

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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This is to certify that the foregoing transcript

In the matter of: QPAM Exemption Hearing

Before: US DOL EBSA

Date: 11-17-22

Place: teleconference

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