

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

PANEL TWO

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

PANEL THREE

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

PANEL FOUR

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

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P R O C E E D I N G S

(9:00 a.m.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Thank you.

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

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

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

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

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

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

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

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

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

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

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

20 MS. DIAMONTE: Right.

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

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

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

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

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

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

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

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

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

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

8 MR. HAUSER: I appreciate all that.

9 But maybe we should talk for a minute about just
10 what the events are that trigger ineligibility.

11 And if you could comment on whether you think
12 those are legitimate bases for disqualifying.

13 You know, the list is -- I don't have it right in
14 front of me, but, it's, you know, committing
15 specified crimes, including substantially similar
16 foreign crimes. It's, you know, essentially
17 misleading the department about eligibility
18 criteria and conditions and the exemption. It's
19 engaging in systemic violations of the exemption
20 and the exemptions conditions. I mean, is it
21 your view that in the -- that when QPAMS engage
22 in systemic violations of these conditions that

1 engage in enumerated felonies?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. WALSH: So, I mean --

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

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

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

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

16 MR. MASON: I agree completely, Kevin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 So you'd open up the contract. Or

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

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

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

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

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

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

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

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

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

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

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

21 MS. DIAMONTE: Yes.

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

1 do you know?

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

4 MR. HAUSER: Yeah.

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

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

9 MS. DIAMONTE: No, no.

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

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

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

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

6 MR. HESSE: Yeah.

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

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

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

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

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

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

16 MR. FRANK: Yes.

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

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

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

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

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

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

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

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

1 filings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. HENRY: Yes. John?

20 MR. MORJANOFF: On the agenda?

21 MR. HENRY: Okay. Doctor --

22 MR. CHRISTENSEN: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Share markets are not realistic.
22 People don't own the shares. It's all done on

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

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

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

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

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

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

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

1 valid.

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

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

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

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

22 For bankers, competitiveness involves

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. MORJANOFF: I'd say absolutely

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the Department of Labor.

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

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

1 financial fraud published in 2017.

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

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

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

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

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

1 You know, that's just --

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. HAUSER: Appreciate it.

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

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

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

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

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

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

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

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

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

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

6 MR. CHRISTENSEN: Yep.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. HENRY: Also --

6 MR. MORJANOFF: Sorry?

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

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

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

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

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

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

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

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

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

1 question, I think.

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

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

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

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

22 Within any international financial

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

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

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

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

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

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

15 MR. CHRISTENSEN: Hear, hear.

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

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

1 questions?

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

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

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

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

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

1 comments.

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

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

19 MR. MORJANOFF: Thank you.

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

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

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

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

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

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

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

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

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

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

22 First, the proposed changes would

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

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

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

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

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

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

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

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

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

1 inconsistent.

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

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

22 If the department has specific

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

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

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

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

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

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

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

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

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

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

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

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

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

22 And finally, before I go into some of

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

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

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

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

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

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

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

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

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

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

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

1 sponsor to extend it for up to two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Second, while I recognize that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 some of the structures.

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

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

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

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

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

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

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

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

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

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

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

1 to the QPAM?

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

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

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

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

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

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

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

1 we had understated that number.

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

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

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

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

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

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

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

1 about.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. RABITZ: Let me --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. MAYLAND: So you say yes.

10 MR. HAUSER: Right.

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

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

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

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

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

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

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

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

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

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

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

22 And my concern is that addressing

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

20 (Simultaneous speaking.)

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

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

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

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

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

14 MR. RABITZ: Unintentionally.
15 Unintentionally.

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

18 MR. HAUSER: Yeah.

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

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

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

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

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

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

22 MR. HESSE: All right. Well, looks

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

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

22 The NCCMP's purpose is to ensure an

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

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

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

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

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

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

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

1 multiemployer plans.

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

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

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

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

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

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

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

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

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

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

22 MR. HESSE: Thank you, Michael. Next

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 At the outset, ABA notes that since

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. HAUSER: Understood. Tim?

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

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

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

22 Do you think it's objectionable in

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

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

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

13 MR. HAUSER: Of course.

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

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

4 MR. HAUSER: So --

5 MR. HADLEY: You have plenty of tools.

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

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

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

13 Probably this is -- this is --

14 (Simultaneous speaking.)

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

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

22 (Simultaneous speaking.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MS. GOMEZ: Okay. Thanks, Erin.

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

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

Before: US DOL EBSA

Date: 11-17-22

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



Court Reporter

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