in isolation,  
21 you're right. Who can quibble with, you know,  
22 what's it -- what's it going to cost? Doesn't



1 even cost to stamp, to your point. But there's  
2 much broader implications that we're trying to  
3 point out.

4 MR. ORINGER: And I do think -- just  
5 to that point, I do think that -- I mean, I -- I  
6 know myself in advising clients from all  
7 directions that it is often an important point at  
8 some point in the conversation, you know,  
9 question, what do I have to do to use the QPAM  
10 exemption? You know, what needs to be done here?  
11 And there is just an overarching utility, I  
12 think, to the efficiency of being able to say,  
13 nothing. The QPAM exemption simply works if the  
14 conditions there are satisfied. You don't need  
15 to make an application, raise your hand, you  
16 know, encourage additional oversight or anything.  
17 You simply need to comply with your -- your  
18 duties, and then with the conditions.

19 And I do think that Steve's point in  
20 terms of the monetary cost of an email, that I  
21 would -- I would suggest that maybe that that's  
22 not the focus in that -- to your laser-shot

1 question. I think possibly the focus is more  
2 along the lines of an exemption that works both  
3 well and with remarkable ease and efficiency, as  
4 opposed to one that now involves interaction with  
5 the government.

6 MR. MAYLAND: Steven and Andrew on  
7 this, and, you know, one part of it also is that  
8 you have investment managers who -- who may not  
9 be in the business of being a QPAM, but, you  
10 know, they could be a conditional QPAM, where it  
11 will -- they'll say that, yeah, I have a hedge  
12 fund, and if my -- if my hedge fund were to hold  
13 plan assets, then I would agree to, you know, a  
14 pension plan that'll act as a QPAM. But right  
15 now I'm not a QPAM. And, you know, there's some  
16 complexity there about, you know, do you say  
17 therefore that you are one? Or do you say that  
18 you might be one, or do you say you're not one?

19 MR. HAUSER: Scott, do you think you  
20 could write it as an e-mail to us that explained  
21 that, was the status of your -- your client in  
22 that circumstance? I mean, that -- even that,

1 that doesn't strike me as a difficult disclosure  
2 to make to us.

3 MR. MAYLAND: But I mean, we just  
4 don't --

5 MR. HAUSER: Right? You say, look I'm  
6 a -- I'm a conditional QPAM. I'll be relying on  
7 the QPAM exemption in this circumstance. And  
8 just --

9 MR. MAYLAND: So you say yes.

10 MR. HAUSER: Right.

11 MR. MAYLAND: I didn't know -- I  
12 didn't know -- I don't know the answer.

13 MR. HAUSER: Well, I'm just saying I'm  
14 not -- it -- it just strikes me, this -- this  
15 issue, I don't want to dwell on this too much  
16 more. But this at least is a fairly simple  
17 thing. You're -- you're -- we're -- we're giving  
18 a pass from the prohibited transaction rules.  
19 We're permitting conduct that's otherwise  
20 illegal. We would just like to know when we give  
21 that pass that we can readily identify who the  
22 folks are that are relying upon it so we can kind

1 of do whatever we need from a regulatory  
2 standpoint, to make sure that the things are  
3 working out the way we'd like. And that's it.  
4 There's -- you know, and if you need to qualify  
5 the disclosure, just like when you're filling out  
6 other government forms, by all means. Put it --  
7 put in the parenthetical and say, here's --  
8 here's what it is.

9           And if we need to do something to make  
10 it clear that of course, people slip up,  
11 sometimes there's a name change, they forget, and  
12 an inadvertent mistake isn't going to result in  
13 some catastrophic consequence. We can do that.  
14 But of all the many things that we proposed here,  
15 this one condition didn't strike me as one that  
16 anyone should object to. And yet it -- it's  
17 recurrence, and I'm puzzled by it. Anyway, so  
18 just one more point on I(c). So -- and this  
19 maybe goes back to a point, an observation you  
20 made, Andrew. I -- again, I appreciate your --  
21 your sense of what we are about when we made the  
22 proposal. But the proposal obviously contains

1 one change in I(c). We described what the change  
2 was.

3           When you're proposing that we engage  
4 in a whole other process before we make any  
5 changes to I(c), are you suggesting there's some  
6 deficiency in the notice process here, or you  
7 just saying that would be a good idea or what? I  
8 mean, what -- what additional notice should we  
9 have provided with respect to what we were  
10 thinking of on I(c)? I mean, and if, for  
11 example, what we decided to do was simply -- to  
12 say, look, people are over-reading, there was a  
13 draft -- there's a drafting issue here. We just  
14 wanted to make sure that, you know, QPAMs  
15 understood that ultimately this is their  
16 responsibility. They're on the hook. They're  
17 not delegating it. And we -- we kind of took  
18 care of some of the language that people think  
19 are overexpansive. I mean, does that, does that  
20 resolve the issue?

21           I mean, so I guess the two questions  
22 are, one, is there -- is there, in people's

1 minds, some notice deficiency with respect to  
2 I(c), given that it was included in the proposal?  
3 And we gave you the exact text and gave a  
4 rationale? And two, if there is -- if there  
5 isn't a notice issue, as -- as I hear it at  
6 least, and I just like to confirm that's right,  
7 people aren't really objecting to the notion of  
8 making clear that we want the QPAM not to be a  
9 rubber stamp and we want the QPAM to be making  
10 the decision. But we don't intend, you know, to  
11 preclude other sorts of interactions with parties  
12 in interest, obviously.

13 MR. ORINGER: So thank you for that,  
14 Tim. Yeah, I -- I think that -- you know, I  
15 don't know that I would go so far as to suggest  
16 that there is a notice deficiency. I think that  
17 the comments from -- from me and us are more  
18 along the lines of what's best for everybody in  
19 terms of process, as opposed to what needs to be.  
20 So I don't know that I would be suggesting a  
21 notice deficiency. In terms of your question as  
22 to, so why not now, you know, we have a proposal.

1 Why can't that just be reacted to? I think just  
2 echoing some stuff that Scott was saying and  
3 other panelists as you sort of go down the list,  
4 I think where I come out on this is it's just  
5 much more nuanced based on the different kinds of  
6 investment structures than what one might have  
7 otherwise thought.

8           If you're dealing with a single  
9 investment manager that's retained by someone  
10 else, if you're dealing with a cross-border  
11 situation, if you're dealing with CIT. And there  
12 are numerous other structures where the words on  
13 the page could have -- especially given the  
14 interaction between ERISA and other regulatory  
15 schemes, particularly the banking legislation.  
16 But not only the banking legislation. There  
17 could be even foreign laws that interact with the  
18 U.S. laws in terms of employment and tax. It's  
19 just a lot, depending on the structure of the  
20 advisor, subadvisor, or fiduciary subadvisor  
21 relationship.

22           And my concern is that addressing

1 things with sort of a sentence here and a word  
2 there, a concept here and a concept there, could  
3 wind up when people drill down into those words  
4 in some or all of these various different  
5 structures. It's like, oh my goodness, am I  
6 still not -- am I now not in compliance? Did  
7 they intend something different than what we're  
8 doing? Did they mean to get at us? Does it  
9 reach that far? And to me, those kinds of  
10 questions can best be analyzed -- they emerge  
11 from sort of a notice and comment arrangement  
12 based on that where all the different kinds of  
13 people who do sub-advisory relationships in so  
14 many different contexts can say, wait a minute,  
15 look what you're doing to me here that you don't  
16 even mean to be doing, with words that seem, you  
17 know, sort of otherwise straightforward. So I  
18 think that's where we're more coming from.  
19 Hopefully that helps you in terms of what we --

20 (Simultaneous speaking.)

21 MR. HAUSER: It does. Thanks, Andrew.

22 And I guess -- just for the sake of clarity, but



1 -- I mean, your -- your issue would not be -- so  
2 the general concept of the QPAM is the one  
3 overseeing the transaction, they're the one on  
4 the hook, they're the one making the decision,  
5 they're not rubber stamping. That, you're fine  
6 with. Your concern is that --

7 MR. ORINGER: I think it's already  
8 clear.

9 MR. HAUSER: You think it's already  
10 clear? You're concerned that -- you're concerned  
11 that no matter how many assurances I give you  
12 here, when we go to write it, we'll goof it up in  
13 some way, if that was our goal?

14 MR. RABITZ: Unintentionally.  
15 Unintentionally.

16 MR. ORINGER: I'm -- I'm not sure I  
17 would have worded it quite that way, Tim.

18 MR. HAUSER: Yeah.

19 MR. ORINGER: I just think there are,  
20 you know, tentacles that are hard to identify  
21 without a separate process that focuses on  
22 something so important. How's that?

1 MR. HESSE: So, we are a bit over time  
2 at this point. I don't know if anyone needed  
3 any, you know, final thoughts or solicitations  
4 for supplementing comments, but if not, I'll  
5 leave that open here quick if anyone has those.

6 MR. BUTIKOFER: It was suggested that  
7 we could look at form ADV, and of course back at  
8 5500 to try to get a major number of QPAMs. If  
9 they have ideas about how they could actually use  
10 that, given that -- if not, I can direct  
11 question. To try to tease that out, that would  
12 be very helpful.

13 MR. RABITZ: We could certainly --  
14 thanks.

15 MR. HESSE: Okay. Great. Okay. Yep,  
16 thank you. So with that, we will take a 15-  
17 minute break. So since we're about 5 minutes  
18 over, let's restart at 2:35 for the final panel  
19 of the day.

20 (Whereupon, the above-entitled matter  
21 briefly went off the record.)

22 MR. HESSE: All right. Well, looks

1 like we're in pretty good shape here. So we'll  
2 go back on the record. And based on the list  
3 that I have here for panel four, we'll start with  
4 Michael Scott for the National Coordinating  
5 Committee for Multi-employer Plans.

6 MR. SCOTT: Good afternoon. My name  
7 is Michael Scott and I'm the executive director  
8 of the National Coordinating Committee for Multi-  
9 employer Plans, or NCCMP. On behalf of the  
10 NCCMP, I want to thank the department for  
11 allowing us to testify about the proposal to  
12 amend the prohibited transaction class exemption,  
13 PTE 84-14, the QPAM exemption. The NCCMP is the  
14 only national organization devoted exclusively to  
15 protecting the interests of multiemployer plans,  
16 as well as the unions and the job-creating  
17 employers of America that jointly sponsor them,  
18 and more than 20 million active and retired  
19 workers and their families who rely on  
20 multiemployer retirement, health, and welfare  
21 plans.

22 The NCCMP's purpose is to ensure an

1 environment in which multiemployer plans can  
2 continue their vital role in providing  
3 retirement, health, training, and other benefits  
4 to America's working men and women. As the  
5 department is aware, multiemployer plans are  
6 typically organized as so-called Taft Hartley  
7 trusts pursuant to the requirements of the Taft  
8 Hartley Act. By definition, multiemployer plans  
9 always involve two or more employers, sometimes  
10 numbering in the hundreds or even thousands, and  
11 one or more unions. Furthermore, these plans are  
12 administered by joint boards of trustees composed  
13 of equal numbers of employee and employer  
14 representatives and possibly one or more neutral  
15 trustees.

16 The number and complexity of these  
17 relationships can result in a very large number  
18 of parties in interest. PTE 84-14 is perhaps the  
19 most widely used administrative exemption  
20 facilitating the established business practices  
21 of professional asset managers serving ERISA  
22 plans. PTE 84-14 is, in the multiemployer

1 context, an essential tool for effectively  
2 investing plan assets prudently with an eye  
3 towards diversification and the appropriate  
4 construction and maintenance of an investment  
5 portfolio suitable for the purposes and  
6 investment horizon of the plan.

7 As a threshold matter, the NCCMP is  
8 particularly concerned about the proposed change  
9 -- that the proposed changes will significantly  
10 increase plan administrative expenses by making  
11 QPAMs more expensive and less available to plans.  
12 We are also concerned that the proposed changes  
13 will increase investment expenses, reduce the  
14 ability to diversify the portfolio, and reduce  
15 investment returns for strategies for which QPAMs  
16 are often used, such as long duration illiquid  
17 investments. All of which are to the specific  
18 detriment of the plan, its participants, and  
19 beneficiaries.

20 This is particularly true for  
21 multiemployer plans. Because the only money that  
22 a multiemployer plan has comes from the

1 contributions of the active workers. These  
2 contributions represent the collectively  
3 bargained, deferred wages of the workers in these  
4 plans. As such, any increase in a plan's  
5 administrative or investment expense, or in the  
6 reduction of investment opportunity, must be made  
7 up either through increased contributions, which  
8 lowers the take-home pay of the worker, or  
9 through a reduction of nonvested future benefits,  
10 neither of which is in the interest of the plan,  
11 its participants, or beneficiaries.

12 DOL's proposal reflects a fundamental  
13 misunderstanding of capital markets and the day-  
14 to-day investment practices and operations of  
15 employee benefit plans subject to ERISA. The  
16 proposal seeks to impose substantial regulation  
17 on more than 600 QPAMs as the result of 14  
18 convictions affecting a relatively small number  
19 of QPAMs over the span of almost a decade. The  
20 proposal would certainly, if not withdrawn,  
21 create additional and unnecessary disruption,  
22 complexity, uncertainty, and expense for

1 multiemployer plans.

2 Clarifying updates to section I(c) are  
3 overly broad and would disrupt common and  
4 beneficial investment practices. The proposal  
5 would further create further uncertainty and  
6 disruption by expanding the current  
7 disqualification provisions of section I(g). The  
8 proposal's changes would ultimately create new  
9 expense and harm for the participants and  
10 beneficiaries intended to benefit from EBSA  
11 oversight as a result of hampering efficient and  
12 beneficial existing industry standard investment  
13 practices.

14 ERISA's prohibited transaction  
15 provisions were crafted with the expectation that  
16 administrative exemptions would be issued to  
17 facilitate established business practices of  
18 financial institutions that serve employee  
19 benefit plans subject to ERISA, where it is  
20 demonstrated that those business practices are in  
21 the best interests of plan participants and  
22 beneficiaries. Substantially similar parallel

1 provisions appear in the code that are applicable  
2 to tax qualified plans, including -- including  
3 individual retirement accounts. ERISA section  
4 408(a) and code section 4975(c)(2) grant  
5 authority for such administrative exemptions.

6 DOL's proposal suggests that the loss  
7 of QPAM status would not prevent an asset manager  
8 from effectively investing plan assets. The  
9 NCCMP believes that this reflects a poor  
10 understanding of the history and importance of  
11 QPAMs and their operations. For multiemployer  
12 plans, maintaining a list of parties in interest  
13 or disqualified persons, if at all possible,  
14 would be an unreasonable cause, and fraught with  
15 the peril of inadvertent prohibited transactions  
16 as a result of foot faults.

17 Further, even if such a list could be  
18 maintained, the need to forego investment  
19 opportunities with parties in interest and  
20 disqualified persons would unreasonably limit an  
21 asset manager's ability to make investments that  
22 are in the interests of the plan and its



1 participants and beneficiaries. The preamble to  
2 the original proposal for PTE 84-14 recognized  
3 this difficulty. Neither do alternative  
4 exemptions provide the same latitude for an  
5 investment manager to execute investment  
6 strategies. The relief granted under PTE 84-14  
7 applies to the extent that the disposition of its  
8 assets is subject to the discretionary authority  
9 of the QPAM.

10 Alternative exemptions, such as PTE  
11 90-1 and PTE 91-3 are narrower in scope and do  
12 not serve to support large plan investment  
13 portfolios in the comprehensive and flexible  
14 manner that PTE 84-14 does. Therefore, the NCCMP  
15 strongly urges DOL not to make changes that limit  
16 the utility, availability, or cost of QPAM  
17 investment services to multiemployer plans. Our  
18 written comments filed on October 11th provide  
19 our views in great detail on the specific changes  
20 that DOL has proposed to PTE 84-14.

21 We note that each is contrary to  
22 nearly 40 years of established investment

1 practice, contrary to the statutory intent of  
2 ERISA, significantly more expensive to plans than  
3 DOL's grossly simplified cost assumptions, and  
4 most importantly, impose significant harms to  
5 multiemployer plans, participants, and  
6 beneficiaries. We urge DOL to withdraw the  
7 proposal and, if needed, issue a new proposal for  
8 notice and comment that addresses the many  
9 concerns raised during the current notice and  
10 comment.

11 Before I close, I want to provide a  
12 solution to Tim's QPAM identification question,  
13 which is simply to establish a QPAM code on the -  
14 - on the 5500 for service provider information.  
15 This would provide DOL with the information it  
16 says it needs in the most efficient manner.  
17 Thank you for the opportunity to appear in this  
18 proceeding. In addition to the comments the  
19 NCCMP filed on October 11th, we will be filing a  
20 written version of this testimony, and I look  
21 forward to any questions.

22 MR. HESSE: Thank you, Michael. Next

1 up, we have Mike Hadley on behalf of Spark  
2 Institute.

3 MR. HADLEY: This is Mike Hadley, a  
4 partner at Davis & Harman. As mentioned, I'm --  
5 I'm here on behalf of the Spark Institute, which  
6 represents the interests of a broad cross section  
7 of defined contribution retirement plan service  
8 providers, investment managers, and lots of  
9 others that are part of the defined contribution  
10 world. And I want to thank you, Assistant  
11 Secretary Gomez, for appearing. And I'm sorry  
12 that the first time we're -- we're meeting in  
13 your official capacity, I'm going to be  
14 complaining about some of the things that are in  
15 this proposal.

16 I want to begin by emphasizing that we  
17 really don't have an issue with what we  
18 understand is the thrust here. And that is to  
19 address the issue of criminal convictions for  
20 non-U.S. laws, as well as to put in place an  
21 appropriate process for individual exemptions for  
22 investment managers who find themselves

1 ineligible for QPAM. To put my -- my context --  
2 my comments in context, however, I'd like to  
3 repeat something you've heard over and over  
4 again. The vast majority of transactions that  
5 occur under the QPAM exemption are incredibly  
6 routine and incredibly favorable to plans.

7 In fact, while we've been sitting  
8 here, thousands of transactions have occurred  
9 under the QPAM exemption, all of which, very  
10 favorable by allowing plans access to the capital  
11 markets in ways they wouldn't be able to if we  
12 were trigger-shy about having to -- about every  
13 single transaction. Because of the possibility  
14 there might be a party interest involved.

15 It is to emphasize one of the most  
16 successful exemptions, a real success for the  
17 Department of Exemptions. I want to focus on  
18 those parts of the proposal that I think are  
19 going to harm those circumstances where the QPAM  
20 exemption's working just fine. I'm going to  
21 start by focusing on the new requirements for  
22 investment management agreement. So I won't

1 repeat everything that you've already heard. I'm  
2 going to focus on a few ways in which we point  
3 out in our comment letter, we think these new  
4 mandatory provisions -- and let's be very clear,  
5 this is going to be mandatory, because QPAM is  
6 essentially a requirement for managing plan  
7 assets. The reasons why requirements for  
8 specific provisions in IMAs should be removed  
9 from the final rule.

10 First, we lay out a number of ways in  
11 which the language you propose is just ambiguous.  
12 For example, it would prohibit fees unless  
13 they're designed to prevent generally recognized  
14 abusive investment practices. I'll just say, if  
15 my friends at Dechert proposed that as a  
16 counterparty in one of their agreements, I'd say,  
17 I don't understand what that means. Let's work  
18 that out. It's too ambiguous. Well, while we  
19 totally understand why you're proposing that, no  
20 contract really should have that kind of vague  
21 terminology, which is really to make the point  
22 that the department just really doesn't have the

1 expertise to insert itself into negotiations  
2 between two parties, especially two parties that  
3 are fiduciaries.

4 Second, while a lot of these  
5 provisions may be appropriate for -- appropriate  
6 conditions for an individual exemption, or for an  
7 investment manager who for some reason needs  
8 additional oversight, we're just not aware of any  
9 anecdotal or any other evidence that there are  
10 investment management agreements that, without  
11 this language, is not sufficiently protective of  
12 participants. The department says that they're  
13 necessary to ensure the QPAMs act with integrity.  
14 And therefore, this is to make sure that their  
15 agreements include certain standards of  
16 integrity. But I'll just make the point again  
17 and again that these folks are fiduciaries.  
18 ERISA requires they act with a pretty high level  
19 of integrity and provides lots of ways for you to  
20 hold them to that standard if they don't need it.

21 In our letter, we suggest two  
22 alternative approaches. First, as I mentioned

1 earlier, these conditions really should only be  
2 imposed when there's some evidence that they're  
3 needed. For example, as a condition of the wind-  
4 down period, or as a condition of an individual  
5 exemption where similar requirements have imposed  
6 in the past. In that case, the managers  
7 demonstrated that it's done something that may  
8 need additional oversight. But to impose that on  
9 every investment management agreement is  
10 unnecessary.

11 Second, if there are particular  
12 contractual provisions that you've seen in  
13 investment management agreements that you don't  
14 think are appropriate, then I would say prohibit  
15 those from being in there. For example, the  
16 regulations under 408(b)(2) have long had a  
17 prohibition on a clause that penalizes a plan for  
18 termination on reasonably short notice, but  
19 wisely doesn't require that specific provisions  
20 be in every investment management agreement.

21 Now, before I leave this -- this whole  
22 issue of investment management agreements, I just

1 have to make the point, because I'm in trouble if  
2 I don't, that you've essentially required that  
3 every investment management agreement be amended  
4 within 60 days. That's just not even humanly  
5 possible. We're recommending that the effective  
6 date be at least 18 months after publication. If  
7 you don't accept our recommendation, just remove  
8 these as required conditions in every IMA. Then  
9 at least they should only apply to investment  
10 management agreements entered into or materially  
11 modified after the effective date.

12 In my remaining time, I want to just  
13 address two other comments you've heard from  
14 others. I won't spend a lot of time on it, I'm  
15 happy to answer questions first. Like others,  
16 we're recommending that you eliminate this --  
17 this new written ineligibility notice process.  
18 There's been a lot of time spent on that and a  
19 lot of the commenters. I'll just make one point  
20 that there's a lot in there that lack objective  
21 standards by which parties could know whether  
22 they're the subject -- they may be the subject of



1 an ineligibility notice. When I have been  
2 convicted of a crime, I know that's happened,  
3 that's objective, it's gone through a court, but  
4 there are a lot of -- a lot of those standards  
5 are pretty vague.

6 We appreciate there may be  
7 circumstances where you encounter investment  
8 managers, as Tim talked about earlier, who  
9 basically is one of the bad guys. That's  
10 something really bad. If that's the case, then  
11 you have a range of tools available to you, not  
12 only to prevent them from using the QPAM  
13 exemption, but preventing them from being a  
14 fiduciary at all, including asserting a fiduciary  
15 breach or actually bringing an action to remedy a  
16 fiduciary from acting as such. But all those  
17 tools have appropriate due process procedures  
18 that Congress has put in place to protect the  
19 fiduciary.

20 And I also -- of course I can't leave  
21 without mentioning I(c), you've been beaten up  
22 enough on that today. I'll just say that

1 obviously we think that's important that that be  
2 -- that you go back to the current version of  
3 I(c). One thing I'll say is there's some  
4 questions about subadvisors. We did mention that  
5 in our comment letter, and I'm happy to answer  
6 questions about that as well. I'll just make the  
7 point, you can't possibly have meant what you  
8 said. And I think -- I think you recognize that  
9 you want to make sure you're not preventing plans  
10 from access to the fixed income security markets,  
11 for example.

12 Just a couple of procedural points in  
13 closing. One thing that hasn't been noticed but  
14 will -- has shown up in a number of the  
15 commenters is a requirement that -- that evidence  
16 of compliance be available at any time to every  
17 plan, every participant that's invested it --  
18 with -- in the plan or in the fund that is being  
19 managed by the QPAM. We just don't have any  
20 evidence whatsoever that that's necessary, that  
21 that's routinely requested and refused. Very  
22 different -- and you've talked about the need for

1 the department to have oversight, but to make it  
2 available at any time to everybody -- because  
3 it's essentially everybody, because there are  
4 millions of Americans that are invested in funds  
5 managed by QPAMs -- that's just unnecessary.

6 And finally -- I wasn't going to  
7 mention it, but since you asked a lot about it,  
8 Tim, in the last panel -- about the requirement  
9 that fiduciaries that are going to rely on QPAM  
10 register with the department. I'll make one  
11 point, and that is if you are going to put that -  
12 - if you're going to post that publicly on a  
13 website, then that's going to be -- really  
14 require commitment by the Department of Labor to  
15 keep that web page updated immediately. Because  
16 I can envision, in fact it's very likely, that  
17 the securities markets are going to depend on  
18 that. Not only to make sure that somebody --  
19 when they say they're a QPAM, they'll go and  
20 check, or when somebody's saying, yeah, I'm not  
21 managing plan assets right now, they'll go and  
22 they'll check, which makes me a little concerned

1 somebody might do a, gee, I may be a QPAM in the  
2 future.

3           Lastly, I want to go back to a point  
4 that I started with and has been emphasized a  
5 couple times, just how successful QPAM is. It  
6 really is one of the great successes of the  
7 Office of Exemption Determinations. We want  
8 investment managers to feel it's a workable  
9 exemption. We want them to commit to complying  
10 with it in their investment management  
11 agreements. We want them to feel like they can  
12 invest plan assets of plans in the same  
13 securities that they invest all their other  
14 institutional investors. This happens all the  
15 time. They buy security and they say, we want to  
16 make sure that all of our clients can have access  
17 to that security. So we allocate it to all their  
18 accounts.

19           What we don't want is them going to  
20 less clear exemptions or taking aggressive  
21 positions to avoid screening transactions as not  
22 prohibited. QPAM works because it says for a set

1 of transactions which there's very low risk to  
2 the plan, we just don't have to worry about  
3 checking with who's a party in interest, et  
4 cetera. Which is why we'd like you to focus  
5 these changes where we know the exemption needs  
6 improving without making an exemption that no one  
7 wants to use. Thanks so much, and happy to take  
8 your questions.

9 MR. HESSE: Thank you, Mike. The last  
10 person up today is Tim Keehan on behalf of the  
11 American Bankers Association.

12 MR. KEEHAN: Thanks, Erin, and members  
13 of the panel. My name is Tim Keehan. I'm vice  
14 president and senior counsel for the American  
15 Bankers Association. ABA is the voice of the  
16 nation's \$23.7 trillion banking industry. Its  
17 membership is comprised of small, regional, and  
18 large banks, that together employ more than two  
19 million people, safeguard \$19.6 trillion in  
20 deposits, and extend \$11.8 trillion in loans.  
21 ABA appreciates the opportunity to be here  
22 regarding the Department of Labor's proposed

1 amendments to prohibited transaction class  
2 exemption 84-14, commonly referred to as the QPAM  
3 exemption.

4           Rather than covering the substance of  
5 the proposal, my testimony today instead will  
6 focus on the regulatory process leading up to the  
7 proposal's release. Specifically, I will address  
8 first the directives on regulatory rulemaking  
9 expressly affirmed by this administration through  
10 executive order. Second, guidance on regulatory  
11 analysis provided by the Office of Management and  
12 Budget to federal agencies. Third, the  
13 Department of Labor's perilous deviation from the  
14 rulemaking process as laid out by executive order  
15 and OMB guidance, which has resulted in at least  
16 one critical error in the department's drafting  
17 and projected cost of the proposal. And finally,  
18 recommendations that would remediate the  
19 department's actions and preserve a rulemaking  
20 process that is consistent with federal  
21 regulatory standards and guidance.

22           At the outset, ABA notes that since

1 its guidance -- since its issuance nearly four  
2 decades ago, the QPAM exemption has functioned  
3 well and exactly as intended. The exemption has  
4 become a core market practice of the retirement  
5 services industry across the spectrum of  
6 financial lines of business and products. The  
7 QPAM exemption's guardrails ensure proper use of  
8 the exemption and provide the department with  
9 full authority to supervise its implementation  
10 and to sanction improper conduct, including,  
11 where necessary, QPAM disqualification. While we  
12 acknowledge the department's regulatory authority  
13 to revise the exemption, we also understand that  
14 the department must abide by the regulatory  
15 rulemaking process as laid out by White House  
16 directives and OMB guidance.

17 Specifically, in the January 2021  
18 memorandum modernizing regulatory review,  
19 President Biden reaffirmed the basic principles  
20 of the federal regulatory process as set forth in  
21 executive order 13563 on improving regulations  
22 and regulatory review. Executive order 13563,

1 among other things, states that before issuing a  
2 notice of proposed rulemaking, each agency, where  
3 feasible and appropriate, shall seek the views of  
4 those who are likely to be affected, including  
5 those who are potentially subject to such  
6 rulemaking.

7           Likewise, OMB circular A4, which  
8 addresses regulatory analysis, directs federal  
9 agencies, as they design, execute, and write  
10 their regulatory analysis, to seek out the  
11 opinions of those who will be affected by the  
12 regulation. OMB adds that consultation can be  
13 useful and ensuring an agency's analysis, that it  
14 addresses all of the relevant issues and that the  
15 agency has access to all pertinent data. In  
16 doing so, OMB stresses that early consultation  
17 can be especially helpful and that an agency  
18 should not limit consultation to the final stages  
19 of the agency's analytical efforts.

20           Executive order 13563 and OMB circular  
21 A4 thus make clear that, in proposing amendments  
22 to the QPAM exemption, the department's



1 obligation was to seek input from QPAMs, their  
2 client plans, and service providers and other  
3 stakeholders likely to be impacted from the  
4 revisions and additions to the QPAM exemption.  
5 It appears that the department has not complied  
6 with these directives. We believe that the  
7 proposal would have greatly benefited from a  
8 collaborative process between the department and  
9 representatives of banks and other asset managers  
10 that are QPAMs to discuss the function and  
11 operation of the QPAM exemption and to identify  
12 any issues of concern, as well as any compliance  
13 or administrative challenges, which the  
14 department then could have factored into the  
15 proposal.

16           Unfortunately, the proposal was  
17 drafted and released without any input from our  
18 membership. In fact, we are not aware of any  
19 department efforts prior to the proposal's  
20 issuance to study, survey, analyze, or evaluate  
21 banks or any other asset managers serving as  
22 QPAMs, their retirement plan clients, or the

1 retirement marketplace to understand how current  
2 activities would be directly or indirectly  
3 impacted by the proposal. Likewise, the  
4 department has not presented any evidence of  
5 systemic misconduct, violations, or abuse to  
6 support its conclusion that the QPAM exemption is  
7 flawed and in need of a significant overhaul.  
8 Instead, the department simply released the  
9 proposal without any advanced public reaction or  
10 input.

11 Failure to engage those subject to the  
12 QPAM exemption prior to issuing the proposal has  
13 led to at least one crucial error in the  
14 department's calculation of the estimated time,  
15 resources, and costs for QPAMs to comply with the  
16 -- with the revised exemption, if finalized as  
17 proposed. In this regulatory impact analysis to  
18 the proposal, the department states that a single  
19 QPAM services, on average, 32 client plans. In  
20 fact, the department considers 32 as an upper  
21 limit for the average number of client plans  
22 served by a QPAM. However, as we point out in

1       our comment letter, our member banks serving as  
2       QPAMs have client plans numbering in the hundreds  
3       and the thousands. This is a serious and costly  
4       miscalculation by the department and has widely  
5       skewed the cost of the proposal to retirement  
6       plans and the retirement services industry.

7                 For instance, the department estimates  
8       that the total cost of QPAMs amending their  
9       investment management contracts with their client  
10      plans, which the proposal would require, is  
11      approximately \$135,000. This dollar amount,  
12      however, is based on the erroneous assumption  
13      that a QPAM, on average, has 32 plan clients --  
14      plan clients. When factoring in the true number  
15      of plan clients, the costs of complying with the  
16      proposal's requirement soars from \$135,000 to  
17      nearly \$1 billion, even by conservative  
18      estimates. Moreover, this amount does not  
19      account for the multitude of contracts with IRA  
20      owners. The department's miscalculation thus  
21      significantly raises the cost of implementing the  
22      proposal.

1           On the other hand, if the department  
2           had followed the procedures of the executive  
3           order and OMB guidance and had consulted with  
4           QPAMs as it was drafting the proposal, or if  
5           department staff had simply asked QPAMs the  
6           number of client plans, this costly mistake  
7           easily could have been avoided. This  
8           miscalculation further compounds the proposal's  
9           regulatory burdens and costs to illustrate, for  
10          the proposed record keeping requirements imply  
11          that the QPAM established and maintain complete  
12          and accurate records of each and every investment  
13          transaction. For a QPAM managing 32 client  
14          plans, this is an unnecessarily prescriptive and  
15          costly requirement. However, it would amount to  
16          an overwhelming cost overrun for a QPAM with  
17          thousands of client plans, further raising the  
18          proposal's cost to retirement plans.

19                 These and other provisions of the  
20                 proposal would have benefited from a preceding  
21                 dialogue between department staff and QPAMs and  
22                 their client plans. It is not too late to

1 correct the department's course of action. As we  
2 recommended in our comment letter, the department  
3 can withdraw the proposal and, as required by  
4 executive order and OMB guidance, reach out to  
5 those who would be impacted by the proposal to  
6 get their input and perspectives and to access  
7 pertinent industry data. This department action  
8 could include roundtable discussions with QPAMs,  
9 client plans that retain QPAMs, and industry  
10 stakeholders to determine whether significant  
11 revision of the QPAM exemption is necessary or  
12 appropriate.

13           The department could also issue a  
14 request for information or RFI to seek public  
15 views on the QPAM exemption and follow the RFI  
16 with an Advanced Notice of Proposed Rulemaking,  
17 or ANPR, to give the retirement industry the  
18 opportunity to react, comment, and provide  
19 feedback on proposed revisions to the exemption.  
20 Such an approach is not new. The department has  
21 successfully employed this administrative  
22 procedure for lifetime income regulation. The

1 department first published an RFI requesting  
2 input from marketplace participants and the  
3 public regarding lifetime income options for  
4 those covered in retirement plans. Over 700  
5 comments were provided in response to the RFI.  
6 The department subsequently held public hearings  
7 to flesh out specific issues. The department  
8 next issued an ANPR focusing on lifetime income  
9 illustrations that would be provided to  
10 participants in defined contribution retirement  
11 plans.

12           Following federal legislation on the  
13 subject, the department published an interim  
14 final rule on lifetime income illustrations that  
15 became effective last year, providing plan  
16 participants annually with valuable lifetime  
17 income information and disclosures regarding  
18 their retirement savings. ABA and its member  
19 banks, acting as QPAMs, would be glad to support  
20 and promote such a regulatory approach. We stand  
21 ready to work with department staff to ensure  
22 that the QPAM exemption remains a standard bearer

1 for responsible investment management of the  
2 nation's retirement assets. Panel members, thank  
3 you for your time and I'm happy to answer any  
4 questions you may have.

5 MR. HESSE: Thank you, Tim. So I  
6 guess I'll kick off a question. I know you  
7 didn't opine on this so much here in your  
8 testimony, but I think there was some information  
9 in your comment letter. And it's been touched on  
10 a little bit by others as well with respect to  
11 collective investment trusts and the reliance on  
12 the QPAM exemption. I'm curious what the  
13 interaction is with the QPAM exemption,  
14 collective investment and trust, and the class  
15 exemption that we have specifically for bank  
16 sponsored collective investment funds, which  
17 should include collective investment trusts.

18 MR. KEEHAN: You're asking me a  
19 question that's outside my bailiwick. I guess  
20 that's -- that's the pain of being a trade  
21 association. But I would be -- I would defer to  
22 my client bank -- my member banks that are

1 involved in collective investment funds who would  
2 be happy to respond to that question.

3 MR. HADLEY: I'm happy to offer my  
4 thoughts. You know, many CITs expect to rely on  
5 both, knowing that they have slightly different  
6 conditions. But in the real world, the fact is  
7 that if you are purchasing securities in the open  
8 market and you have a counterparty, they will  
9 expect as the investment manager to certify that  
10 you are a QPAM. So even if you're -- even if  
11 it's on behalf of the CIT and not a separate  
12 account, the expectation in the securities  
13 markets is that you're going to -- you're going  
14 to be able to serve as a QPAM. And if you're  
15 disqualified from doing so, you're going to have  
16 a problem, even if you could otherwise rely on  
17 91-38.

18 MR. HESSE: So Mike, I understand  
19 that, like, for -- for CITs, you know, there's --  
20 the bank is required to be involved. And then  
21 oftentimes there is some sort of subadvisor -- I  
22 think -- I think from comments, the suggestion



1 was that oftentimes that's going to be a  
2 registered investment advisor -- are both  
3 entities representing that they're QPAMs, is the  
4 bank, is it just the RIA? This really kind of I  
5 think dovetails in with 91-38 and kind of how  
6 these pieces fit together.

7 MR. HADLEY: Yeah. Well, I want to  
8 reemphasize something we said in the last panel  
9 that the relationship between an advisor and a  
10 subadvisor, including in a CIT, and who's  
11 responsible for exactly what and what the  
12 relative responsibilities are, is not a --  
13 there's not one solution to that. It really does  
14 vary. In some cases the subadvisor's a 3(38), in  
15 some cases they're not. It is true in the CIT  
16 space that the bank or trust company does have to  
17 have ultimate responsibility. That is a  
18 condition of the -- of the securities exemption.  
19 And often, the bank will say to itself, I want to  
20 be a QPAM, or I need to represent to somebody  
21 that I'm a QPAM, or I want it just in case,  
22 because the prohibitive transaction rules also

1 prohibit indirect PTEs; right? So I don't want  
2 to be in trouble with my subadvisor.

3 And so they want to be able to rely on  
4 it, which causes a problem with the language you  
5 have in I(c). In the typical arrangement, the  
6 subadvisor is the one that's actually out there  
7 managing, on a day-to-day, the assets. Typically  
8 it's a 3(38), but not always. So the current --  
9 the current conditions are very flexible for a  
10 variety of arrangements, including -- including  
11 in CITs.

12 MR. HESSE: Thank you. Michael Scott,  
13 I'm curious, and you may or may not have the  
14 answer to this. Do you -- do you know at all if  
15 any of, you know, your -- your membership has  
16 been, I would say, impacted by the individual  
17 exemptions that we've issued for section I(g)  
18 ineligibility? Have they been clients of any of  
19 these entities with, you know, operating under  
20 those individual exemptions?

21 MR. SCOTT: I have not heard that  
22 we've had anyone that's had an issue with that.

1                   MR. COSBY: You have data that could  
2 be helpful to us in terms of the number of QPAMs?  
3 And then you also contesting the timing that we  
4 had for certain calculations that we made in the  
5 RIA? So I mean, we've gone through this before  
6 with other projects, but if you could share that  
7 data with us, it would be more than helpful and  
8 appreciated.

9                   MR. KEEHAN: I've -- I've gotten some  
10 response from our bank, our member banks. I'm  
11 happy to delve further and give you more  
12 information if that would be helpful. I actually  
13 would be interested, I know there was just one or  
14 two sentences in the preamble to the proposal on  
15 what the department did, but it's still not clear  
16 to me how they came up with the number 32. That  
17 would be helpful to know from our end.

18                   MR. COSBY: Right. I don't know. I  
19 don't know if James is on the call. He's the  
20 economist that -- that, you know, dealt with the  
21 RIA. I mean, we'd be glad to follow up later.  
22 But it'd be great if you could supplement the

1 record to provide us with data. And I open that  
2 up for anyone that's on the call. Because  
3 there's been a lot of issues that people raised  
4 with our estimate on the number of QPAMs. And  
5 so, if you have a better number or a better data  
6 source, please provide that to us. Because, I  
7 mean, you're right that we have an obligation to  
8 do our best estimate when it comes to the RIAs  
9 and circular A4 and the various executive orders,  
10 12866.

11 And so, you know, we make our best  
12 efforts to comply with them. But there's --  
13 there's sometimes a data vacuum. And we made  
14 requests in the past for data, and we haven't  
15 received it. So if there is anything out there  
16 that we don't have that you have, please pass it  
17 on to us. Be very much appreciated.

18 MR. BUTIKOFER: Just pulled off of the  
19 -- trying to mine the 5500 data. Because there  
20 is a little bit of service provider data. They  
21 try to -- they have to identify if they're an  
22 asset manager, if they're using an asset manager.

1 And then we tried to backtrack with the  
2 individuals reporting those service providers to  
3 see how many other plans reported using those  
4 same service providers. That's where the 32 came  
5 from.

6 MR. KEEHAN: Okay. Well, as mentioned  
7 in our testimony, it would have been helpful, I  
8 think, if the department had set down in  
9 accordance with the directives of the executive  
10 order and OMB guidance beforehand, before issuing  
11 the proposal. I'm thinking that all the  
12 information exchange that we've had today, I hope  
13 it's been very helpful to the department. But  
14 this would have been the type of information that  
15 the department would have been able to have  
16 process and worked into a proposal prior to its  
17 issuance.

18 MR. HAUSER: We appreciate that  
19 observation very much, Tim. And we'd encourage  
20 you in the -- in the period between now and the  
21 closing of the record to provide any data that  
22 you are -- your members believe would be helpful

1 in terms of the time commitments, their resource  
2 commitments associated with the various  
3 obligations here, as well as the number of  
4 clients served, the basis for the calculations,  
5 the costs, et cetera. Whatever you're willing to  
6 provide us, you -- you and the American Bankers  
7 Association have the proposal in front of you.  
8 You have the specific requirements. You know,  
9 and if you're having trouble tracking down that  
10 data, you know, please reach out. Happy to have  
11 a conversation about what the impediments are.

12 But I'd like to ask of each member, I  
13 mean, just a few of the questions we've covered  
14 in the other groups. But I'd just like to make  
15 sure I understand. And one is -- you know, and I  
16 -- Mr. Hadley, I certainly understand your point  
17 about being careful about what we put on the  
18 website as far as, you know, any list of QPAMs,  
19 how maybe we couched that, how current that data  
20 is. But apart from -- I mean, but do you have  
21 any issue or does Spark have any issue with  
22 merely having QPAMs identify themselves to us?

1                   MR. HADLEY: Our comment letter  
2                   objected to that. And the points we made are,  
3                   number one, in order for you to require that, you  
4                   need to make a finding that that's necessary to  
5                   protect participants and the interests of plans  
6                   and participants. And you've never required that  
7                   for any other exemption. It's not required by  
8                   Congress for any exemption that is built into the  
9                   statute. And as was pointed out by a prior  
10                  panelist, there are other exemptions that  
11                  seemingly similar. And so we're not quite sure  
12                  why you're singling them out. It also encourages  
13                  people to use other exemptions so they don't get  
14                  identified.

15                  To answer a question you posed  
16                  earlier, in terms of the burden of sending an e-  
17                  mail, you know, not -- obviously, that's not  
18                  huge, but I will say that many financial  
19                  institutions have a lot of affiliates who may be  
20                  managing money who changed their -- changed their  
21                  name from time to time. So if you're going to  
22                  keep that, you absolutely do need to have a

1 process to -- for corrections so that this is not  
2 a foot fault where -- I got every plan that this  
3 investment manager is managing, it could be --  
4 who knows how many transactions suddenly become  
5 prohibited because we find out six months ago  
6 there was a name change and we didn't -- we  
7 didn't update. And that was sort of the point  
8 made in the prior panel, that making it a  
9 condition creates this really dangerous foot  
10 fault if you don't get it exactly right.

11 MR. HAUSER: Yep, I understand the  
12 point about having some kind of correction  
13 provision and about the dangers of not turning  
14 foot faults into, you know, major compliance  
15 issues. But I just want to make sure I've  
16 explored, like, the limits of what people's --  
17 you know, the outer boundaries, I guess, and what  
18 people's objections are to just telling us  
19 whether they intend to use the QPAM. So I  
20 understand that. I understand that the point you  
21 made that will -- perhaps this would encourage  
22 people to use other exemptions, although I wonder



1 about that, to be candid. Given all the praise  
2 that's been heaped upon the QPAM exemption at  
3 this hearing, I kind of suspect that you really  
4 don't think there are other competing exemptions  
5 but -- that -- that would be quite so alluring.  
6 But please correct me if I'm wrong.

7 And then I rescind the point, well,  
8 you haven't done this before, which -- you know,  
9 I mean, that goes as far as it goes. But is  
10 there anything else concerning about just  
11 requesting -- about asking people to let us know  
12 if they're using the exemption so we can kind of  
13 keep track of what the universe looks like in a  
14 more efficient way?

15 MR. KEEHAN: I mean, Tim, my question  
16 I guess would be, is this going to open the  
17 floodgates to a -- for instance, please let us  
18 know if you rely on PTE 2020-02. And then, you  
19 know, from there, how many class exemptions are -  
20 - is the department going to ask parties to rely  
21 on? So there -- there is -- there is that  
22 concern that this is -- this is without

1 precedence. If this sets a precedent, then  
2 what's to stop the department from asking similar  
3 question for a number of different class  
4 exceptions?

5 MR. HAUSER: Right. I mean,  
6 obviously, we can take each exemption in turn, I  
7 suppose. But -- but let's suppose those  
8 floodgates -- I mean, as, floodgates go, I'm not  
9 sure how concerned to be about that flood. I  
10 mean, so let's suppose the department started  
11 more routinely saying, hey, you know, if we're  
12 going to give you a pass from compliance, you  
13 know, from -- from permitting you to engage in  
14 transactions that are otherwise illegal, maybe  
15 you should tell us who you are. What -- what  
16 would be your objection to opening that  
17 particular floodgate?

18 MR. KEEHAN: Well, aside, I guess,  
19 from the administrative cost and what others have  
20 said beforehand about, you know, this is a moving  
21 target for a number of institutions and for their  
22 affiliates, you also have concern that this

1 requirement may infer that that a QPAM is not  
2 relying or may not rely on one or more other  
3 exemptions in discharging its investment  
4 management responsibilities. So the fact that  
5 you're a QPAM doesn't mean that you're always  
6 relying on the QPAM exemption. That, combined  
7 with the fact that would be available on the  
8 publicly available portion of the DOL website  
9 would be especially I think concerning for our  
10 membership.

11 MR. HAUSER: Yeah, I -- so -- so just  
12 as you're thinking about comments, you know, in  
13 the post-hearing period, to the extent you think  
14 that there are -- to the extent you can be  
15 fairly granular about what you think the -- the  
16 problems are of that aspect of this proposal, it  
17 would be helpful to hear. And if it's just we  
18 haven't done this before and you're worried about  
19 the implications for other exceptions, that's  
20 fine. But if there's -- if there's more to it  
21 that you'd like to say, let me know -- let us  
22 know. I'd appreciate it.

1                   MR. SCOTT: So I'd just go back to  
2 what I closed my remarks with, is you have  
3 schedule C on the 5500 being easy-add to pick  
4 that up if the investment manager is a QPAM, and  
5 it seems to me that would be the least painful  
6 way for plans and providers to get the department  
7 that information. And then you have --

8                   MR. HAUSER: I read -- I read that  
9 proposal in your comment letter and heard you say  
10 it. And it -- it has -- it, you know,  
11 potentially has some appeal and it's certainly  
12 worth thinking about. But the 5500 is a fairly  
13 lagging document. It -- it reports the world as  
14 it existed some -- you know, many months before  
15 as a general rule. So it doesn't -- it doesn't  
16 really -- you know, a QPAM could be operating for  
17 quite some time under the exemption before we're  
18 first going to hear about it after that. And --  
19 you know, and as I'm thinking about the burdens  
20 and what's -- what's a greater or lesser burden,  
21 I'm not sure I'm seeing that -- that, you know,  
22 checking something off on the 5500 is necessarily

1 easier or better, preferable, less burdensome,  
2 less costly than -- than shooting us an e-mail.  
3 So again, if -- but if you -- if you have reasons  
4 to think that's the case, if you could let us --  
5 let us know.

6 Another question I asked of an earlier  
7 panel is just, you know, taking it as a -- as a  
8 given. Well, two things. One, just going back  
9 to I(c). I mean, is this panel in entirely in  
10 agreement with -- with Andrew and Steven, I  
11 think, from the last panel, that -- you know, if  
12 what I(c) he is really just driving at is that  
13 the idea here is that the QPAM's in the driver's  
14 seat and it's not serving as a rubber stamp for,  
15 you know, parties in interest and that -- that  
16 ultimately -- it's -- it's the one driving the  
17 train and assuming the responsibility. And in  
18 that fashion, does that -- and that's all that  
19 we're trying to get at, is that of -- is that  
20 concept concerning? You know, assuming we don't  
21 mess up the language. Or is -- or is even that  
22 notion somehow of a concern to people?

1                   MR. HADLEY: The Spark Institute  
2                   doesn't have an objection with -- with you making  
3                   clear that QPAM shouldn't be abused by, you know,  
4                   blessing something that otherwise is completely  
5                   inappropriate. But as the prior panel said, we  
6                   think the current language already does that.  
7                   And to the extent that, you know, there is a  
8                   problem, you could say something in the preamble  
9                   to warn folks, don't abuse this. And I would  
10                  also say that, you know, if people are abusing it  
11                  like that, there's other things going on. And  
12                  you don't need this language in QPAM to address  
13                  it. And I -- I really am concerned, just like  
14                  Andrew was, that, you know, this is really  
15                  important. And if we go to a final rule and you  
16                  come up with some new language we haven't seen  
17                  before, it could cause problems.

18                  MR. HAUSER: Understood. Tim?

19                  MR. KEEHAN: Yeah, I think I would  
20                  affirm what Michael just said that, you know, we  
21                  understand that the QPAM has ultimate investment  
22                  responsibility and has that fiduciary

1 responsibility. And certainly, that's -- I think  
2 that's where we are already. And so if we just  
3 have language affirming that, I think that should  
4 be sufficient for everyone's purposes.

5 MR. HAUSER: Okay. And then -- and  
6 then putting aside -- I guess I would like to  
7 hear from each of you, I mean to the extent to  
8 you object. Again, I appreciate the -- the  
9 process points that have been made about people  
10 wanting more process before they're disqualified.  
11 Similarly, I understand the concerns folks have  
12 expressed about the degree of affiliation that  
13 there should be or degree of control that there  
14 should be between the entity that engaged in the  
15 wrongdoing and the disqualified entity. But just  
16 putting those things aside, and imagine, we're  
17 talking about, you know, the QPAM itself is the  
18 one that engaged in the conduct. The -- and  
19 assume we solved the process issues, which may  
20 all be a bridge too far for you all to assume.  
21 But assume we did.

22 Do you think it's objectionable in

1       some -- you know, are any particular ones of  
2       those disqualifying events objectionable and --  
3       and why? And I guess just as a reminder, there  
4       are -- there are, you know, the specified  
5       convictions, substantially equivalent foreign  
6       convictions, systemic violations of the QPAM  
7       exemption itself, intentional violations of the  
8       QPAM exemption. And I mean, you can take as a  
9       given that I understand your -- your objections  
10      to including DPA and NPAs. But as for those  
11      other provisions, is that viewed as problematic  
12      in your -- in your mind, and why? And say you  
13      shouldn't be able to, you know, get the benefit  
14      of the exemption if that's your conduct.

15                   MR. HADLEY: I'm happy to go first.  
16      Yeah, we -- yeah, we do have concerns. Again,  
17      with a conviction, there has been an independent  
18      authority. We know when we're going to meet it,  
19      and we know it's -- we don't have an issue. But  
20      we do have a significant concern with -- with the  
21      authority that this would give the department to  
22      essentially shut down somebody's business. Not -



1 - if it were just you, Tim, you're very  
2 reasonable. But I can't be sure that every one  
3 of your regional offices are just as reasonable  
4 as you are. And so all of these have a  
5 significant amount of ambiguity for which we are  
6 just concerned that you could just suddenly say,  
7 that's gone, even if there was a -- sort of an  
8 internal process. I'd just make the point that  
9 ERISA gives you all kinds of tools to deal with  
10 parties who, you know, are bad guys; right? It  
11 gives you the ability to say, you have committed  
12 a prohibited transaction.

13 MR. HAUSER: Of course.

14 MR. HADLEY: You violated the law.  
15 You need to make the plan whole; right? I mean,  
16 if you have somebody who's systematically  
17 violating the terms of the exemption and  
18 committing prohibited transactions, I think you  
19 have lots of tools to deal with that. You can  
20 also go to court and say, you can't act as a  
21 fiduciary, or more commonly say, if you don't  
22 want to go to jail, you're going to agree in a

1 settlement agreement that you will not manage  
2 plan assets. And you have done that from time to  
3 time.

4 MR. HAUSER: So --

5 MR. HADLEY: You have plenty of tools.

6 MR. HAUSER: I got -- I understand  
7 that, and I'm sorry, just to cut you off for a  
8 moment, then please continue whatever additional  
9 points you wanted to make. But -- but it just  
10 occurred to me. I mean, so to your mind, the way  
11 you're looking at this, is it like, what if  
12 instead of the way we had done it, we have simply  
13 said, you know, there is no process, there isn't  
14 this notice process. We just said the exemption  
15 is unavailable if you've engaged in -- you know,  
16 to people who've engaged in the following  
17 conduct. And presumably, you know, that would  
18 result -- you know, presumably that would result  
19 in an excise tax that'd potentially result in  
20 litigation.

21 But, you know, we didn't insert  
22 ourselves in that way. But, you know, within --

1 and I suppose if we set a time standard on it,  
2 but is -- is that more -- I mean, is that, like,  
3 more or less problematic from your standpoint? I  
4 mean, because it -- you had -- you know, you have  
5 an excellent -- you have potential -- potential  
6 ability to challenge the excise tax the same way  
7 you would normally. You have the same ability to  
8 defend yourself in litigation then you other  
9 would -- otherwise would. But -- but we  
10 nevertheless defined a disqualifying condition,  
11 and you'd want to be careful to avoid engaging in  
12 that conduct or getting sideways with that.  
13 Probably this is -- this is --

14 (Simultaneous speaking.)

15 MR. HADLEY: -- on behalf of my client  
16 without talking to him.

17 MR. HAUSER: No, and it's a completely  
18 unfair question. Because it's also, you know,  
19 being made up on the fly. And I'm just thinking  
20 through how I would structure such a thing  
21 myself. But --

22 (Simultaneous speaking.)

1                   MR. HAUSER: I'm just wondering if  
2 part of the problem here actually in your mind is  
3 -- is the fact that we're giving you a notice and  
4 making a finding as opposed to a structure where  
5 we just said, look, you can't engage in this  
6 conduct and continue to use it. We'll leave it  
7 to the courts and to enforcement proceedings and  
8 whatever to decide whether you in fact engaged in  
9 it. But if in fact you did, and, you know,  
10 you've engaged in a PTE, you have the excise  
11 taxes and you have the, you know, whatever  
12 remedial consequences flow from the court  
13 proceeding, but you don't have us issuing the  
14 notice. And I just wonder if that's, like,  
15 better or worse from your standpoint.

16                   MR. HADLEY: We'd be happy to follow  
17 up on that.

18                   MR. HAUSER: Yeah, fair enough. And  
19 I'm sorry, I did cut you off. Were there are  
20 some other observations?

21                   MR. HADLEY: No, no, I want to make  
22 sure everyone gets a chance.

1                   MR. KEEHAN: Yeah, Tim, I think I'll  
2 just say my understanding that there's already a  
3 mechanism for the government to disqualify  
4 entities from acting as QPAMs and as ERISA  
5 fiduciaries more broadly for egregious  
6 misconduct, I wanted to say that would be section  
7 411 of ERISA and wanted to know if the department  
8 gave that any thought as it was putting this  
9 provision together.

10                   MR. HAUSER: Yeah, of course we did.  
11 You'll -- you'll actually see a reference to  
12 section 411 in I(g) in the -- in the definitional  
13 provisions. We also though, think that these  
14 other -- these other circumstances, intentional  
15 violations of the exemption conditions, systemic  
16 violations of the exemption, are -- are -- you  
17 know, to the extent there's that sort of conduct,  
18 we'd prefer those folks not rely on this  
19 exemption. I mean, that's the nature of their  
20 proposal. I'm sorry, and probably I should wrap  
21 it up, but Michael, give you the last word,  
22 maybe?

1                   MR. SCOTT: Yeah, so I think the --  
2                   I'm not -- I don't want to get into, you know, a  
3                   new proposal that's not in the proposal. But  
4                   within the proposal, our belief is that if the --  
5                   if the conviction isn't connected to the QPAM,  
6                   it's too remote to impact the fitness of the QPAM  
7                   business. And the issues surrounding DPAs and  
8                   NPAs, you know, you don't know what went into  
9                   that. So I'm -- fundamentally, we don't think  
10                  that that's a fair process.

11                  MR. HAUSER: So Michael, though, on  
12                  your first point, I'm not so -- I mean, just --  
13                  let me just give you an example from one of our  
14                  cases outside of the QPAM context. But we had a  
15                  plan that hired a -- this appraiser had numerous  
16                  problems, but one of his issues was he had  
17                  recently been convicted of felony embezzlement  
18                  from a trust. Now, that felony embezzlement from  
19                  a trust wasn't exactly -- it wasn't his line of  
20                  business. He's an appraiser. He wasn't -- the  
21                  plan wasn't entrusting plan assets to him. And I  
22                  can't recall, but let's hypothetically say the

1       embezzlement from a trust and involved plan  
2       assets. Is it -- is it really in your view,  
3       like, irrelevant to whether or not somebody  
4       should hire such a person? That -- well, but  
5       they didn't do it with plan assets, or it wasn't  
6       in that line of business?

7                       I mean, I guess what the -- the  
8       problem I'm having is if -- if I'm looking at the  
9       QPAM itself for example, and they've engaged in  
10      embezzlement or they've engaged in price fixing  
11      or they've engaged in tax evasion or they've lied  
12      to the government about something, but it was  
13      with respect to other non-ERISA investors, we --  
14      is the position that that's irrelevant to whether  
15      or not they -- you know, that they should be  
16      serving plans in this capacity?

17                      MR. SCOTT: Well, if the -- if the --  
18      if -- what you're hypothetically proposing  
19      happened at the QPAM, then I think that's  
20      substantially different than if it's at an entity  
21      that is not the QPAM itself -- QPAM itself.

22                      MR. HAUSER: I'm sorry, I -- I may

1 have just misunderstood you. But I thought when  
2 you started it was the crime needed to actually  
3 involve the conduct of its business in connection  
4 with plans for you to think it -- we should count  
5 it here.

6 MR. SCOTT: I think it has to happen  
7 at the QPAM. And not a -- you know, JP Morgan is  
8 a huge entity. And, you know, if -- if it's not  
9 in the QPAM business and they had a felony  
10 conviction, is that really affecting the fitness  
11 of the QPAM itself?

12 MR. HAUSER: Okay. I understand your  
13 -- I do understand the argument you're making  
14 there. All right. I have nothing further.  
15 Thank you.

16 MR. HESSE: Well, we are right at  
17 time. I don't know if others have any last  
18 questions or requests or follow up for, you know,  
19 comment submissions, but I'll give folks a chance  
20 for any last remarks or questions.

21 MR. CROSBY: I'm good, Erin, it's  
22 Chris. Thank you.



1                   MR. HESSE: Okay. And then I guess  
2 with that, I will just ask Assistant Secretary  
3 Gomez if she wants to make any final remarks.  
4 And if not, then, you know, we can -- we can  
5 conclude now. But if she wants to make some  
6 final remarks, then I will give her the last  
7 word.

8                   MS. GOMEZ: Thank you Erin, and thank  
9 you everyone for your contributions and time  
10 today. I know that -- that we talked a little  
11 bit about the timing, but would you mind, either  
12 Chris or Erin, just clarifying on the -- on the  
13 end of the comment period for everyone?

14                   MR. HESSE: Yeah, absolutely. So the  
15 comment period is already reopened, so you can  
16 begin submitting additional comments immediately.  
17 We have opened that date, and it's tentatively  
18 set right now for December 16th. So that's 30  
19 days from today. That date is somewhat linked to  
20 the timing of us posting a finalized hearing  
21 transcript. Once we do that, we will issue a  
22 Federal Register notice announcing the official

1 end date of the comment period. It will not be  
2 before December 16th. There is some potential,  
3 if we don't get it up within about 14 days before  
4 that date, that we would extend the comment  
5 period a little bit longer. But we'll make sure  
6 to publish that in Federal Register notice.

7 MS. GOMEZ: Okay. Thanks, Erin.

8 Yeah, I think I had stated it earlier more as a  
9 drop dead, you know, date of the 16th. But  
10 thanks for that clarification and everyone can  
11 look out for the notice. But thanks everyone for  
12 your time, and have a great rest of your day.

13 (Whereupon, the above-entitled matter  
14 went off the record at 3:36 p.m.)

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## A

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