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:

LISA M. GOMEZ, Assistant Secretary, Employee Benefits Security Administration (EBSA)
TIM HAUSER, Deputy Assistant Secretary for Program Operations, EBSA
CHRIS COSBY, Director, Office of Exemption Determinations
CHRIS MOTTA, Chief of Individual Exemptions Division, Office of Exemption Determinations
ERIN HESSE, Senior Employee Benefits Law Specialist, Office of Exemption Determinations
JAMES BUTIKOFER, Acting Division Chief, Division of Regulatory Policy Analysis, Office of Research and Analysis
MARTHA FRYDL, Counsel for Regulations in the Plan Benefits Security Division, DOL Office of the Solicitor

PANELS:

PANEL ONE

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.)

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

Before we get started with testimony, I want to provide some background on the proposed amendment and say a few words about why we're here today and then cover a few housekeeping and procedural matters. There have been substantial changes in the financial services industry since the department first granted the QPAM exemption in 1984. These changes include industry consolidation that was caused by a variety of factors and an increasingly global reach for financial services institutions, both in their affiliations and in their investment strategies, including those for plan assets.

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

So in the proposed amendment that was published on July 27th, 2022, the department sought to accomplish this objective with the following: addressing perceived ambiguity as to whether foreign convictions are included in the scope of the exemption's ineligibility provision; expanding the ineligibility provision to include certain additional types of serious misconduct; focusing on mitigating potential costs and disruption to plans and IRAs when a QPAM becomes ineligible due to a conviction or other serious misconduct; updating asset management and equity thresholds in the definition of a qualified professional asset manager; adding a standard record-keeping requirement that the exemption currently lacks; and clarifying and reemphasizing the required independence and control that a QPAM must have with respect to the investment decisions and transactions.

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

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

We received 31 comments on the proposal during the comment period, and we look forward to continuing that dialogue with the regulated community on the proposed amendment during today's hearing. We're grateful for the valuable input that we've received as part of the public notice and comment process, and we've posted on the department's web page the public comments that have been submitted on the proposal, the request to testify, and the agenda for today's hearing. In the hearing notice, we announced that the comment period for the proposed amendment would reopen with today's hearing. Today's hearing is being transcribed. We expect that the transcript for today's hearing will be available on EBSA's web page approximately three weeks after today. The hearing transcript will be added to the public record for the proposed amendment.

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

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

We will not be taking questions from the audience during the hearing. Need to ask that you please do not draw any inferences or conclusions based on how the government panelists frame a particular question or series of questions. Our goal today is just to develop the public record for the proposed amendment and to learn from all of you the information that is conveyed in the testimony. So to help ensure a smooth-running hearing, we have several requests for those of you who are testifying. Please first identify yourself, and if applicable, identify the organization that you're representing before you begin your testimony.

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

With those formalities out of the way, I would like to now introduce the members of the government panel that will moderate today's hearing. We have Tim Hauser, who is EBSA's Deputy Assistant Secretary for Program Operations; Chris Cosby, the Director of the Office of Exemption Determinations; Chris Motta, who's the Chief of Individual Exemptions Division in the Office of Exemption Determinations; Erin Hesse, Senior Employee Benefits Law Specialist in the Office of Exemption Determinations; James Butikofer, the Acting Division Chief of the Division of Regulatory Policy Analysis in the Office of Research and Analysis; and we have Martha Frydl, who is Counsel for Regulations in the Plan Benefits Security Division of the DOL's Office of the Solicitor.

In addition to those individuals, there are several other dedicated EBSA staff who are working diligently on this project, particularly the staff of the Office of Exemption Determinations and the Office of Research and Analysis. I want to thank all of the absentee members who are working on this project for all of the time and efforts that they've put into this. And I also again thank today's witnesses for taking the time to engage with the department on this important proposed rule. So, phew. Well, with that, I'm going to turn it over to Erin for a few tips regarding the Webex that we're using today before we start the first panel. Thank you, everyone.

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

And then the last thing is just the timekeeping. Susan Wilker will be monitoring time. She's got some signs up to let you know when your time is, you know, starting to run low. Additionally, when we get close to the end of your time, she will probably raise her hand using the feature in the Webex software to let you know that that's the time to say your last few words and wrap up so that we can move on to the next witness or Q&A. So with that, unless -- Chris Cosby, unless you have any more to say, I think we can probably get started with panel one.

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

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

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

My testimony today highlights the proposal's potential direct impacts on employer-sponsored plans, their sponsors, and participants. We are concerned at the ARA that the proposal would needlessly disrupt some plan relationships and consequently increase costs. Our view is that plans of the participants benefit from and rely on professional management of plan assets. We're concerned that the proposal, in some ways, would make it harder for many plans and participants to have access to professional asset management, something they value.

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

This condition concerns involvement investment decisions by parties in interest to a plan. We understand that this may be intended in part to address situation where it appears that a QPAM is brought in to approve an already negotiated transaction, and is therefore not acting as an independent fiduciary in the particular transaction. And the proposed change seems intended to ensure that QPAM has sole responsibility for the terms of a transaction and any associated negotiations. Any transaction planned, negotiated, or initiated by the party interest in whole or in part would not meet the conditions for exemptive relief under the amendment. It can't be involved in any aspect of a transaction, aside from certain ministerial duties and oversight, such as providing general investment guidelines to the QPAM.

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

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

Indeed, it's easy to imagine that in some cases it would be imprudent for a plan sponsor not to initiate a conversation about an investment. Plan sponsors, in fact, have duties to bring suggestions. In this way, we see the proposal as a somewhat blunt instrument that would prohibit a wide variety of routine prudent interactions by precluding all involvement. Where this ultimately goes is plans will end up losing out on favorable investment opportunities. And the ARA believes that practices which preserve the QPAM's ultimate discretion, yet permit some degree of involvement by sponsors should be permitted.

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

Asset manager transitions typically cause plans to incur costs in time and attention, which are hard to quantify. Also, are -- they are disruptive in terms of resources that would need to be directed away from activities that are otherwise necessarily -- necessary for the functioning of a plan. The ARA is concerned that under the proposal, a winding down period may only be used to transition existing clients out of existing investments. That is, it does not appear that new transactions in existing accounts would be permitted.

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

Qualifying for the amended exemption would require specified provisions in written management contracts. So in addition to imposing these conditions on all QPAMs, including every single existing and future QPAM, the proposal requires indemnification of plan losses that result. If the QPAM becomes ineligible for exemptive relief, it must agree to restore actual losses to the plan. These potential liabilities may not be priced into current agreements, and they could be significant. And the cost of QPAM services may increase, and the costs will ultimately be passed onto plans.

The proposal would also require investment management agreements to include terms addressing potential future ineligibility of the QPAM. And this means that every investment manager agreement that is currently in place between an ERISA plan and a QPAM will need to be amended. Because the proposal does not provide a transition period for existing agreements, plan sponsors and QPAMs appear to only have 60 days after publication of a final exemption to add these provisions. And we believe that would be prohibitively difficult for plans to complete the required amendments in such a brief timeframe. Some plan sponsors have management agreements with multiple QPAMs. We believe at least 18 months are needed to bring QPAM agreements into compliance with these extensive changes.

And the last thing that I'm going to mention is just to highlight some impact on plan investments from the plan sponsor perspective. So we're concerned about the impact on some particular investments, and in turn on the plans that offer them. And of particular concern are target-date funds, which are frequently selected to be QDIAs. According to a 2020 survey conducted by one of our affiliate organizations, the Plan Sponsor Counsel of America, two-thirds of employer-sponsored defined contribution plans include QDIAs, and where those plans have more than 5,000 participants that percentage goes up to 81 percent. And target-date funds are the favored choice for QDIAs among plan sponsors.

So -- and as with many other types of managed funds, the proposal, we believe, would disrupt the operation of target-date funds. And that disruption would be acutely felt in employer-sponsored plans where target-date funds are heavily used. We urge the department to recognize these collateral impacts as it considers revisions to the QPAM exemption. The ARA appreciates the department's commitment to safeguarding American workers' retirement savings, and we share this (audio interference).

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

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

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

And then importantly, while on the surface, you know, it appears that the QPAM protections are primarily protective of investment managers. We felt an important aspect of our testimony today is to emphasize that the QPAM exemption, again, as it's been working for decades, is also a very important tool for protecting plan fiduciaries, and importantly for easing the administrative burden on pension fiduciaries who might otherwise have to comb through many transactions and investments to determine whether certain transactions may or may not raise technical risks of party and inter-affiliation concerns. So those are a few opening thoughts. Let me turn it over to Robin from Raytheon, who will talk about CIEBA's comments and Raytheon's practical experience in this area.

MS. DIAMONTE: Good morning. My name is Robin Diamonte, and I'm a CIEBA board member and a former chair. Currently, I'm also the Chief Investment Officer for Raytheon Technologies. Raytheon has over 90 billion in retirement assets, covering 300,000 DB participants, and 220,000 DC plan participants. As the department is aware, CIEBA members and most pension investment fiduciaries rely heavily on the QPAM exemption. Our employees and plans have thousands and thousands of parties interest, and it's simply not possible for us to identify and track those relationships in any cost-efficient manner.

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

However, CIEBA members are experienced qualified investment fiduciaries, and thus are entirely capable of looking at the conduct of our managers and deciding for ourselves whether the conduct impacts our faith in their ability to manage our plan assets. Experienced plan fiduciaries who select and retain investment managers use a formal established due diligence process for evaluating candidates and then monitoring the managers they hire for the purposes of both compliance and performance. So that includes continually monitoring for any events or changes that may impact the managers' qualifications, their reputation, their operations, as well as their performance.

We simply don't need changes or additional protections in this regard. We wouldn't have to disqualify a potentially effective asset manager because an uninvolved subsidiary may have engaged in crime-related activity. Again, as responsible fiduciaries, we're very capable of determining the materiality of any given situation with one of our investment managers. So we identified three specific concerns in our comment letter. Our first concern is that changes would require an investment manager to contractually agree to indemnify plan clients for damages if a manager were to become ineligible to continue as a QPAM.

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

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

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

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

MR. WALSH: I'm Kevin Walsh, I'm a principal at Groom Law Group Chartered. I'm here on behalf of CIEBA and their plan sponsor membership. You know, thank you Secretary Gomez, Deputy Assistant Secretary Hauser, Chris Motta, and everyone else here today from EBSA. It's a really great sign, so much of EBSA's leadership is engaging on this important topic. You know, as Robin and Dennis mentioned, our view is that the proposed changes present serious practical concerns. And so, again, you know, respectfully, we ask that the department withdraw the proposed amendments.

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

And second, a process for more expeditiously evaluating individual exemption applications for QPAMs. So, I mean, you know, I think there's frustration on the part of the department on behalf of plan sponsors, on behalf of, you know, asset managers about the process for getting those individual exemptions for the past few years. Where, you know, applications have taken years to process. You know, our thought is that if the department were able to streamline that process and narrow the scope of when those applications are needed, that this could -- that could be a positive outcome, allowing plan sponsors and investment professionals, you know, to best meet the needs of participants and beneficiaries.

So in sum, you know, we think the department -- we think the department's -- we think department would be better to focus its efforts on a more targeted basis, rather than through the broad and sweeping changes that are proposed in the current QPAM exemption proposal. And we would, you know, be happy to engage on, you know, building out a more effective approach for both plan investment professionals, professional asset managers, and you know, the way services are provided, so as to best serve participants and beneficiaries. Dennis?

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

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

MR. MASON: And yes, my name really is Kent Mason. And I'm a partner in the law firm of Davis & Harman. And I've already learned one thing I need to work on, my background here. I'm shamed by Allison and Dennis. I need to put Davis & Harman in my background somehow, but probably not for this call. I'm here today on behalf of the American Benefits Council. And, you know, like others -- like, you know, we'd like to thank you for holding this hearing and for the opportunity to testify.

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

And so if they're -- so essentially, our view is there should be no new conditions on qualifying as a QPAM. If there is conduct that the department feels is sort of a question, require that conduct to be disclosed to the plan sponsor, just so, just as Robin said, the plan sponsor can exercise its fiduciary expertise to determine whether to retain that investment manager. And I think part of it -- and I think I want to just emphasize one other point that came up in our discussions, and that is the prohibited transactions that are involved here, for which QPAM gives relief, are really completely benign transactions.

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

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

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

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

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

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

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

Same thing, really for the written ineligibility notices. Not illegal, and in fact, we were sort of very surprised that there was no notice and comment involved here. This was a very, sort of, you know -- you know, backdoor, you know, dark room determination. All of a sudden somebody could lose their QPAM status. No public discussion, no public hearing, nothing, just out of the blue. And again, if there's something that concerns the department, require disclosure of it so the plan sponsor can make its own fiduciary determination.

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

And I'll just very briefly mention the economic analysis. The economic analysis assumes that these agreements can be amended in one hour by the investment manager, and assumes explicitly that there will be no review by the plan sponsor. I think the answer really is, between the two, they will take hundreds of hours to negotiate, and it would be a fiduciary breach. Contrary to the economic analysis for the plan sponsor not to review the indemnification provision drafted by the investment manager.

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

Finally, you know, on the effective date two points. One is, you know, you essentially give us two months. I think -- you know, I think -- I think Alison may have said 18 months. I'm going to err on the side of 24 months, two years. It's what we've been hearing. This is how long -- if it stays as is, that's how long it would take us to -- to amend. One other thing. On the effective date, if there are any new disqualifying events, any disqualifying event that occurs before the effective date -- any new disqualifying event that occurs before the effective date should be disregarded. So, for example, if a non-prosecution agreement is entered into tomorrow and the effective date is two years from now, that non-prosecution agreement would be -- would not have any effect on the qualification of the QPAM.

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

Thank you.

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

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

MS. DIAMONTE: In our perspective on -- you know, we need to -- we would want to make the decision on whether we even had to wind down an asset manager. Because in many cases, you know, we wouldn't feel that that was necessary. And then if we did, it really would depend on -- the asset class on where it was in the defined benefit plan, the defined contribution plan -- on how long it would take to do that and in what cost-effective way; right? Because a lot of times when you're selling assets, you need to put on future as not to get out of the market. It's very complicated. And it can take a long time, or it can be done quickly depending on the asset class.

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

MR. HESSE: There may have been -- it may have been Allison that -- that mentioned this kind of relatedly. I can't remember if you -- if you said that you thought that new clients should also be able to be signed up during that period of time or not. Maybe -- maybe I misheard. New transactions and new accounts, I think is what I heard. I wasn't sure if that was something that you had -- you had mentioned or if I just misheard.

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

MS. DIAMONTE: Come up with an idea of why they would even want a QPAM to come up with new clients. You know, you can have a client that doesn't require QPAM, and then the investment manager can actually transition your assets to that new client. And that's the most cost-effective way to wind down. So they basically take on those positions. So there's a lot of nuances to this.

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

MS. DIAMONTE: Right.

MR. SIMMONS: And this is Dennis, before you jump in. Just so we put this into context, I know we're responding to specific questions on the wind down, but, you know, this -- and Robin, I'm sure you're going to chime in. This happens all the time in terms of, you know -- and there's a really thoughtful, methodical way to go through this with an investment manager. I just want to, you know, just put back into context the reason why this would -- might be happening is maybe some technical concern on the -- on the -- you know, the definition of QPAM as opposed to something substantive happening with the portfolio.

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

MS. DIAMONTE: Yeah, Dennis, you're absolutely right. I mean, we do not want to eliminate, fire, get rid of a manager, unless we really feel that we don't have any confidence in them anymore. Because it is a very cost-effective and timely process. And it really depends on -- depends, again, on the asset class and where -- and where this portfolio resides in the DB or the DC world. But typically, you would have to do an RFP or do some kind of a search for another manager if you didn't already have one sort of on the bench. And then once you do that, you have to negotiate on all types of investment management agreements with that manager. And then you seem to -- and sometimes you have to hire a transition manager.

And again, it depends on the asset class. You have to decide what you want to turn into cash, what types of assets you want to transfer sort of in kind to another manager, and what kind -- and there are sometimes even assets that stay -- have to stay on the manager's books for a very long period of time because they're not tradable anymore; right? So you can't actually make a market for it. So sometimes when we eliminate a manager, we have an account open for years to try to sort of sell off those last remaining few securities. So it's really time-intensive and can be very costly. Because if you have to sell out of a trade and then buy it somewhere else, you have to incur those round-trip transaction costs, which can be very expensive.

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

MS. DIAMONTE: Yes. I mean, absolutely, that is so important. Because, you know, we do do these. We lost confidence in a manager, we freeze their assets, and we transition them. You know, we do that, you know, often when we lose confidence. But we would never want to be forced to transition a manager that we have done complete due diligence on monitoring and feel extremely comfortable with.

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

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

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

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

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

MR. HAUSER: Can we stop there just for a moment, though? Because that really wasn't my question, I guess. I mean, the -- I mean, the question I have I suppose is -- I mean -- well, I mean, actually, let's just follow up on your question. So, I mean -- and the foreign convictions we've had -- have you seen this? I mean, I appreciate the hypothetical about the hostile foreign state, but is that what we've seen in the foreign convictions that have been issued? I think by and large they've been -- they've been species of price fixing, they've -- they've been -- I mean, the crimes that we've seen have been things like price fixing, you know, and Libor, foreign exchange transactions, corrupt practices kind of things. We have not seen the kind of hypotheticals you're talking about thus far.

MR. WALSH: Well, so I mean, I think the difficulty there is that the hypotheticals -- you know, we're not seeing the hypotheticals, but some of that's coming down to discretion. But just pivoting back to the current proposal, I think -- you know, we talked about lying department. I think when we looked at the current broadening of the scope, also, it raises some due process concerns that we find troubling. So it's tough to say, you know, should we scrap section I(g) in its entirety? But directionally, it seems like section YG is going -- I(g) is going in the wrong direction.

MR. HAUSER: If I could just say one more thing here, because I just want to -- I'm trying to probe the -- just what the position is that's being advocated here. I'm -- I certainly understand an argument that folks would like more process, you know, before they're -- they're disqualified. I understand an argument about, you know, some concerns about foreign convictions. But I guess, you know, if you put aside those issues for a moment and just say if, in fact, the entity engaged in this conduct, if that's been established in some fair way, is the -- is the position nevertheless that, you know, notwithstanding the prohibited transaction rules and notwithstanding the fact that we have, you know, conditions in this exemption in that, that really we should just defer to the plan fiduciaries to decide whether they want to continue dealing with these folks.

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

And the disruption and cost to plan participants and the plan for changing, it's a high burden. It's not just, you know, in the backroom, Department of Labor decides we -- you know, this guy hasn't been forthright with us, or to save money we have entered into a deferred prosecution agreement. Those are not justifications, and I think we can sort of and hopefully agree on those points. Now, is there a point at which it becomes egregious enough that -- yes, that there's a public policy interest in saying, you know, that maybe this this entity should be punished? We have not talked about that issue with our -- with our plan sponsors and we'd be happy to think about that more and supplement on -- you know, the record on that point. But I think this is tilted way too far against plan participants by taking a lot of sorts of things which are really not harmful and saying, we're going to -- because of these unharmful events, we're going to harm participants.

MR. HAUSER: The disqualification provisions -- and I don't mean to be argumentative, so please, by all means follow up, tell us what you think. But they're -- the things that are disqualifying, you know, that gets you to a point of ineligibility are intended to be egregious. So they're -- it's intentional violations, not inadvertent intentional violation.

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

MR. HAUSER: No, I understand, but -- you have a process issue. But I'm asking a question. I'm still where I started, which is assume that we've resolved your process issues about how the determination is made. Do you still have an issue even with saying that people are ineligible based on this kind of misconduct? On intentional -- intentional violations of it, systemic violations of the conditions of the exemption? Of embezzlement, fraudulent conversion, or misappropriation of funds? You know, all of the enumerated crimes there. I mean, assuming that we answered your process issues, is it still the case that the position you all are taking is that even then, these things should not be disqualifying? I mean, and what -- what -- why are these things not egregious enough?

MR. WALSH: So, I mean --

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

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

MR. WALSH: Can I chime in here? I

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

MR. MASON: I agree completely, Kevin.

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

MS. DIAMONTE: Tim, let me just answer your question from my perspective; right? Because we've had -- we've had instances over the years where there was maybe egregious behavior and -- you know, or things like an entire team lifts out of the investment management firm; right? And we are like, okay, we need to get rid of this manager; right? So if, however, our manager or their team or their affiliate is involved in embezzling or any of those egregious crimes, absolutely we would want to terminate and wind down that manager. However, take Goldman Sachs or JP Morgan. And let's just suppose that they had a foreign subsidiary that was in Malaysia that got convicted of embezzlement. I definitely do not want to have my U.S. based fixed income portfolio that's a billion dollars and, you know, long corporate credit that is so expensive to unwind and have to unwind that.

So that's -- that's sort of my concern. My concern is we would get on the phone with JP Morgan, in my example, understand why there was embezzlement, who was it, what are the controls, what are the compliance issues, what are the fixes that they're going to do to make sure that doesn't happen again? And if we're satisfied with all that, then we want them to continue, in my example, this U.S. fixed income portfolio that had nothing to do with the team, the management, the practices of that portfolio. And the way that I read it, that's what I would be concerned about. That I would have to do that because of this rule. So I think -- does that make sense?

MR. HAUSER: I understand what you're saying, certainly. But I mean, I guess -- I guess a question I have here is -- is, I mean, is it your expectation that each -- each fiduciary for each of the plans that are dealing with Goldman Sachs would essentially be engaging in that -- that same exercise in a circumstance where you have the foreign affiliate engaging and, you know, fairly significant criminal conduct that may or may not be a reflection of what the culture is? And what would be the cost associated with having each of those investment managers doing the -- you know, each of those fiduciaries doing it system-wide as opposed to essentially saying to that entity, look, you no longer can just rely on the QPAM exemption as a matter of routine.

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

MS. DIAMONTE: Well, Tim, in I should say, my perspective, I think that's normal fiduciary duties. We're constantly monitoring these managers for behavior and compliance, and we have questionnaires and annual due diligence and -- and contracts that they need to report these types of incidents. So it's much easier for me to get on the phone, get immediate -- you know, immediate access to this and make a determination on whether it has to do with my own investment portfolio. If these were frozen and I had to wait for the government to determine that, that could really sort of interrupt my investment process and my assets.

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

MR. WALSH: And I think your question was, you know, which is more burdensome for plan -- for plan sponsors? And I mean, I think if we look at it, you know, plan sponsors are already going to have experience with the manager. They're going to have a new piece of information and they're going to be incorporating that into their ongoing, you know, monitoring framework.

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

MR. HAUSER: Yeah. To me I guess, I mean -- and we'll move off this topic and I think probably I've spent more time on it than we really needed to. But to me an important question here is the egregiousness of these particular disqualifying items. And if you think they're not sufficiently egregious, you know -- I mean, my presumption is that these are not routine things. I would not expect the investment managers that you deal with on a routine basis and are comfortable dealing with to kind of routinely, you know, intentionally violate the conditions of the exemption engagement system, systemic violations of the exemption -- or commit the enumerated felonies here. And assuming that's the case, the question is kind of, well, when that does happen, you know, on a less-than-routine basis, what should be the consequences?

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

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

And they're going to want to renegotiate other provisions as well. But I wanted to make sure I've got that right. And then the second thing I wanted to understand is, what are the current practices with respect to renegotiations? How often are these contracts renegotiated? To what extent are changes in terms such as fees handled by essentially, defaults? You know, notice of a change in term subject to a right to opt out, but otherwise you'd default in. And like that, if you could just explain a little bit of the mechanics of how these, the contracting process works, it'd probably be helpful for us. And maybe, Robin, I'll direct that to you in the first instance.

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

So you'd open up the contract. Or

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

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

MR. HAUSER: Yep. And is it the case, then for, in your agreements with your QPAMs and your investment managers, that there is no such thing as their sending you a -- you know, the equivalent of, like I get at home, you know, a rider saying I get -- you know, all my insurance contracts I'm -- every quarter I'll get -- it seems like I get something that says, hey, good news, we changed your contract. They don't -- they don't look to negotiate with me. They don't -- they don't -- we don't have discussions.

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

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

MR. SIMMONS: I tried that. But obviously, the indemnification I mean, you know, indemnification is at the core of, you know, if there's -- if there's a dispute and it can't not, you know, have some impact on other aspects of the overall relationship between the fiduciary and the investment manager. So I don't think, even if maybe they have the capability to just send a rider, that most fiduciaries would just sign off and say, fine.

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

MR. HAUSER: So I guess another -- I'm going to stop asking questions, but it -- just another thing you might want to supplement with. So we have done a number of individual QPAM exemptions. You know, granting relief after QPAMs or affiliates have gotten in significant criminal trouble. And those exemptions have had conditions for these kind of indemnification arrangements that look just like this one. And the -- life proceeded, contracts were executed, people moved on. But to the extent you think that, you know, the consequences were more severe than they looked -- looked like from the outside, from the plan's perspective, it'd be good to hear about that. It'd be good to hear generally, well, how mechanically did that happen in those cases, in all those individual exceptions where we've imposed this condition. And people did, in fact, continue to engage with the same customers they had before. And did it result in a cost increase, did it result in changes and other conditions? What were the consequences? Robin, if you dealt with Goldman Sachs, what -- what happened? You have experience with that, and I don't. Did you -- did your contract expire? Did -- did your fees go up?

MS. DIAMONTE: Yes.

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

do you know?

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

MR. HAUSER: Yeah.

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

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

MS. DIAMONTE: No, no.

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

MR. HESSE: We have pretty much reached the end of time for this panel. In the spirit of leaving you with one other question to possibly supplement the record with Allison, I think you had mentioned, you know, target-date funds and QDIAs. I was just hoping that there could be some additional supplementation with respect to how the involvement of the QPAM with respect to them being engaged to be a part of that from the plan sponsor perspective, how that occurs so that we kind of have a fuller picture of that. That's kind of the last thing that I have to leave folks with. So unless anyone else --

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

MR. HESSE: Yeah.

MR. MOTTA: Yeah, can I chime in with one quick one? I'd just like to hear a little bit more, maybe in supplemental information. It seems to me that the essential premise of the QPAM exemption is the integrity of the parties that control the QPAM. And it seems like I'm hearing a lot of, like, the plan sponsor is the one that, you know, is best able to determine the integrity of the QPAM, or the parties that control the QPAM based on its own experience. It just -- it just seems at odds to me with the essential premise of the exemption. It's the department's expectation that the QPAM and those parties act with integrity, not the plan sponsor to look at its own facts and decide whether the QPAM acted with integrity. So if you -- if someone could provide that and supplemental information, that would be helpful.

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

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

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

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

MR. FRANK: Yes.

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

MR. FRANK: Okay. Just a second. Thank you for the floor. My name is Andreas Frank. In my first life, I was a banker with Goldman Sachs and HSBC. As Goldman Sachs was mentioned in the conversation before, you know, I was with Goldman when it was a family business. Completely different outset than today. For more than 25 years, I served as an AML CFT. That means anti-money laundering, countering the financial terror expert, for various institutions, such as the Bundestag, the Council of Europe, and the European Parliament.

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

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

Profit margin in illicit -- in illicit financial transaction tend to be a multiple of the legal business. Law-abiding banks are clearly at a competitive disadvantage. Therefore the legal financial sector should support better regulation also at this hearing. The existing regulatory system for QPAMs exemptions clearly failed. In 2012, Pictet, Switzerland's fourth largest bank, announced that it is under investigation by the DOJ. In 2022 Pictet is still under investigation under -- according to the Swiss news.

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

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

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

MR. HENRY: James Henry, I'm an economist and lawyer, former chief economist at McKinsey and Company. I've had a long history of looking at banks and financial institutions in general around the planet. I listened to the earlier panel criticizing your proposal, which I and our panel more than support, we really welcome. And the hard thing for me was to figure out why they wouldn't want to see QPAM regulation abolished. I mean, essentially they're saying that we could do without any regulation in this area at all.

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

You know, we have a very powerful industry on our hands. And $132 trillion of assets. About 71 trillion managed by the top 30 firms. And when we go down the list of those companies, I was involved in this 2015 hearing in which we asked for you to deny Credit Suisse a waiver. Instead, the Department of Labor decided to give them a five-year waiver, and then they extended that in 2019. We're seeing the consequences of that in just the last two years. Credit Suisse pled guilty in Mozambique, in the United -- in the United -- to defrauding Mozambique in the Justice Department case in November 2021.

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

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

The third thing I'm concerned about here in addition to the list, in addition to targeting this serious misconduct and making sure that people in the industry understand that it will be taken seriously, is the budget for the DOL to enforce this activity. I would -- I would hope that you would, in your considerations here, let us know what you have in mind for requirements, so we can go to work and defend the kind of increased resources that I see the Department of Labor needing to make this proposal actually effective.

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

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

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

MR. HENRY: Yes. John?

MR. MORJANOFF: On the agenda?

MR. HENRY: Okay. Doctor --

MR. CHRISTENSEN: Go ahead.

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

There was obstruction of criminal investigations, lying to the regulator, evidence destruction, market manipulation, systematically falsifying documentation, and conducting business without a license. This pattern of wrongdoing has repeated multiple times since then. The CS division of Japan changed its name twice, finally to Credit Suisse International, or CSI. Remember that name, it will repeat.

Next year, Credit Suisse in India was caught in market manipulation. It confessed to a fraudulent scheme of synchronized, circular, and fictitious trades, which created artificial volumes, markets, and share prices. It was convicted from trading for two years, but the appeals tribunal stated this was unjustifiably lenient. This emphasizes that foreign convictions are more likely to be lenient, not severe. Next year, Credit Suisse in Switzerland was caught red-handed in market manipulation again, plus embezzlement and fraud for CST and case. Just like in the previous cases, it initially denied any wrongdoing. However, this time it was on home ground. There was a criminal investigation. The prosecutor asked for the documents, but CS simply refused to produce the documents or destroyed documents, hid witnesses, lied, and even used bank secrecy to conceal its participation.

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

I met with CS' legal department several times. They refused to look at the documents, and even hacked into our website. I told them I knew what went on and that they had stolen the honest savings of thousands of hard-working taxpayers. I shared my investigation with every major law enforcement agency and regulator. That is why criminal bank and QPAM Credit Suisse is in such a mess. There is worse to come for it, because I know their books are not true. Last quarter, they wrote down four billion dollars. They were deferred tax assets which have been logged as hard capital. Highest quality CET1 core capital. That was absurd and they knew it.

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

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

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

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

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

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

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

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

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

Share markets are not realistic. People don't own the shares. It's all done on leverage finance and we're moving from an era of low-interest debt to high-interest debt. The traditional outcome is what we could call stagflation with certainty. There's not even that much certainty these days. The only certainty is a bad result is coming. And unless we start to clean up our house, try and do the best we can to get rid of the criminal money out of the pension funds so that they can stay stable and can survive the next financial crisis, then we're going to be in a lot of trouble. Thank you.

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

MR. CHIRSTENSEN: Thank you, and good morning. And thank you for inviting me to submit to this hearing. My name is John Christensen. I'm attending this hearing from London, which is where I live and work. I'm the former chief executive of the -- and chair of the Board of the Tax Justice Network, which is an NGO established to monitor and campaign for better regulation of financial services, particularly cross-border financial services. That's why I think that my experience is pertinent to this hearing. I practice as both a forensic auditor and an economist. And in the form of capacity, I laid on a number of major investigations into the banking fraud, including an investigation into an offshore subsidiary of Swiss banking giant UBS. And that's -- that investigation, after many years of denial of any malfeasance or wrongdoing, led to the subsidiary bank in question, which is called Cantrade Bank, pleading guilty to criminal recklessness in its treatment of its clients' affairs.

I also work as a documentary filmmaker, and Jim earlier talked about HSBC, one of the films I made with a French team -- French, sorry, French, German teams, called -- and this gives -- the title gives you the -- gives -- tells you exactly what it does. The film's title was HSBC: the Gangsters of Finance, and that film explores the role that HSBC played over many years and in many countries in facilitating money laundering and tax evasion on a global scale. And that included in the United States, where HSBC was investigated by the Department of Justice and paid a record out of court settlement.

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

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

But I'm thinking in particular of the protracted periods of competitive deregulation that we've seen globally in the finance industry in the 1980s and 1990s, which inexorably led to the 2008 banking collapse. And I'm thinking that the lessons that were learned coming out of that collapse have subsequently been unlearned in recent years. And the lobbyists are back out there saying, we don't recognize the need for regulation or, indeed, tight compliance procedures because, you know, we're doing fine at the moment. But as Paul just said, we are -- we are facing a period where -- of almost unrivaled -- I think the fragility of the financial sector is much, much worse than it was in the build up to the 2008 crisis.

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

For bankers, competitiveness involves

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

So for bankers, competitiveness translates into LAX, know-your-client regimes, weak compliance with anti-money laundering regimes, lower capital adequacy ratios, and inevitably, state-funded bailouts when the poo hits the fan, as it does all too regularly. And I agree with Paul, by the way. I think we're heading for the mother and father of all crises. But far too often, when banks are caught out in financial frauds or assisting clients with tax cheating or other financial crimes, they've wriggled free from the consequences by settling out of court in order to avoid conviction and consequential reputational harm.

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

Earlier this week, Senior Bank of England officials stated that the chaos facing pension funds in London in late September -- some of you might have heard about the so-called mini budget crisis coming out of the government led by Prime Minister Liz Truss. That crisis for the pension sector arose from a liquidity crisis caused by overuse of leverage liability driven investment strategies. And these are widely used within the pension industry as a hedging mechanism. Now, as much as anything, that -- the chaos which came out of the mini budget pose an existential threat to some of the pension funds in operating out of London. And in many cases, they were saved by a huge, truly massive, œ65 billion intervention by the Bank of England.

But the chaos can be attributed to poor risk management, lack of transparency and clarity about how the risks interlink across different financial institutions, and that led to an inability to adequately and comprehensively stress test the risk exposures of all the players, whether they were pension funds or banks and non-bank sector organizations. I think there are very, very important lessons to be learned, but I've heard some of the interventions earlier from -- in the previous session. It struck me as being complacent to a very high degree. So I think that the dynamic of competitive deregulation dangerously undermines the interests of pension fund holders and other savers.

And with this in mind, I think it's important -- and I'd like to strongly endorse some of the recommendations that have been made. I strongly endorse that financial services providers wanting QPAM status should notify the DOL. And I think this should be an annual notification of its reliance on QPAM exemption. And I think the DOL should maintain an online listing of all the recognized QPAM exemptions. But I'd go further. I suggest that these exemptions are independently reviewed by experts to ensure that the exempted parties remain eligible for their QPAM status. And as part of that annual notification that I recommend, I think the principals of any exempted entities should sign a declaration stating that they have not -- they have not engaged in any prohibited misconduct that might render them ineligible due to continued -- ineligible to continue to hold QPAM status. And I think that that declaration should not be exclusive to their activities within the U.S. It should be global.

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

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

MR. CHRISTENSEN: Yeah, my third point would be, more attention needs to be paid to the role of whistleblowers in flagging up concerns about misconduct in spaces and criminality. I know from my own experience that banks, fund managers, and pension funds, they're kind of prone to suppressing internal dissent to the extent that whistleblowers put their careers and their livelihoods at risk by whistleblowing. And they need to be protected from that. And I think this needs to be built into -- one, into the safeguards that we put when dealing with QPAM. Well, thank you for that time and I look forward to questions.

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

MR. MORJANOFF: I'd say absolutely

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

MR. HENRY: I think that the Department of Labor has a chance to really aggregate its experience in this area, and to proactively identify the kind of concerns and misbehavior that ordinary pension fund managers' funds are not in a -- in a position to do with this kind of decentralized approach. I would call that legalized dueling, effectively. You know, it's -- it's just naive. And, you know, this is not a matter where we don't have history. History tells us that Credit Suisse is a glaring example, but there are many others. You know this -- it's not as if the DOL has created a huge burden with this kind of concern.

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

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

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

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

MR. HENRY: I think that the idea of having -- you know, the SEC has had a success in terms of having the industry fund this kind of enforcement program. And, you know, it does that partly with a kind of financial transactions tax that most people don't know about. But secondly, you know, the idea of actually having the misbehavior paid for by those who are caught doing it is not a bad suggestion. But I think the idea of having levels of QPAM status, like in other words, let's have trial periods where people come into the program and they're sort of on probation, you know, but there is some notion that you're -- good behavior will be rewarded.

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

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

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

MR. HENRY: Our overall point here is that some of these organizations that we're dealing with are very large and very, very difficult to -- to manage. They have internal cultures which I would describe, having worked at several major financial institutions, as a -- as a kind of higher immorality. You know, once you're inside, it's very hard not to comply, not to go along to complain. And it's important, for that reason, to have the Department of Labor able to have an independent perspective on -- on these matters. So --

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

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

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

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

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

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

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

They say it's the lack of compliance and the lack of enforcement that drives the race to the bottom in standards across the sector. So their personal view -- not the institutional view, but the personal view -- was they preferred to have stronger standards and to have strong compliance and enforcement of those standards. All of that was written up in a book about financial fraud published in 2017.

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

You know, we're outside experts, we don't get paid for this. All of the people on the panel this morning, I think, we're -- we're there by virtue of working for their industry. And you know, I'm -- I'm not questioning their good faith, but I think that you have to have an outside analysis of the impact of these regulations and not just listen to the industry. Because you know, the industry has a history of buying influence. And you know, not all the players that we're talking about can be trusted.

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

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

You know, that's just --

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

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

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

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

And when UBS heard that the second divisional court in New York was going to go for it and prosecute them in New York, UBS said, no, we would be -- we would prefer to be prosecuted in Jersey. So it's the exact opposite. And I kind of thought, where do these people come from when they think -- and of course, the Jersey Court was particularly lenient and UBS pleaded guilty to criminal recklessness and had a final four million, which was peanuts, whereas New York courts would have given a very much more severe, I think, fine, and might well have looked twice at the license arrangements with UBS. So I honestly can't imagine where that comment came from. My experience suggests it's the opposite that happens.

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

And before we give folks that pass, we -- we want to make sure that they're the kind of institutions that can be trusted to act in a way that's protective of the plan participant's interests and isn't -- isn't going to make us regret the fact that they -- they were given a pass from -- from rules that were intended to protect plan participants. But our focus is entirely on what is the interest of plans. You know, we're not -- we're not here to -- our job is not to second-guess whether prosecutors impose the right penalties, whether other financial regulators, you know, got the right kind of recoveries, or to kind of supplement the criminal provisions or anything else. It's strictly about protecting plans.

And I think a lot of the arguments -- yeah, I mean, obviously, they're focused on very specific provisions. But a lot of the argument of the -- of the prior panel was, in their view at least, however well-intentioned we might be in this exemption, we are in the end going to impose some significant additional costs on plans. And -- well, first on the investment managers, but then secondarily on the plans without necessarily getting much benefit. In particular, they're concerned about the indemnification provisions. And liken them -- yeah, that's kind of what I'm looking for. I mean, what -- how do you think -- how do you think that?

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

MR. HAUSER: Appreciate it.

MR. HENRY: We're actually trying to figure out what your role should be, short of the libertarian proposal that you be abolished. And I think you were suggesting, in your very astute questions to that panel this morning, that, look, we are talking about highly -- you know, a thin slice of extreme behavior by institutions that have engaged in systematic recurrent behavior. That's a pretty -- pretty clear. Now, I would submit that in the case of Credit Suisse, we also have a dramatic example of where the Department of Labor could have acted earlier, to be much stricter than it was. And we were right. I hate to say that. It gives me no -- no satisfaction whatsoever to say that we warned you. We told you so in January 2015. Ralph Nader, myself, Andreas, and Dr. Paul were all on that call. And we were there.

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

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

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

MR. HAUSER: And how about with -- with respect to, you know, deferred prosecution agreements and non-prosecution agreements in particular? The argument is that, you know, criminal liability, at least in those cases, remains to be proven whether anybody did anything egregious. And so, I guess the argument is that maybe a notice should go out to the plans and the participants, and they should be informed of the -- of the facts, but it shouldn't be kind of an automatic disqualification from being able to take advantage of the general QPAM exemption, just as a matter of fairness, as I was hearing the argument. Do you have -- do you have thoughts on that?

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

So I don't think it's any particular deferred prosecution agreement that we're talking about paying attention to that would set -- set off, you know, some kind of response by DOL. We're talking about the collective accumulated pattern that some of these institutions have engaged in over time. You know, JP Morgan, 66 such agreements. So when it begins to add up and there's -- it's more than just an occasional rogue trader in London, apologies to John. The -- it's always in London, isn't it, John? The City of London has its found history here.

MR. CHRISTENSEN: Yep.

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

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

And look, I was kind of shocked to the core about the attitude and the lack of competence. I'll say it quite bluntly that -- that they took what was -- what you regard as an adversarial approach to what is really an inquisitorial inquiry. We're trying to find the facts here. We don't need people lying and making things up.

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

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

MR. CHRISTENSEN: Yeah. Paul, also, you know, I spoke about having a requirement to make an annual declaration, because in too many cases when it comes to declaring prohibited misconduct or whatever information, materially misleading information is provided, or simply materially important information is withheld from that -- from the DOL, which -- or whichever authority is the reporting authority. It's the withholding of information and the systemic pattern of the -- the pattern of not providing information about systemic failures elsewhere or systemic misconduct elsewhere that should be of concern to the DOL.

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

MR. MORJANOFF: See, there's another more severe danger, and I don't know how you're going to tackle it. And that is the highly complex financial products that are whizzed around the pension funds which I -- you could almost say no one understands them except the creators, and some of them are likely to be, you know, deceptive or illegal or fraudulent or whatever. But they're just too complicated to pull apart. And the funds themselves don't understand them. And while things are stable, the stable economy, it's fine, but what they do is they calculate it to protect the issuer in that the cost is borne on the -- on the recipient. That is the pension fund.

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

I don't know what you're going to do about it, but from my first thought, you know, somehow you got to sense the honesty of the corporation and give yourself some sort of honesty rating to -- to start to work out a strategy to deal with it. Because in the next financial crisis, these are the things that are likely to collapse. And people have all sorts of explanations later on, but the --

MR. HENRY: Also --

MR. MORJANOFF: Sorry?

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

But what is going to be necessary in the next five years to protect against some of these, you know, sort of innovations that are just percolating across the globe? And I don't think they're prepared. I don't know that this -- this set of proposals is great. It's a good start. But it's, like, 200,000 tax lawyers at the bottom of the ocean. It's just a good start.

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

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

MR. MORJANOFF: Yeah, I've thought about this problem quite a bit. And look, let's look -- take an analogy in the normal world of justice. Our -- our world of justice is very imperfect. U.S. has more people in jail per capita than almost anyone else. It's not very effective. But on the other hand, if you -- if you didn't put people in jail, you're liable to have a worse situation still. Scandinavian countries have a better system where they keep people out of jail, but they have a society that's way more friendly to each other. They don't have the entrenched racist and class problems that the USA have, and they don't have guns.

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

MR. HENRY: But have they been able to insulate their QPAMs? That's the point of the question, I think.

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

MR. HENRY: So I think the idea is that we would have a presumption that would be rebuttable, and, you know, that's a tricky fact question and how you get information in a particular case. But in principle, there could be, hypothetically, some QPAM that was insulated. You know, it just depends. But I think what we're saying, generally speaking, is in the case of really serious systemic misbehavior like Credit Suisse, that you usually can tell from a slight distance that this institution is not trustworthy. And you look beyond any one particular set of facts. And, you know, I think the -- whether they've structured their QPAM one -- one way or another is just one piece of evidence.

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

Within any international financial

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

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

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

MR. MOTTA: I'm good at those.

MR. HENRY: In the abstract. You're -- yeah, you're good at those. So -- by the way, I really do want to say that this is -- it is great that the Department of Labor is holding this hearing and that you are actually entertaining -- we don't expect to win. We expect the same result, basically, in 2015 in terms of reform. I hope you're able to make all this happen, but -- it would be a great victory, but we're up against some very powerful opponents, and they're technical experts. But it is terrific to see you're at least asking the right questions. What is -- fundamentally, what value added does the Department of Labor QPAM regime provide, and how are we going to reinvent ourselves to be useful to all of these clients of ours? Our customers, not just the -- ultimately the pension fund recipients? So that's -- that's the question. And the rest of the world now depends on the United States to get this right, because of these top 30 funds, asset managers, you know, 24 of them are U.S. based. The role of the dollar here has been a big factor in that, in the growth of the -- tremendous growth of U.S. based assets. And our, you know, very low interest rate policy. But I think we're now going to be expected on the part of the rest of the world to look to us to set standards like we did in 1977 with the Foreign Corrupt Practices Act in this tricky area of, how do you protect pension funds when you have corporate misbehavior? Good luck.

MR. CHRISTENSEN: Hear, hear.

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

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

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

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

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

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

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

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

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

MR. MORJANOFF: Thank you.

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

MR. HESSE: It's the time listed for

the Insured Retirement Institute, so please begin, Scott.

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

When I look at all the regulations, exemptions, and guidance the department has issued under ERISA since 1974, the QPAM exemption is one of the most important. If you ask me, it's one of your greatest hits. The QPAM exemption provides an efficient means for asset managers to comply with the broad sweeping party in interest prohibited transaction provisions of section 406(a) of ERISA. I want to emphasize that the QPAM exemption is for and benefits plans and their participants and beneficiaries as much as, if not more, than asset managers themselves. It allows transactions with the plan's parties in interest. It does not allow asset managers to engage in transactions where they have a conflict of interest that could affect their best judgment as fiduciaries.

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

Having to navigate the prohibited transaction rules without the QPAM exemption would significantly -- would significantly increase -- increase the resources and costs a plan sponsor would need to administer an ERISA plan. Some of these costs could be charged directly to the plan itself, and many investment opportunities would have to be foregone. Any changes that department makes to the QPAM exemption will therefore affect plans and their participants and beneficiaries as much as they do asset managers.

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

First, the proposed changes would

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

An example is underwritings of securities, where the offering might be planned, at least in part, by a party in interest broker dealer acting as an underwriter for the offering. QPAMs commonly used subadvisors, and we are concerned how they would be able to continue to do so if the requirement is simply that the QPAMs have sole responsibility -- sole responsibility. Similarly, the requirement that the QPAM agree not to restrict a plan's ability to withdraw or terminate in connection with the QPAM's disqualification could also make real estate and private equity funds unavailable to plans.

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

Second, the proposed amendments would increase the legal risk and costs associated with serving as a QPAM to an unwarranted degree. The department has routinely recognized that the costs of transitioning from one asset manager to another as a result of QPAM disqualification is significant for one plan. The department is now proposing to require that a disqualified QPAM cover this cost for all of its clients -- all of its client plans, of which there may be many, especially if the QPAM manages a fund. No QPAM expects to be disqualified, but this is an underlying risk that QPAMs would have to account for, either in their decision to continue servicing the plan market or through the fees that they charge to plans. In addition to the substance of that risk, it would not be possible for QPAMs to amend all of their agreements within the 60-day time frame the amendments would appear to require.

Third, the proposed changes would unnecessarily diminish levels of confidence by plans and the uninterrupted provision of investment management services. We believe that the current disqualification provisions are overbroad by allowing QPAMs to be disqualified in situations where there may not be any risk of harm to plans. For example, a conviction could disqualify a QPAM or the person or entity that is convicted only owns an indirect five percent ownership interest in the QPAM and does not play any role in the management of the QPAM or in its asset management activities.

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

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

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

If the department has specific

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

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

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

My testimony today is going to reflect the impact that the proposed changes to the QPAM requirements will have on all these entities. But before I go into some of our recommendations, one of the things that I wanted to do is kind of take us back to the basics. When I was doing my research, I was, you know, really looking. Like, why -- why did we -- why did the Department of Labor issue this in 1984? And I found a really good quotation from the preamble to the individual exemption for BNP that was issued in 2015. I'm just going to read the quote, because I think this will kind of set the landscape and help get us back to why we're here today and the importance of it.

So I quote, "PTE 84-14 was granted based on an effort to improve the administration of the prohibited transaction rules of ERISA, because the prohibited transaction rules sweep very broadly, and in some circumstances could work to prevent beneficial transactions. For example, large employers and funds necessarily engage in a wide range of transactions with parties in interest that pose little danger to plan participants. For example, all of the different service providers to plans are technically parties in interest. Accordingly, Congress gave the department authority to issue exemptions from the broad reach of the prohibited transaction rules, where it has determined that such exemptions are in the interest of and protective of affected plans and the participants and beneficiaries thereof, as well as administrative feasible.

And prohibited transaction exemption 84-14 is just one such exemption. Primarily, PTE 84-14 simply permits QPAMs to engage in various arm-lengths transactions with parties and interests and obviates the need to undertake time-consuming compliance checks for parties in interest, forego investment opportunities, or seek an individual exemption for the department for each transaction. The conditions of the exemption were designed to ensure that the transactions covered there and are protective of and beneficial to affected plans."

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

But according to Eversheds Sutherland's paper, there were 18 individual QPAM PTEs that were granted since 1997 based on losing the class status because of the criminal convictions. There were 13 from the five-year period from 2016 to 2021. However, these applied just to 10 distinct asset managers. It wasn't 13 asset managers, it was 10. And so we looked at it, and that was about an average of two per year. So, assuming DOL's assessment in the preamble of the QPAM proposed amendment is correct, that there are about 1,600 -- 1,600 -- 616 QPAMs, this amounts to .32 percent of QPAMs being disqualified per year. Which, when I really looked at it, didn't really seem like enough to merit a wholesale change the system.

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

And finally, before I go into some of

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

And finally, I think it's important to assume that DOL shouldn't assume that everyone is a bad actor who's going to lose their QPAM status. As people have talked about today, this status is very important to people. And it's what -- something that people really strive to protect. No one is trying to lose their QPAM status. So instead of trying to base on the rationale of why we need to update the current QPAM status on, well, the individual class exemptions, we should need to look at it differently. Because the individual class exemptions are because of conduct that occurred that made them lose their exemption. So to place those conditions on an actor who has not done any of those seems kind of inherently unfair.

So now I want to go on to a few of our recommendations. I'm not going to spend a lot of time on the first one. I think that you've heard quite a bit from everyone else. It's the issue of the sole discretion. We have more detail in our written testimony. We are concerned with some of the language in there, and it's the same language that everyone else has earlier talked about, that no relief is provided under the exemption for any transactions then plan negotiated or initiated by a party in interest, et cetera, et cetera. We also were concerned that this language will render the QPAM class exemption meaningless for both common transactions and situations that their unique investment needs, which will result in many asset managers actually excluding ERISA plan clients from beneficial investments. Which, as I talked about at the very beginning, was the very reason that DOL issued this to begin with in 1984.

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

Our view is if a plan or a plan sponsor wants to pay for an increased cost, such as increased assurances through increased indemnity, that should be up to the plan sponsor to decide and negotiate it, not have it dictated by Department of Labor. After all, it's the fiduciary who needs to make this decision, and we should let the fiduciaries do their job. On another aspect, there are three new requirements that must be in the written management agreement that -- it's one, the QPAM agrees not to restrict the plan from terminating, withdrawing from the arrangement, will not impose any fees, charge -- charges or penalties for doing so with certain exceptions, will not employ or knowingly engage in any individual participant in the conduct that's subject to the criminal conviction or written ineligible notice.

Generally, we don't have a problem with these provisions, as you can go back and look at our written testimony. We do suggest a few little tweaks. But we don't understand why these need to be part of the written contract, and instead just part of the QPAM exemption themselves. And that's what we would suggest on there. And I will close out, this kind of section of it is with respect to the indemnity. We suggest that these provisions be deleted in their entirety and instead, as many other people have suggested, leave that to the parties to negotiate.

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

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

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

MR. ORINGER: My name is Andrew Oringer. I'm a partner at Dechert, and chair emeritus of Dechert's ERISA group. I know from interactions with the department the extent to which the department wants and values comments from the market generally and takes them so seriously. And I greatly appreciate this opportunity to comment on the department's efforts to amend the QPAM exemption. And thank you for that. Steve and I have many years of experience representing plan sponsors, other plan fiduciaries, plan managers, transaction counterparties, and financial institutions generally, that give us multiple perspectives that will help -- that -- that we really think will be helpful to the department, and we certainly hope so.

We see a lot, and we see it from many different angles. And we see the QPAM exemption as a critical one in that it permits transactions to go forward without regard to the kind of transaction at issue and without regard to the specific form of the investment vehicle that is investing in the plan assets. This one-two punch of covering a broad range of transactions and not requiring any particular investment structure helps to make the QPAM exemption a real go-to exemption for a variety of managers engaging in a variety of investments. Our comment letter contains our detailed provision-by-provision comments. I wanted to use my brief time here to focus on several high-level contextual points before turning it over to Steve.

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

Now, the department's efforts here to amend the exemption appear to have centered, initially, at least, on concerns associated with the anti-criminal provision of section I(g). Based on comments by the department and department personnel in connection with the release of the proposal, it seems to me that the department now sees reason to focus on the integrity of managers that utilize the QPAM exemption. The result, then, is that the department now is proposing to expand the scope of section I(g) quite significantly. This focus on integrity seems to stem in large part from a perception by the department that QPAMs are out there presenting themselves as being the gold standard of fiduciaries by virtue of their QPAM status. That is not my experience.

Rather, my experience is that managers present the QPAM exemption as being the gold standard of exemptions. And that is because of the broad usability of the exemption I mentioned earlier, both in terms of the generally unlimited breadth of covered transactions and in terms of the lack of a need to fit within the organizational structures that are contemplated by other narrower investment-based exemptions. Stated another way, I see the focus by managers as being on the broad and developed utility of the exemption, not on somehow presenting QPAM qualification as an indicator that the manager itself is operating on some kind of a higher plane.

As a result, I would respectfully suggest that a number of the changes being proposed to ramp up the exemption's integrity-type requirements go beyond what is necessary to ensure independence and freedom from undue influence, and indeed, may significantly dislocate the market with additional administrative requirements. The proposals, I think, overshoot the mark, so to speak. I am concerned that managers will be increasingly disqualified from being able to use the exemption and that some managers may turn to more cumbersome and less efficient ways to get to the -- to get the transactions done, to the detriment, really, of all.

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

So to sum up, I believe that it raises fundamental fiduciary requirements, together with existing conditions in section I(g), are sufficient for these purposes. For decades, we've had a critical and workable exemption that does precisely what the department intended, allowing plans to benefit from a broad range of investment opportunities in a manner that is both advantageous to and protective of plans and their participants. There's always room for touching up around the edges, but I think that we don't need the basic changes that may have an uncertain -- an uncertain impact that can lead to unintended consequences to the possible detriment of all. Steve is now going to expand a bit on some of these points and hit upon a number of specific provisions. Steve, over to you.

MR. RABITZ: Thanks, Drew. My name is Steve Rabitz, and I'm co-chair of Dechert LLP's ERISA team. As Drew indicated, in our experience, the QPAM exemption is valued because of its functional utility, not because it represents some imprimatur of excellence. And there's a reason for that. Section 406(a)'s prohibited transaction rules are not focused on the QPAM's behavior. And likewise, neither is the QPAM exemption. Instead, it's about protecting plans from the other side of the transaction, from the counterparties, the parties in interests with whom the plan transacts.

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

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

Second, while I recognize that the

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

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

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

To be clear, QPAMs are one thing, and we agree that covered convictions at certain affiliates would also merit disqualification. But disqualification by attenuated association is not in plans' interests. On this last point, I recognize that the existing exemption casts a wide net in defining affiliates. But I see an opportunity for the department to improve upon the exemption. When deciding which affiliates' criminal convictions count for this purpose, the department should look only to those that actually have the ability to oversee or otherwise influence the QPAM, or close affiliates engaged in the pension management business.

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

In addition to those five points, I just wanted to mention two others. As you know, the department currently has a separate proposal to change how applicants can obtain individual prohibited transaction relief. I think it's important for the QPAM proposal be viewed in concert with that one, especially if the application procedures are ultimately finalized in a way that makes it more difficult for plans to obtain individual relief, including QPAM individual relief.

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

MR. HESSE: Thank you both so much. So now time for some Q&A. So you know, I do have some -- some questions related to an issue that we didn't get into on either -- either of the earlier panels, and I think it was (audio interference) here. I welcome others that have provided testimony to supplement the record on this. But I'm very curious about the subadvisor relationship with respect to a QPAM. I think how I understand, at least the general way that it was presented to us and in comment letters, is that there's effectively a QPAM kind of sitting at the top managing assets. And they may engage subadvisors to assist them in managing the assets.

And I'm -- I'm very curious on a few different issues. One is, with respect to what the subadvisors are doing, how much involvement or direct oversight does the QPAM entity have? Somewhat related -- related to that is, are the subadvisors themselves purporting or representing that they are QPAMs? And then I think the last related thing is, with respect to the plan sponsors that are hiring the QPAMs, you know, how -- how much of the sub-advising are they aware of or approving themselves? Is the QPAM utilizing discretion without some pre-approval by the plan sponsor to engage these subadvisors and these types of relationships? So I'm hoping that, you know, some -- some of you can provide some additional insight on -- on how those arrangements are set up.

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

You know, in the previous panel, someone mentioned the target-date fund. And I'm not saying this is what they meant, but there could be a structure where a large plan is creating a custom target-date fund, and they might -- they might hire one investment manager who will represent that they're a QPAM, and then that investment manager will bring in subadvisors to play a role. They -- they might manage different parts of the target-date funds. Like, you know, the -- like, part of the equity or part of the fixed income. And in those situations, you know, it could really vary. I think that, you know, for those plans, that -- like, a plan's investment committee would know who the subadvisors are. And they would want both -- they would -- in that situation, they would want both. I think the top-level manager and also the subadvisors to the QPAMS.

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

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

MR. HESSE: So if I can just -- I'll just -- I'll maybe add a point of clarification in terms of current section I(c). And not -- not what is in the proposal, but what's in the existing section I(c). We have a very limited, I would say, scope exception to the discretion that the QPAM is anticipated to have for property management types of situations. And so I'm -- I'm wondering if the sub-custodial issue is somewhat similar to that, in the sense that for property managers, the exception more or less still envisioned some explicit involvement by the QPAM with written guidelines. And is that compatible with the sub-custodial issue that we've now heard about through your comment letters?

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

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

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

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

MR. RABITZ: Scott, if I could -- if I could just jump in. Again, I think from our perspective, you know, the language is obvious and works the way it should work. And so, to the extent that there might be a concern about the so-called rent-a-QPAM or QPAM-for-a-day, perhaps that could be addressed separately. We don't see honestly any need to deal with you know, I(c), certainly not through this project. As Drew mentioned before, look, this regulation presumably is about I(g), that's what's driving things. If this is sort of another look at I(c) for other reasons -- again, we would contend that there's no reason for that -- then it really should be something else separate.

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

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

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

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

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

MR. COSBY: Yeah, I understood that point. But I was just wondering -- so I mean, it sounds like you don't have a problem, though, if the QPAM is the ultimate decision maker, the ultimate authority for decision making. It seems like -- it seems like that's what you're okay with, if I'm not misunderstanding.

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

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

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

This is fundamental, I think, misperception, as Drew alluded to, between QPAM exemption and QPAM status. Look, not every QPAM is a registered investment advisor. Many, if not most, probably are. And presumably, looking through forms ADV, you know, which is readily accessible, might give you, you know, a sense of who QPAMs are. But again, if people want to ask about that, that -- or for -- under a separate -- you know, a separate, you know, program, I think that's fine. The challenge and the issue that we have is making it a condition for relief under the exemption. I think that conflates an investigation power with the relief power. That's not beneficial for plans.

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

MR. HAUSER: So could I -- we could

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

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

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

But, you know, it does feel a bit like at the same time, you're telling us that, you know, this is a bit of a problem in search of a solution. And, you know, you haven't shown there is an injury or an issue here. You're also saying, but we shouldn't even have ready access to, like, knowledge of who the QPAMs are and how many there are.

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

MR. HAUSER: So I think there's a -- there's a common issue, or maybe just a difference in perspective here on some of these issues. So we certainly do look at the QPAM exemption in connection with our responsibilities as a -- as a regulator. And -- and as an entity that's charged with making sure that, you know, when we give somebody a pass from the prohibited transaction rules that otherwise apply, we have reason to believe that they're -- they're going to act in a way that kind of vindicates the purpose of the prohibited transaction rules, and doesn't -- doesn't kind of compound the problems of conflicts and related party transactions and the like.

And you know, a lot of what I've heard at the hearing is that, well, you should just let the fiduciaries take care of that. But -- you know, but the problem is that, you know, from our standpoint, there's -- there's some things the department is just better situated to do. One of them is making sure that the folks we give these exemptions kind of complies with the law. But -- but a fairly obvious predicate for our ability to do that is we know who's out there relying on the exemption. And our ability to know who those folks are and to -- to take a look, kick the tires, have a sense of the number of people, the number of transactions, the -- you know, to do inquiries as appropriate, helps us make sure that -- that our premises are right and that there's compliance with the law.

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

You know, they're making that decision after a violation has occurred, after they're locked into a contract that's potentially going to require them to unwind some transactions after they're going to be required to incur some expenses. The department has an interest kind of systemically in making sure that people are complying with their obligations under the exemption in the first place. And our -- our interest in making sure that happens, you know, we're in a very different position in a sense than a fiduciary is who's looking at, you know, whether to continue an engagement after the bad thing has happened. We like to make sure that there's compliance up front. We'd like to make sure that plan fiduciaries take these obligations seriously. And generally, the disqualification provisions go to things that are fairly serious violations of the exemption.

So it's just, there -- there is a regulatory component here. There is a, are we making sure, are we doing our job to make sure that the right people are -- are acting as QPAMs and that they're complying with the exemption the way they should? And there's something to be said for giving the department the ability to engage in some oversight and to disqualify folks, as opposed to just relying on private actors to take care of that on a plan-by-plan-by-plan basis. And so any response is welcome.

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

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

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

MR. RABITZ: Let me --

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

MR. RABITZ: No, I just -- Tim, I think we -- you know, there may be a difference of kind of perspectives here. The other thing I just want to point out, we haven't really talked about it that much, is, you know, you mentioning the administrative additional overlay. There's also the, you know, negotiation overlay. We've mentioned it before, others have mentioned it before, between the plan and the QPAM. There's also the trading side with the counterparties and the parties in interests. I don't want there to be an assumption that simply adding a new condition doesn't then require renegotiation of many, you know, of those, you know, contracts that allow plans to get done what they need to get done. Many of those negotiations -- many of those provisions are highly nuanced, highly negotiated, and I just wouldn't underestimate the amount of time, energy and cost to fix those or to change them.

MR. HAUSER: At the moment, I'm focused just on the requirement that you raise your hand in the form of an e-mail and tell us, hey, we're going to rely on the exemption as a QPAM. Apart from the concern about that being a condition is, I mean, you're not -- you're not asserting that that requires renegotiation of contracts or imposes some gross administrative cost, are you? Isn't it just a question of you're concerned about it being a condition and blowing the condition, potentially? Or is there something more here?

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

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

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

MR. RABITZ: It's -- I mean, if you're talking about the cost to send an e-mail, the cost to send the e-mail of course isn't much. But the other collateral things that we're talking about, it's -- it's good that you're thinking about it -- that in isolation, Tim. But I think it's -- it's still necessary to look at the whole -- whole package. So in isolation, you're right. Who can quibble with, you know, what's it -- what's it going to cost? Doesn't even cost to stamp, to your point. But there's much broader implications that we're trying to point out.

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

And I do think that Steve's point in terms of the monetary cost of an email, that I would -- I would suggest that maybe that that's not the focus in that -- to your laser-shot question. I think possibly the focus is more along the lines of an exemption that works both well and with remarkable ease and efficiency, as opposed to one that now involves interaction with the government.

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

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

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

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

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

MR. MAYLAND: So you say yes.

MR. HAUSER: Right.

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

MR. HAUSER: Well, I'm just saying I'm not -- it -- it just strikes me, this -- this issue, I don't want to dwell on this too much more. But this at least is a fairly simple thing. You're -- you're -- we're -- we're giving a pass from the prohibited transaction rules. We're permitting conduct that's otherwise illegal. We would just like to know when we give that pass that we can readily identify who the folks are that are relying upon it so we can kind of do whatever we need from a regulatory standpoint, to make sure that the things are working out the way we'd like. And that's it. There's -- you know, and if you need to qualify the disclosure, just like when you're filling out other government forms, by all means. Put it -- put in the parenthetical and say, here's -- here's what it is.

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

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

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

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

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

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

And my concern is that addressing

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

(Simultaneous speaking.)

MR. HAUSER: It does. Thanks, Andrew. And I guess -- just for the sake of clarity, but

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

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

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

MR. RABITZ: Unintentionally. Unintentionally.

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

MR. HAUSER: Yeah.

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

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

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

MR. RABITZ: We could certainly -- thanks.

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

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

MR. HESSE: All right. Well, looks

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

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

The NCCMP's purpose is to ensure an

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

The number and complexity of these relationships can result in a very large number of parties in interest. PTE 84-14 is perhaps the most widely used administrative exemption facilitating the established business practices of professional asset managers serving ERISA plans. PTE 84-14 is, in the multiemployer context, an essential tool for effectively investing plan assets prudently with an eye towards diversification and the appropriate construction and maintenance of an investment portfolio suitable for the purposes and investment horizon of the plan.

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

This is particularly true for multiemployer plans. Because the only money that a multiemployer plan has comes from the contributions of the active workers. These contributions represent the collectively bargained, deferred wages of the workers in these plans. As such, any increase in a plan's administrative or investment expense, or in the reduction of investment opportunity, must be made up either through increased contributions, which lowers the take-home pay of the worker, or through a reduction of nonvested future benefits, neither of which is in the interest of the plan, its participants, or beneficiaries.

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

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

ERISA's prohibited transaction provisions were crafted with the expectation that administrative exemptions would be issued to facilitate established business practices of financial institutions that serve employee benefit plans subject to ERISA, where it is demonstrated that those business practices are in the best interests of plan participants and beneficiaries. Substantially similar parallel provisions appear in the code that are applicable to tax qualified plans, including -- including individual retirement accounts. ERISA section 408(a) and code section 4975(c)(2) grant authority for such administrative exemptions.

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

Further, even if such a list could be maintained, the need to forego investment opportunities with parties in interest and disqualified persons would unreasonably limit an asset manager's ability to make investments that are in the interests of the plan and its participants and beneficiaries. The preamble to the original proposal for PTE 84-14 recognized this difficulty. Neither do alternative exemptions provide the same latitude for an investment manager to execute investment strategies. The relief granted under PTE 84-14 applies to the extent that the disposition of its assets is subject to the discretionary authority of the QPAM.

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

We note that each is contrary to nearly 40 years of established investment practice, contrary to the statutory intent of ERISA, significantly more expensive to plans than DOL's grossly simplified cost assumptions, and most importantly, impose significant harms to multiemployer plans, participants, and beneficiaries. We urge DOL to withdraw the proposal and, if needed, issue a new proposal for notice and comment that addresses the many concerns raised during the current notice and comment.

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

MR. HESSE: Thank you, Michael. Next

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

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

I want to begin by emphasizing that we really don't have an issue with what we understand is the thrust here. And that is to address the issue of criminal convictions for non-U.S. laws, as well as to put in place an appropriate process for individual exemptions for investment managers who find themselves ineligible for QPAM. To put my -- my context -- my comments in context, however, I'd like to repeat something you've heard over and over again. The vast majority of transactions that occur under the QPAM exemption are incredibly routine and incredibly favorable to plans.

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

It is to emphasize one of the most successful exemptions, a real success for the Department of Exemptions. I want to focus on those parts of the proposal that I think are going to harm those circumstances where the QPAM exemption's working just fine. I'm going to start by focusing on the new requirements for investment management agreement. So I won't repeat everything that you've already heard. I'm going to focus on a few ways in which we point out in our comment letter, we think these new mandatory provisions -- and let's be very clear, this is going to be mandatory, because QPAM is essentially a requirement for managing plan assets. The reasons why requirements for specific provisions in IMAs should be removed from the final rule.

First, we lay out a number of ways in which the language you propose is just ambiguous. For example, it would prohibit fees unless they're designed to prevent generally recognized abusive investment practices. I'll just say, if my friends at Dechert proposed that as a counterparty in one of their agreements, I'd say, I don't understand what that means. Let's work that out. It's too ambiguous. Well, while we totally understand why you're proposing that, no contract really should have that kind of vague terminology, which is really to make the point that the department just really doesn't have the expertise to insert itself into negotiations between two parties, especially two parties that are fiduciaries.

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

In our letter, we suggest two alternative approaches. First, as I mentioned earlier, these conditions really should only be imposed when there's some evidence that they're needed. For example, as a condition of the wind-down period, or as a condition of an individual exemption where similar requirements have imposed in the past. In that case, the managers demonstrated that it's done something that may need additional oversight. But to impose that on every investment management agreement is unnecessary.

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

Now, before I leave this -- this whole issue of investment management agreements, I just have to make the point, because I'm in trouble if I don't, that you've essentially required that every investment management agreement be amended within 60 days. That's just not even humanly possible. We're recommending that the effective date be at least 18 months after publication. If you don't accept our recommendation, just remove these as required conditions in every IMA. Then at least they should only apply to investment management agreements entered into or materially modified after the effective date.

In my remaining time, I want to just address two other comments you've heard from others. I won't spend a lot of time on it, I'm happy to answer questions first. Like others, we're recommending that you eliminate this -- this new written ineligibility notice process. There's been a lot of time spent on that and a lot of the commenters. I'll just make one point that there's a lot in there that lack objective standards by which parties could know whether they're the subject -- they may be the subject of an ineligibility notice. When I have been convicted of a crime, I know that's happened, that's objective, it's gone through a court, but there are a lot of -- a lot of those standards are pretty vague.

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

And I also -- of course I can't leave without mentioning I(c), you've been beaten up enough on that today. I'll just say that obviously we think that's important that that be -- that you go back to the current version of I(c). One thing I'll say is there's some questions about subadvisors. We did mention that in our comment letter, and I'm happy to answer questions about that as well. I'll just make the point, you can't possibly have meant what you said. And I think -- I think you recognize that you want to make sure you're not preventing plans from access to the fixed income security markets, for example.

Just a couple of procedural points in closing. One thing that hasn't been noticed but will -- has shown up in a number of the commenters is a requirement that -- that evidence of compliance be available at any time to every plan, every participant that's invested it -- with -- in the plan or in the fund that is being managed by the QPAM. We just don't have any evidence whatsoever that that's necessary, that that's routinely requested and refused. Very different -- and you've talked about the need for the department to have oversight, but to make it available at any time to everybody -- because it's essentially everybody, because there are millions of Americans that are invested in funds managed by QPAMs -- that's just unnecessary.

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

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

What we don't want is them going to less clear exemptions or taking aggressive positions to avoid screening transactions as not prohibited. QPAM works because it says for a set of transactions which there's very low risk to the plan, we just don't have to worry about checking with who's a party in interest, et cetera. Which is why we'd like you to focus these changes where we know the exemption needs improving without making an exemption that no one wants to use. Thanks so much, and happy to take your questions.

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

MR. KEEHAN: Thanks, Erin, and members of the panel. My name is Tim Keehan. I'm vice president and senior counsel for the American Bankers Association. ABA is the voice of the nation's $23.7 trillion banking industry. Its membership is comprised of small, regional, and large banks, that together employ more than two million people, safeguard $19.6 trillion in deposits, and extend $11.8 trillion in loans. ABA appreciates the opportunity to be here regarding the Department of Labor's proposed amendments to prohibited transaction class exemption 84-14, commonly referred to as the QPAM exemption.

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

At the outset, ABA notes that since

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

Specifically, in the January 2021 memorandum modernizing regulatory review, President Biden reaffirmed the basic principles of the federal regulatory process as set forth in executive order 13563 on improving regulations and regulatory review. Executive order 13563, among other things, states that before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are potentially subject to such rulemaking.

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

Executive order 13563 and OMB circular A4 thus make clear that, in proposing amendments to the QPAM exemption, the department's obligation was to seek input from QPAMs, their client plans, and service providers and other stakeholders likely to be impacted from the revisions and additions to the QPAM exemption. It appears that the department has not complied with these directives. We believe that the proposal would have greatly benefited from a collaborative process between the department and representatives of banks and other asset managers that are QPAMs to discuss the function and operation of the QPAM exemption and to identify any issues of concern, as well as any compliance or administrative challenges, which the department then could have factored into the proposal.

Unfortunately, the proposal was drafted and released without any input from our membership. In fact, we are not aware of any department efforts prior to the proposal's issuance to study, survey, analyze, or evaluate banks or any other asset managers serving as QPAMs, their retirement plan clients, or the retirement marketplace to understand how current activities would be directly or indirectly impacted by the proposal. Likewise, the department has not presented any evidence of systemic misconduct, violations, or abuse to support its conclusion that the QPAM exemption is flawed and in need of a significant overhaul. Instead, the department simply released the proposal without any advanced public reaction or input.

Failure to engage those subject to the QPAM exemption prior to issuing the proposal has led to at least one crucial error in the department's calculation of the estimated time, resources, and costs for QPAMs to comply with the -- with the revised exemption, if finalized as proposed. In this regulatory impact analysis to the proposal, the department states that a single QPAM services, on average, 32 client plans. In fact, the department considers 32 as an upper limit for the average number of client plans served by a QPAM. However, as we point out in our comment letter, our member banks serving as QPAMs have client plans numbering in the hundreds and the thousands. This is a serious and costly miscalculation by the department and has widely skewed the cost of the proposal to retirement plans and the retirement services industry.

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

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

These and other provisions of the proposal would have benefited from a preceding dialogue between department staff and QPAMs and their client plans. It is not too late to correct the department's course of action. As we recommended in our comment letter, the department can withdraw the proposal and, as required by executive order and OMB guidance, reach out to those who would be impacted by the proposal to get their input and perspectives and to access pertinent industry data. This department action could include roundtable discussions with QPAMs, client plans that retain QPAMs, and industry stakeholders to determine whether significant revision of the QPAM exemption is necessary or appropriate.

The department could also issue a request for information or RFI to seek public views on the QPAM exemption and follow the RFI with an Advanced Notice of Proposed Rulemaking, or ANPR, to give the retirement industry the opportunity to react, comment, and provide feedback on proposed revisions to the exemption. Such an approach is not new. The department has successfully employed this administrative procedure for lifetime income regulation. The department first published an RFI requesting input from marketplace participants and the public regarding lifetime income options for those covered in retirement plans. Over 700 comments were provided in response to the RFI. The department subsequently held public hearings to flesh out specific issues. The department next issued an ANPR focusing on lifetime income illustrations that would be provided to participants in defined contribution retirement plans.

Following federal legislation on the subject, the department published an interim final rule on lifetime income illustrations that became effective last year, providing plan participants annually with valuable lifetime income information and disclosures regarding their retirement savings. ABA and its member banks, acting as QPAMs, would be glad to support and promote such a regulatory approach. We stand ready to work with department staff to ensure that the QPAM exemption remains a standard bearer for responsible investment management of the nation's retirement assets. Panel members, thank you for your time and I'm happy to answer any questions you may have.

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

MR. KEEHAN: You're asking me a question that's outside my bailiwick. I guess that's -- that's the pain of being a trade association. But I would be -- I would defer to my client bank -- my member banks that are involved in collective investment funds who would be happy to respond to that question.

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

MR. HESSE: So Mike, I understand that, like, for -- for CITs, you know, there's -- the bank is required to be involved. And then oftentimes there is some sort of subadvisor -- I think -- I think from comments, the suggestion was that oftentimes that's going to be a registered investment advisor -- are both entities representing that they're QPAMs, is the bank, is it just the RIA? This really kind of I think dovetails in with 91-38 and kind of how these pieces fit together.

MR. HADLEY: Yeah. Well, I want to reemphasize something we said in the last panel that the relationship between an advisor and a subadvisor, including in a CIT, and who's responsible for exactly what and what the relative responsibilities are, is not a -- there's not one solution to that. It really does vary. In some cases the subadvisor's a 3(38), in some cases they're not. It is true in the CIT space that the bank or trust company does have to have ultimate responsibility. That is a condition of the -- of the securities exemption. And often, the bank will say to itself, I want to be a QPAM, or I need to represent to somebody that I'm a QPAM, or I want it just in case, because the prohibitive transaction rules also prohibit indirect PTEs; right? So I don't want to be in trouble with my subadvisor.

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

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

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

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

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

MR. COSBY: Right. I don't know. I don't know if James is on the call. He's the economist that -- that, you know, dealt with the RIA. I mean, we'd be glad to follow up later. But it'd be great if you could supplement the record to provide us with data. And I open that up for anyone that's on the call. Because there's been a lot of issues that people raised with our estimate on the number of QPAMs. And so, if you have a better number or a better data source, please provide that to us. Because, I mean, you're right that we have an obligation to do our best estimate when it comes to the RIAs and circular A4 and the various executive orders, 12866.

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

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

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

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

MR. HAUSER: We appreciate that observation very much, Tim. And we'd encourage you in the -- in the period between now and the closing of the record to provide any data that you are -- your members believe would be helpful in terms of the time commitments, their resource commitments associated with the various obligations here, as well as the number of clients served, the basis for the calculations, the costs, et cetera. Whatever you're willing to provide us, you -- you and the American Bankers Association have the proposal in front of you. You have the specific requirements. You know, and if you're having trouble tracking down that data, you know, please reach out. Happy to have a conversation about what the impediments are.

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

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

To answer a question you posed earlier, in terms of the burden of sending an e-mail, you know, not -- obviously, that's not huge, but I will say that many financial institutions have a lot of affiliates who may be managing money who changed their -- changed their name from time to time. So if you're going to keep that, you absolutely do need to have a process to -- for corrections so that this is not a foot fault where -- I got every plan that this investment manager is managing, it could be -- who knows how many transactions suddenly become prohibited because we find out six months ago there was a name change and we didn't -- we didn't update. And that was sort of the point made in the prior panel, that making it a condition creates this really dangerous foot fault if you don't get it exactly right.

MR. HAUSER: Yep, I understand the point about having some kind of correction provision and about the dangers of not turning foot faults into, you know, major compliance issues. But I just want to make sure I've explored, like, the limits of what people's -- you know, the outer boundaries, I guess, and what people's objections are to just telling us whether they intend to use the QPAM. So I understand that. I understand that the point you made that will -- perhaps this would encourage people to use other exemptions, although I wonder about that, to be candid. Given all the praise that's been heaped upon the QPAM exemption at this hearing, I kind of suspect that you really don't think there are other competing exemptions but -- that -- that would be quite so alluring. But please correct me if I'm wrong.

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

MR. KEEHAN: I mean, Tim, my question I guess would be, is this going to open the floodgates to a -- for instance, please let us know if you rely on PTE 2020-02. And then, you know, from there, how many class exemptions are -- is the department going to ask parties to rely on? So there -- there is -- there is that concern that this is -- this is without precedence. If this sets a precedent, then what's to stop the department from asking similar question for a number of different class exceptions?

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

MR. KEEHAN: Well, aside, I guess, from the administrative cost and what others have said beforehand about, you know, this is a moving target for a number of institutions and for their affiliates, you also have concern that this requirement may infer that that a QPAM is not relying or may not rely on one or more other exemptions in discharging its investment management responsibilities. So the fact that you're a QPAM doesn't mean that you're always relying on the QPAM exemption. That, combined with the fact that would be available on the publicly available portion of the DOL website would be especially I think concerning for our membership.

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

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

MR. HAUSER: I read -- I read that proposal in your comment letter and heard you say it. And it -- it has -- it, you know, potentially has some appeal and it's certainly worth thinking about. But the 5500 is a fairly lagging document. It -- it reports the world as it existed some -- you know, many months before as a general rule. So it doesn't -- it doesn't really -- you know, a QPAM could be operating for quite some time under the exemption before we're first going to hear about it after that. And -- you know, and as I'm thinking about the burdens and what's -- what's a greater or lesser burden, I'm not sure I'm seeing that -- that, you know, checking something off on the 5500 is necessarily easier or better, preferable, less burdensome, less costly than -- than shooting us an e-mail. So again, if -- but if you -- if you have reasons to think that's the case, if you could let us -- let us know.

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

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

MR. HAUSER: Understood. Tim?

MR. KEEHAN: Yeah, I think I would affirm what Michael just said that, you know, we understand that the QPAM has ultimate investment responsibility and has that fiduciary responsibility. And certainly, that's -- I think that's where we are already. And so if we just have language affirming that, I think that should be sufficient for everyone's purposes.

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

Do you think it's objectionable in

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

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

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

MR. HAUSER: Of course.

MR. HADLEY: You violated the law. You need to make the plan whole; right? I mean, if you have somebody who's systematically violating the terms of the exemption and committing prohibited transactions, I think you have lots of tools to deal with that. You can also go to court and say, you can't act as a fiduciary, or more commonly say, if you don't want to go to jail, you're going to agree in a settlement agreement that you will not manage plan assets. And you have done that from time to time.

MR. HAUSER: So --

MR. HADLEY: You have plenty of tools.

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

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

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

(Simultaneous speaking.)

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

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

(Simultaneous speaking.)

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

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

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

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

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

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

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

MR. HAUSER: So Michael, though, on your first point, I'm not so -- I mean, just -- let me just give you an example from one of our cases outside of the QPAM context. But we had a plan that hired a -- this appraiser had numerous problems, but one of his issues was he had recently been convicted of felony embezzlement from a trust. Now, that felony embezzlement from a trust wasn't exactly -- it wasn't his line of business. He's an appraiser. He wasn't -- the plan wasn't entrusting plan assets to him. And I can't recall, but let's hypothetically say the embezzlement from a trust and involved plan assets. Is it -- is it really in your view, like, irrelevant to whether or not somebody should hire such a person? That -- well, but they didn't do it with plan assets, or it wasn't in that line of business?

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

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

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

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

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

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

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

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

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

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

MR. HESSE: Yeah, absolutely. So the comment period is already reopened, so you can begin submitting additional comments immediately. We have opened that date, and it's tentatively set right now for December 16th. So that's 30 days from today. That date is somewhat linked to the timing of us posting a finalized hearing transcript. Once we do that, we will issue a Federal Register notice announcing the official end date of the comment period. It will not be before December 16th. There is some potential, if we don't get it up within about 14 days before that date, that we would extend the comment period a little bit longer. But we'll make sure to publish that in Federal Register notice.

MS. GOMEZ: Okay. Thanks, Erin. Yeah, I think I had stated it earlier more as a drop dead, you know, date of the 16th. But thanks for that clarification and everyone can look out for the notice. But thanks everyone for your time, and have a great rest of your day.

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

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: QPAM Exemption Hearing

Before: US DOL EBSA

Date: 11-17-22

Place: teleconference

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