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**DATE:** January 6, 2023

**TO:** Mr. Erin Hesse
Office of Exemption Determinations
Room N-5700
Employee Benefits Security Administration U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210

Telephone: (202)-693-8546.

**RE: Our Joint Supplemental Comments on Docket ID number EBSA–2022–0008**

Regards. This supplemental letter follows up on our joint comment letter of October 10, 2022, that we submitted to US DOL's Office of Exemption Determinations, as well as the testimony that we presented at your virtual public hearing on November 17, 2022. These submissions pertain to the US Department of Labor's proposed QPAM Amendment of July 27, 2022 (Docket ID EBSA-2022-0008).

We are submitting this supplemental letter to summarize our review of comments that have been submitted by other contributors to this proceeding. As discussed, our review has, if anything, only reaffirmed our support for our initial positions.

We wish to underscore the fact that *we are a panel of independent outside experts,* with no financial stakes in its outcome, and no current, past, or future financial or employment ties with the global pension fund management services industry, the financial services industry or its many lawyers and lobbyists. We would welcome similar "declarations of financial independence" from the other participants in this proceeding.

## KEY FINDINGS – OUR REVIEW

1. In general, many commentators – especially those with direct or indirect ties to the pension fund management services industry or the financial services industry -- share an almost childlike degree of *naivete* when it comes to the merits of *financial deregulation* in general. It is as if they completely missed the US savings and loan crisis of 1989-91, the Japanese banking crisis of the 1990s, the 1998 Russian financial meltdown, the Iceland collapse of October 2008, and the GFC financial meltdown of 2007-9, as well as the recent catastrophic collapse of FTX, Silvergate Bank, and other affiliated enterprises, where, unfortunately, several US and Canadian pension funds, as well as several leading Wall Street and Silicon Valley asset managers, reportedly experienced huge losses.

In our view, a review of this track record shows that the merits of sensible financial regulation i*n general* is no longer an abstract theory. These and other recent cases clearly demonstrate the huge savings in direct and opportunity costs that might have been realized by effective, timely financial regulation – *not only to pension funds and other investors in the US and all over the world, but also to ordinary citizens and taxpayers,* who otherwise often end up bearing the ultimate costs of financial chicanery.

2. With respect to US DOL's proposed QPAM regulations in particular, the case of Credit Suisse clearly illustrates the magnitude of these *avoidable* costs very precisely. Its sordid criminal track record following its 1999 felony conviction in fellow OECD member Japan demonstrates in excruciating detail the necessity of allowing the DOL to bar QPAMs in such extreme cases.[1] Had DOL heeded the many early warning signs of Credit Suisse's serial criminal behavior, DOL might not have waited *until 2022* to decide that this institution did not deserve QPAM privileges.

3. Beyond Credit Suisse, as we've argued, there is also abundant evidence that many leading financial institutions like HSBC, UBS, Morgan Stanley, Deutsche Bank, Danske Bank, and Bank Pictet may also be worthy of closer scrutiny for their recent indulgence in *apparent widespread serial criminal misconduct* -- including the facilitation of tax dodging, illegal trading, bribery, sanctions busting, mortgage fraud, and insider trading. There is evidence that, under the impact of *widespread financial deregulation* since the 1990s, this kind of misbehavior has become *pervasive,* especially in certain countries that have notoriously weak financial regulation.

4. For example, in 2013, for the first time in its history, the US Department of Justice (DOJ) offered Swiss banks as a whole a path to resolve their potential US criminal liabilities. Out of a total of 243 Swiss banks, more than 90, or *40 percent,* ended up settling with the US DOJ and paying over $1.3 billion in fines and penalties. Fourteen others, including UBS, Credit Suisse, Pictet and Switzerland's other top three banks, were excluded from this settlement because they were already under criminal investigation. Of these, Bank Pictet, Switzerland's fourth largest bank, was recently named in connection with the global FIFA, Petrobras, and Odebrecht scandals. In March 2022, Pictet's Geneva offices were searched by Switzerland's Office of the Attorney General (OAG) on suspicion of aiding and abetting bribery of public officials and money laundering in Brazil and other countries. As of 2023, Pictet is reportedly *still* under criminal investigation by the US DOJ, an investigation that has continued since at least 2012. On request, US DOL has confirmed that it does not know whether Bank Pictet and/or its affiliates have received QPAM exemptions. In our view, this leading financial institution is certainly worthy of more

[1] See attachment A.

DOL scrutiny, at least at the level of determining whether its asset management group has claimed QPAM status.

5. Another glaring recent example is provided by two leading European FIs, Danske Bank and its correspondent, Deutsche Bank. The attached Criminal Information for Danske Bank's more than $200 billion money laundering scheme is astonishingly similar to some of the schemes pursued at Credit Suisse.[2] Unfortunately, Danske was only penalized around $2 billion, or 1% of assets, by DOJ and other bank regulators – most of which fines and penalties were almost certainly passed on, in turn, to customers. Indeed, one of the key points of DOL's proposed new QPAM regulations is that the costs of engaging in such financial crimes are far too low. That, indeed, is why money laundering, tax dodging, and other financial crimes have been expanding so rapidly. Most of the objections to the DOL's QPAM proposals would, in effect, continue to make such highly financial crimes highly profitable.

6. These are specific examples where DOL should clearly not be limited by its current practice of only considering *US criminal convictions* when enforcing restrictions on QPAM privileges. Sadly, the fact is that financial crime has become globalized and sophisticated, makes paying attention only to USA convictions an anachronism. DOL's QPAM program managers deserve to have clearer authority to make elementary inquiries about such clear credible reports of international misbehavior proactively – whether or they happen to derive from foreign prosecutions. We wish to emphasize that, contrary to some commentators, this additional DOL authority would hardly amount to sanctioning "fishing expeditions," let alone create a new US DOJ. DOL is clearly establishing a substantial threshold of credible, entrenched egregious behavior that will be required before FIs risk losing their QPAM status. In contrast, the only relevant non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) that DOL is concerned with pertain to grossly illegal misbehavior. DOL is simply trying to bring QPAMs into compliance and set a level playing field to protect honest financial institutions.

7. Some commentators have speculated that the new DOL QPAM regulations might cause foreign enemies of the US like Russia or China to concoct bogus prosecutions and convictions of FIs abroad, and then somehow induce DOL staff to take them seriously. We regard this as one of those fanciful hypotheticals that only $2000 per hour DC lawyers for the financial services industry can come up with. The far more likely scenario, in our view, is that where – as in the recent case of Morgan Stanley in South Africa – leading FIs have

[2] See Appendix B.

been able to exert local influence to avoid prosecutions in countries with corruption-ridden tax authorities and weak judicial systems.

8. As we've argued, one *elementary* minimum requirement for effective DOL regulation of QPAM status is a timely, regularly updated public registry for all institutions and their affiliates that are either have, or are applying for, the QPAM privilege.

   To underscore what ought to be obvious: under ERISA, Section 406(a) exemptions can only be granted by DOL. They obviously cannot be granted by financial institutions to themselves, much less so anonymously.

   But this is what the current bizarre regulatory regime amounts to, given the absence of a public QPAM registry. Right now, even DOL's QPAM program managers cannot tell if institution X, Y, Z, or their affiliates are currently registered to be QPAMs.[3]

   In effect, therefore, QPAM's current "anonymous/ no public registry" regime is *borderline illegal, in so far as it directly undermines DOL's exclusive exemption power under Section 406 (a).* The DOL, as the responsible regulatory authority, does not know which or how many FI's are claiming to be exempt, given that they have unilaterally appropriated their anonymous exemptions.

   In our view, therefore, DOL's modest proposal for QPAM registration is the ONLY legally compliant proposal that has been submitted in these proceedings. No one has seriously argued that the cost of maintaining such a registry would be prohibitive, relative to its essential utility.[4]

9. With respect to procedures for handling divestment for barred QPAMs, we wish to emphasize that even under the revised regulations, the *total loss* of QPAM status is likely to be a *rare* sanction. (In the only recent instance to date, Credit Suisse is simply selling its main US asset management business.) DOL has proposed a 1-year divestment period, calculated from *the date of sentencing.* Given that this is likely to be at least 18 to 24 months from the date when offending FIs reasonably know they will be liable, this is ample. It may be that some so-called "target-date funds" and some other legitimate financial products might need to exceed the statutory deadline, on an exceptions basis. Surely such technical details are not grounds for delaying DOL's important substantive QPAM reforms.

10. One industry commentator proposed that FIs should be allowed to choose which QPAMs to voluntarily divest. History shows that this approach will fail. For example, following

[3] Apparently the only way that DOL found out about Credit Suisse's QPAM status back in 2014 was when this surfaced in the course of the bank's settlement discussions with DOJ regarding its felony tax dodging charges!

[4] Many other such public registries – for example, for beneficial ownership of companies and accounts – have recently been introduced in the interests of improved financial regulation. See, for example, FINCEN's new reporting requirements under the Corporate Transparency Act (2022), discussed at https://www.fincen.gov/boi.

Credit Suisse's US felony criminal conviction in 2014, BlackRock, the world's largest asset manager ($10 trillion), announced that CS's criminal status would have no impact on their relationship. BlackRock was then Credit Suisse's biggest counterparty, and it is a major shareholder in the bank, making it a risk for AML and conflict of interest.

11. Another commentator made the broad claim that "parties in interest cannot be listed" even though they are included in Section 406(a) exemptions and AML compliance, because there are simply too many to be listed. This is tantamount to an unsupportable claim it is too hard to be legal and that DOL should just go away. DOL will have to decide the phase-in of a reasonable compliance program – for example, 90% in 12 months, 99% in 3 years. But blanket claims of complexity and the need for 0% transparency is quite simply not statutorily permitted – either by ERISA or AML statutes.

12. We'd also like comment on several other aspects of US DOL's QPAM proposals.
    a. First, we support DOL's proposal to require that QPAM registration include an enforceable undertaking to indemnify clients for losses incurred if QPAM privileges are lost. A standard clause could be included in all new or renewed QPAM contracts to explicitly state this.
    b. Second, there is a strong case for new criteria as indicators of QPAM risks. For example, since the quality of the national legal, supervision and enforcement systems vary significantly among the principal countries of incorporation for major banks that are applying for QPAM exemption, these variations ought to be taking into account.
    c. Third, we also support US DOL proposed annual registration requirement for QPAM exemptions. We'd also support requiring least some categories of QPAMs to demonstrate affirmative "clean hands," and remedial activities and disclosures to receive renewed QPAM exemptions.

Overall, we wish to emphasize that QPAM status is a privilege. It should not be available to serial corporate and financial criminals. As we noted above, we believe that this proceeding is an important opportunity for US DOL to underscore this basic point.

Respectfully submitted,

(signed)

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