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The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: RIN 1210-AC05, Docket ID Number EBSA-2022-003
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted Electronically via Federal eRulemaking Portal: www.regulations.gov

Re: RIN 1210-AC05, Proposed Amendment to Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Assistant Secretary Gomez:

I am writing on behalf of several clients, who collectively work on the behalf of more than 500,000 participants and who are or who have been involved in seeking prohibited transaction exemptions from the Department in recent years. We very much appreciate the Department's serious consideration of our May 31, 2022 comment letter on the proposed rule amending the 2011 Exemption Procedure Regulation[1] governing the prohibited transaction exemption process (the "Proposal"). Rather than repeat the points made in our May 31st letter, our comments below will focus on issues specifically addressed in the September 15, 2022 public hearing.

At the outset, we wish to commend the Department for its decision to hold an administrative hearing. We especially appreciated the willingness of the staff to engage in a meaningful dialogue with those offering testimony. Rather than simply checking a procedural box in the rule-making process, the hearing provided a valuable exchange of information and concerns, and the additional comment period is useful to discuss further these issues.

On a personal note, I wish to congratulate you, Assistant Secretary Gomez, on your recent confirmation. Your extensive experience advising plans and employee organizations will be a valuable addition to the Department's policy-making process. From your own personal experience, you understand the vital role a robust exemption program plays in protecting plans and participants, and you've assisted plans in navigating the exemption request process. The additional perspective you bring to this process will benefit the Department in better

[1] 29 C.F.R. §§2570.30-52, published 76 Fed. Reg. 66,637 (October 27, 2011).

understanding how its diminishment of the exemption program in recent years—culminating in this very troubling Proposal—is not in the best interest of plan participants.

The Proposal has not yet had the benefit of your input, as it began before you assumed leadership of the agency. But while the process may have begun without your input, the final decision is yours. As you review the Proposal, the comments and the testimony, we urge you to appreciate what is at stake. The decision before you is not one of mere administrative process. The Proposal is, in reality, the vehicle by which the Department is deciding whether it wants to maintain a viable individual exemption program in the future.

The very real concerns of the entire regulated community are laid out in the comments and testimony. The Proposal has united labor organizations, employer groups and service providers, all of whom are expressing serious concerns about the undue restrictions the Proposal would place on exemption requests. This near unanimity among parties who rarely otherwise agree should serve as a warning to the Department that the Proposal would harm the very participants the Department seeks to protect.

The Exemption Program is Wilting—the Proposal Would Cause it to Wither on the Vine

I began my testimony at the September 15th hearing with some facts about the exemption program that bear repeating here, as they illustrate what appears to many of us seeking exemptions as a fundamental shift in the Department's perception of its role under ERISA Sec. 408(a). This shift is not about which political party's nominee serves as President—it appears to be internal to the agency.

- *The Recent and Troubling Shift in the Department's Perception of Individual Exemptions*

The Department appears to view the prohibited transaction rules and the role of administrative exemptions in a different light than it has historically. For most of the Department's history, it recognized the need for a robust exemption program precisely because the prohibited transaction rules are so broad in their effect that they stifle useful and necessary plan activities that are in the best interest of plan participants. Sec. 408(a) was used by the Department to moderate the harsh effects of the prohibited transaction rules—a view that is consistent with Congressional intent.[2]

In recent years, however, the Department appears to regard more favorably the prohibited transaction rules, to appreciate less the real barriers they present to beneficial plan activity, and to view more skeptically exemption requests as efforts to circumvent the law for questionable motivations and reasons. Rather than recognizing the prohibited transaction rules' intentional overbreadth and Congress' intentional decision to blunt the rules' excesses through agency action under Sec. 408(a), the Department now seems to view the individual exemption program as an agency function to be used only very rarely, and then subject to conditions that go well beyond those historically viewed as necessary to meet the requirements of Sec. 408(a).

[2] "The conferees recognize that some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed…" Conference Report 93-1280, Accompanying H.R. 2, the Employee Retirement Income Security Act, at 309. (August 12, 1974).

Deputy Assistant Secretary Hauser articulated this more recent view quite well during the hearing, stating, "Obviously, our rationale for that provision [disclosure of non-exemption alternatives considered by the applicant] is in part because we don't view the appropriate [sic] transaction rules as mere technicalities. We do think that they're there for a purpose and typically involve significant conflicts of interest that need to be addressed. And it's at least when we're assessing whether it's not, it's in the interest of participants to move forward, it's good to understand if there's a way that you can do the transaction, or you can achieve those benefits that don't involve doing something that, you know, is otherwise illegal. [emphasis added]"[3]

While we agree that the prohibited transaction rules are an essential part of ERISA's protection of participants, and that they prohibit a wide array of substantive harmful conduct—self-dealing, bribery, significant conflicts of interest, etc.—we also think the Department must, as a matter of policy, recognize that the prohibited transaction rules also prohibit a wide range of valuable plan activity on the basis of "mere technicalities."[4] The policy solution to that real problem is a robust exemption program, not deference to overbroad rules and inherent skepticism of exemption applications because they are requests to do something "otherwise illegal."

- *Shift in Perception Coincides with a 90% Reduction in Granted Exemptions*

The table below compares exemptions granted during the second term of the Bush Administration and the first term of the Obama Administration (an eight-year period shared by two administrations with very different policy views) with exemptions granted by the Trump Administration and the Biden Administration so far (a nearly six-year period shared by two administrations with very different policy views). While these are not quite "apples to apples" time periods to compare, the results are nonetheless very instructive—granted exemptions have declined by 90% between these two periods, and appear to be unrelated to political affiliations.

	Bush/Obama (2005-2012)	Trump/Biden (2017-2022)
Individual Exemptions Granted:	185	*29*
• *Individual average per year:*	*23*	*<5*
EXPRO Exemptions Granted:	145	*4 (none since 2020)*
• *EXPRO average per year:*	*18*	*<1*
Total Individual and EXPRO Exemptions Granted:	**330**	***33 (90% reduction)***
Total average per year:	41	*<6*

[3] Transcript of Public Hearing, September 15, 2022, at 57. (Given the context, we believe the word "appropriate" is likely a transcription error, and that the original word was "prohibited").

[4] Examples of this abound, but one of the best illustrations of the overbreadth of the prohibited transaction rules and their lack of viability without exemptions is the circular logic regarding service providers. A plan fiduciary is prohibited from selecting a party in interest to provide services under Sec. 406(a)(1)(C), but being hired to provide services causes the service provider to become a party in interest under 3(14)(B). This flat prohibition exists even though engaging a service provider typically is an arms-length transaction with an otherwise unrelated third party that presents no material conflict of interest. Without an applicable exemption, the result would be that virtually no service provider agreement could be renewed by any plan.

It is important to note that the Department has offered no evidence of any misuse of previously granted exemptions that would explain the shift in its use of Sec. 408(a) authority. We believe the Proposal would accelerate this trend of fewer granted exemptions due to its significant new restrictions on who may apply for an exemption, its "gag order" on anonymous communications with the Department, and its restrictions on using experienced independent fiduciaries and other professionals. The result would be harm to the participants who would have benefited from an exemption, but whose plan would be likely ineligible to even apply.

Barring Applications Based on the Existence of Investigations is the Wrong Approach—the Department Should Instead Require Material Investigative Information in an Application:

In the Proposal, the Department seeks to prevent what it terms "bad actors"[5] from using the exemption process for their benefit. Further, the Department asserts that it "…must be completely free from doubt regarding the transaction and the motivations of the parties involved in order to make its findings under ERISA section 408(a)."[6] The method the Proposal would use to achieve these goals is Draconian—worse, it is not supported by the law, and is not in any way reasonably tailored to screen out "bad actors." The solution is disclosure, not being shut out.

- *"Front-End" Bar from Application is Too Broad, Preventing Evaluation of Merits*

In essence, the Proposal states that if an entity is under investigation by any Federal or state authority for a suspected violation of any Federal or state law, then its application "ordinarily will not be considered."[7] In other words, the Proposal simply bars application by anyone under investigation, regardless of the nature of the alleged violation, or the merits of the basis for the investigation.

The effect of this policy on labor unions and plan sponsors would be unprecedented. To take just one example, the Department's own Office of Labor-Management Standards, which is charged with safeguarding union members under the Labor-Management Reporting and Disclosure Act (LMRDA) and related laws, conducted more than 2,000 investigations and audits in FY 2021.[8] The investigation of these thousands of unions by the Department would presumptively bar an application for a prohibited transaction by a plan to which any of them is a party in interest. The effect is not just on the labor union, but on any plan with which they are affiliated.[9] Multiemployer plans covering entire categories of laborers and hundreds or thousands of

[5] Preamble to the Proposal, 87 Fed. Reg. 14,727 (March 15, 2022).

[6] 87 Fed. Reg. at 14,727.

[7] Proposal at §Sec. 2570.33(a)(2)—"(a) The Department ordinarily will not consider:…(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of ERISA, the Code, FERSA, or any other Federal or state law; or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department, the Internal Revenue Service, or any other regulatory entity to enforce ERISA, the Code, FERSA, or any other Federal or state laws."

[8] *See.*, "2021 Annual Report," Office of Labor-Management Standards, available at https://www.dol.gov/agencies/olms/about/annual-reports.

[9] *See.,* ERISA Secs. 3(4) and 3(14)(d) providing that a labor union is an employee organization, and that an employee organization is a party in interest if any of its members are covered by the plan.

employers could be negatively affected. Single employer plans that are the product of collective bargaining covering thousands of workers could be ineligible to seek a needed exemption because of an OLMS investigation regarding union dues or an election dispute.

- *"Completely Free from Doubt" is Not a Valid Legal Standard of Review for Agency Action*

The assertion that the Department must be "…completely free from doubt regarding…the motivations of the parties involved to make its findings under ERISA section 408(a)" is, quite simply, a standard invented out of whole cloth that has no basis in the law. The "completely free from doubt" standard for agency action does not exist in the statute or in the case law—indeed, to our knowledge, it is not a recognized legal standard anywhere in administrative law. The legal standard for a criminal conviction in most jurisdictions is "beyond a reasonable doubt," a lower standard than the Department is attempting to apply to the motivations of an exemption applicant under ERISA Sec. 408(a).

ERISA Sec. 408(a) does not create a new legal standard in its text—it simply requires the Department to make three findings before granting an exemption. It reads in pertinent part:

> "The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—
> **(1)** administratively feasible,
> **(2)** in the interests of the plan and of its participants and beneficiaries, and
> **(3)** protective of the rights of participants and beneficiaries of such plan."

There is no requirement to achieve doubt-free understanding of an applicant's motives—indeed, there is no requirement to analyze those motives at all. Similarly, there is no requirement for the Department to require or to consider information about other alternatives to the requested exemption the applicant has considered.

The statute directs the Department's analysis to focus on whether the transaction is in the participants' and beneficiaries' interests, and whether it is protective of their rights. For example, a proposed exemption that would reduce the cost of providing quality welfare benefits does not fail 408(a) review simply because it will reduce costs for the plan sponsor—the question is whether that outcome is in the interest of the participants and protective of their benefits (for example, the transaction might avoid a benefit reduction that would otherwise occur due to rising costs, etc.).

- *The Department's Duty under Sec. 408(a) is Best Met by Disclosure, not Bar to Application*

As then-Acting Assistant Secretary Khawar and I discussed during my testimony at the hearing,[10] the Department's approach in the Proposal bars application by entities without any evaluation of the relevance or significance of the alleged violation to the prohibited transaction exemption. This "front-end" bar, especially in light of the Proposal's dramatic expansion of its current reach, is not in the best interest of participants as it prevents an evaluation of the merits

[10] *See.*, Hearing Transcript, pgs. 154-161.

of a potential exemption. In our view, this result is inconsistent with Congressional intent in establishing the Department's authority under Sec. 408(a).

Instead, we urge the Department to require disclosure of material investigation information involving the affected plan or plans and the requested transaction. This would address the Department's concerns that the current 2011 regulation, which speaks only to investigations by certain Federal agencies overseeing employee benefits, might not capture all relevant activity. For example, Mr. Khawar asked during the hearing:

> "What if there's been embezzlement from an employee benefit plan, and that's under investigation by a State authority for possible criminal prosecution? It's not an investigation that EBSA's involved in. But there has been theft, and it's going to be prosecuted, or is being prosecuted under criminal laws."[11]

We agree that the Department should take into account embezzlement from the plan involved in the proposed transaction, and that this is material to the Sec. 408(a) analysis. Thus, we believe a disclosure requirement is an appropriate measure to ensure the Department has this kind of material information. However, even in this case, a review by the Department might find that an exemption should nonetheless be granted based on facts and circumstances—a front-end bar denies participants the benefit of this possibility.

For example, suppose a very large, underfunded defined benefit pension plan requests an exemption for an in-kind transfer of property from the plan sponsor. This transfer would ensure funding for the participants' benefits, and may represent the best way to protect these pension benefits. However, a plan official has been accused of exploiting a weakness in a financial control and stealing $5,000 from the plan to pay a gambling debt. The person is being prosecuted locally, but the funds were restored, and the plan imposed tighter financial controls to prevent a similar future event. While this embezzlement is relevant to the Department's review, that isolated theft prosecution would not automatically prevent the Department from finding that this exemption (which protects the benefits of thousands of participants) meets the requirements of Sec. 408(a). Rather than barring the application, the Department should hear the request and conduct the appropriate analysis with the appropriate information.

The Fate of EXPRO Remains Unclear Given the Proposal's Treatment of Precedence

As we noted in our May 31st comment letter, a bedrock principal of administrative law is the reasonable and consistent application of policies to similar facts. An agency cannot reasonably conclude that person A and person B—both of whom have essentially the same set of circumstances—will be treated differently. We expressed our concern that the Proposal text does not merely reserve the Department's right to change policies and exemption conditions over time, but effectively states that precedent has no role in exemption decision-making.

During the hearing, several officials responded to our concerns regarding the role of precedence in exemptions. Specifically, Deputy Assistant Secretary Hauser explained that it was not the

[11] Id. at 157-158.

Department's intent to be arbitrary and capricious, or to ignore all precedent, but to state that precedent alone was not determinative of future exemption policies.[12]

We appreciate this clarification, but we remain concerned about the Proposal's text and what it means with respect to the EXPRO process. As we previously acknowledged, we believe the Department does have the authority to change policy positions, including exemption conditions, over time. But what was missing in the discussion in the hearing was an acknowledgment that each exemption request cannot reasonably result in a new and different set of policies and conditions for exemptions addressing similar topics, especially when those exemptions are granted or considered closely in time to one another. There is a significant difference between changing conditions relative to an exemption granted decades ago, and changing conditions relative to a similar exemption granted only recently. Conditions should not change with each iteration of a frequently granted exemption type—precedent must have value in agency decision-making.

Indeed, this is the basis for the EXPRO exemption process established by PTE 96-62. Under EXPRO, an exemption request that is "substantially similar" to two exemptions granted in the past five years is presumed approved on a fast-track review process. The rationale behind this process is that a full review of a previously answered question is not needed, and that exemptions granted within the past five years "…reflect the current exemption policies of the Department."[13] This is a very practical, precedent-based process. We remain concerned that neither the Proposal language nor the discussion in the Preamble acknowledge the important role of precedent in the EXPRO process—instead, precedent is declared to not be "determinative."

We urge the Department to clarify that the EXPRO process remains valid, and that precedence within the meaning of the EXPRO process will continue to be respected by the Department. If the Department does not wish to retain the EXPRO process, it should take steps to modify or rescind the class exemption through the appropriate notice and comment administrative process—it cannot ignore EXPRO's existence or refuse to abide by its requirements.

- *Precedent and the Meaning of "Substantially Similar" in the EXPRO Process*

In questions and answers addressing the role of precedence with respect to EXPRO, the hearing also included discussion of how EXPRO reviews are currently undertaken by the Department. Though the Preamble to the Proposal states that it is already the current position of the Department that it "is not bound by facts or conditions of prior exemptions in making determinations,"[14] this statement seems to be at odds with the EXPRO process. In fact, the

[12] *See.,* Comment from Deputy Assistant Secretary Hauser: "But we don't say that prior determinations aren't relevant, that they're not to be considered. We don't deny that we're subject to arbitrary and capricious review. And we don't maintain an ability to do things that are arbitrary and capricious. The language, literally, just says, you shouldn't assume it's determinative in every case. I mean, when you get right down to it. And there isn't a statement here that we don't care about what we did in the past, that it's not relevant. Simply that it's not determinative." Id. at 185-186.

[13] 61 Fed. Reg. 39,989 (July 31, 1996).

[14] 87 Fed. Reg. at 14,724.

review of whether a request is "substantially similar" for EXPRO purposes as described in the hearing appears to be very narrowly focused on an extremely detailed analysis of past facts and circumstances.

We were surprised and concerned to learn that the Department currently believes it must determine whether a proposed exemption is "substantially similar" through a nearly line-by-line analysis of thousands of pages of documents, searching for things that "might be a little bit different," and that small differences could cause the Department to "move" an EXPRO request over to an individual exemption request.[15] We do not believe this type of scrutiny is consistent with the Department's historical interpretation of "substantially similar," which is defined in Section IV(a) of PTE 96-62 as "alike in all material respects."

A review to determine whether something is "alike in all material respects" should not require a detailed review of thousands of pages of documents in search of minor differences (i.e., those that are not material). Clearly, this was not the approach taken in the past. From 2008-2012, the Department reviewed and approved 145 EXPRO exemptions, compared to only 4 since 2018. The Department could not have reviewed and approved so many EXPRO exemptions then using the standard of scrutiny that it apparently applies now.

We urge to Department to address the role of precedence in the EXPRO process by properly applying the "substantially similar" test to focus only on material differences, not analysis of things that "might be a little bit different."

The Proposal Inappropriately Limits Eligibility of Experienced Independent Fiduciaries:

The final issue from the hearing we wish to address in detail is the Department's unfounded concerns regarding bias by experienced independent fiduciaries. In essence, the Department is asserting that precisely because an independent fiduciary is experienced in a specific type of transaction, that fiduciary is not independent because it markets its services in connection with that type of transaction.

In this version of the classic conundrum of "who will guard the guardians," the Department is attempting to reserve to itself the right to decide—on an entirely subjective basis—that a particular independent fiduciary can't be used because it has become too closely associated with a particular type of transaction. The Proposal's allegation of bias is without foundation, and its solution of picking winners and losers among specific independent fiduciaries is wholly inappropriate.

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[15] *See.*, Comment from Individual Exemptions Division Chief Christopher Motta: "If someone submits an EXPRO request, you know, what we do in the office, we'll open up the prior exemption requests, and sometimes they'll each be a 500 page application. And, you know, so we're comparing 1,000 pages of documents to another 500 page document. And if we see something in those documents that, you know, cause us concern, might be a little bit different those, those thoughts may not have been expressed in the prior summary of facts and representations, which might be just a couple of pages long…I don't think, you know, the public should take a lot of comfort in some of our prior exemptions, just because not everything can possibly -- A 500-page application is difficult to boil into a summary of facts and reps. If there are a lot of other thoughts captured in those 1,500 pages before us that cause concern, it might give us reason to move it over to the individual exemption space." Hearing Transcript at 182-183.

Specifically, the Proposal states in §2570.31(j) that "…Among other things, the Department will consider whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type.. [emphasis added]" The Preamble expands on this, explaining that, "…a fiduciary may not be independent if it has a business interest in promoting the exemption transaction. For example, a fiduciary may be affected by a conflict of interest if it motivated [sic] to use the exemption transaction to promote its fiduciary services to potential clients contemplating similar transactions… [emphasis added]"[16]

Deputy Assistant Secretary Hauser explored these issues further during the hearing, asking a witness, "But do you question that [the business interest of an independent fiduciary], that's something relevant that we can consider in the course of the review? Just like it's not even relevant. I mean, say we're looking at a transaction that's fairly bespoke. And the people that are in front of us are people who are trying to push forward this bespoke kind of transaction. And that, that really hasn't yet gained ground in the marketplace. Is it irrelevant to us that we're, the people being brought into the process are in fact, the marketers? I mean, all that document says is that these are things we may consider as part of our total facts and circumstances."[17]

We do not believe this is a relevant consideration. And the document does more than allow the Department to "consider" this issue—it allows the Department, at its sole discretion, to prohibit the use of a particular service provider based on little more than suspicion. This is a recipe for allegations that such decisions are arbitrary and capricious, or that the Department favors certain independent fiduciaries over others.

By this "business interest" standard, every professional fiduciary has a conflict of interest because every professional fiduciary has a business interest in doing work in connection with every exemption transaction opportunity. The only distinguishing issue here appears to be one of degree—is this fiduciary more successful at marketing services with respect to a particular transaction type? The Department seems to be saying that at some ill-defined point in time an independent fiduciary can no longer be trusted to do a "good job" because they want "a job."

The Department's determination, based on "our total facts and circumstances," does not appear to have to identify any actual wrongdoing—in fact, there is no standard defined in the Proposal text or the Preamble. The "business interest" argument has no logical limit, and is entirely at odds with ERISA's text and intent—fiduciaries are permitted to market their services, they are permitted to be paid for them, and greater experience is usually perceived as a benefit, not a conflict of interest.

Further, the fact that an independent fiduciary has developed expertise at a particular type of transaction and is promoting that transaction to plans that could benefit from it does not change their legal obligation or the close oversight of their work. They are still subject to the full array of fiduciary responsibilities and liabilities, are personally liable, and are subject to legal action by affected parties as well as by the Department. Indeed, since exemptions often require

[16] 87 Fed. Reg. at 14,726.

[17] Hearing Transcript at 111-112.

independent fiduciaries to provide regular reports to the Department, the independent fiduciary is under routine scrutiny by the Department, a level of review not ordinarily applicable to fiduciary conduct.

Finally, the fact that an independent fiduciary has developed and is "marketing" to appropriate clients a "bespoke" transaction that "hasn't yet gained ground in the marketplace," doesn't make that transaction less valuable to the plan participants for the purposes of Sec. 408(a). If one has built a better fiduciary mousetrap, its utility to the plan participants is not diminished because it is now being advertised to other plans. Indeed, how can a new and beneficial idea gain ground in the marketplace if its very novelty makes its inventor suspect in the Department's eyes? Exemptions are needed in part to allow innovations and to adapt to changes—refusing to permit an independent fiduciary to help develop and gain expertise in a new transaction type is not in the best interest of participants.

Conclusion:

While we very much appreciate the Department's willingness to discuss the Proposal, we remain convinced that, as written, it will severely limit the future utility of the individual exemption program. This, of course, is not the Department's stated goal, but we believe it is the most likely result.

The Department's official goal, according to the Congressional Budget Justifications prepared by EBSA, is to grow the individual exemption program substantially. We very much support that official goal, even as we believe the shift in the perceived agency role under Sec. 408(a) and the text of the Proposal are odds with the official goal.

As the table below shows, the Congressional Budget Justifications prepared by EBSA for each fiscal year from 2020 to 2023 state that the Department has "allocated sufficient resources to close, propose or grant an estimated" 35-42 individual exemptions each year. While we can't tell from the public record how many were "closed," we can determine how many were granted or proposed. Here are the results:

Year[18]	CBJ Estimated Total Exemptions	EXPRO Actual	Proposed Actual[19]	Granted Actual
2020	35	1	0	1
2021	35	0	9	3
2022	40	0	15[20]	3
2023	42	TBD	TBD	TBD

[18] The Congressional Budget Justification is based on the fiscal year, but EBSA reports granted and proposed exemptions by calendar year.

[19] Where a proposed exemption was granted in the same year, it was counted only once as a granted exemption.

[20] Since the Proposal was published, the Department proposed 12 new individual exemptions. While this is a large number of Proposals compared to recent years, it is worth noting that 11 of them are essentially the same transaction resulting from the same precipitating event, though requested by different plans affected by the event.

These numbers seem to suggest that the official goal is not yet the reality. We believe it likely cannot be achieved without significant change to the Proposal, given its many new restrictions.

Our clients are very concerned that the Proposal would have a material and negative effect on plans and participants. We urge the Department to consider our prior comments as well as those in this letter, and we would be happy to discuss these issues with the Department at its convenience.

Thank you for the opportunity to present our additional comments on issues presented by the September 15th hearing.

Sincerely,

Bradford P. Campbell