

UNITED STATES DEPARTMENT OF LABOR

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AMENDMENT TO THE PROHIBITED TRANSACTION
EXEMPTION FILING AND PROCESSING PROCEDURES

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PUBLIC HEARING

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THURSDAY
SEPTEMBER 15, 2022

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The Public Hearing convened via
Video-Teleconference, at 9:00 a.m. EDT, Ali
Khawar, Acting Assistant Secretary, presiding.

PRESENT

ALI KHAWAR, Acting Assistant Secretary, Employee
Benefits Security Administration

JAMES BUTIKOFER

CHRIS COSBY

MEGAN HANSEN

TIM HAUSER

CHRISTOPHER MOTTA

BRIAN SHIKER

SUSAN WILKER

PANEL I

DAVID CERTNER, AARP

PAUL A. GREEN, National Coordinating Committee
for Multiemployer Plans; Mooney, Green,
Saindon, Murphy & Welch, P.C.

ADAM McMAHON, American Benefits Council, Davis &
Harmon LLP

PANEL II

WILLIAM E. RYAN, III, Independent Fiduciary

Group, Newport Trust Company

JEFFREY TARBELL, American Society of Appraisers,

Houlihan Lokey, Inc.

PANEL III

BRADFORD P. CAMPBELL, Faegre Drinker Biddle &

Reath LLP

JENNIFER ELLER, Groom Law Group, Chartered

ALLISON ITAMI, Groom Law Group, Chartered

MICHAEL KREPS, Committee on Investment of

Employee Benefit Assets Inc., Groom Law

Group, Chartered

DAVID LEVINE, Groom Law Group, Chartered

DENNIS SIMMONS, Committee on Investment of

Employee Benefit Assets Inc.

C-O-N-T-E-N-T-S

	PAGE
Opening Remarks	
Acting Assistant Secretary Khawar	4
Panel One	14
American Benefits Council	14
AARP	26
National Coordinating Committee for Multiemployer Plans	32
Q & A	42
Panel Two	63
Independent Fiduciary Group	64
American Society of Appraisers	77
Q & A	89
Panel Three	121
Committee on Investment of Employee Benefit Assets Inc.	122
Groom Law Group, Chartered	131
Faegre Drinker Biddle & Reath LLP	142
Q & A	154
Adjourn Hearing	189

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:06 a.m.)

3 ASSISTANT SECRETARY KHAWAR: Welcome
4 to the hearing. So, you've joined EBSA Employee
5 Benefits Security Administration's Public
6 Hearing, which we're holding virtually, about our
7 proposal to amend the procedures for filing and
8 processing individual and administrative
9 exemptions from the ERISA's PTEs, prohibited
10 transaction rules under ERISA, the Internal
11 Revenue Code and ERISA.

12 I guess I should say: if that's not
13 the hearing you were intending to join, feel free
14 to leave. Feel free to stay as well, it'll be
15 maybe interesting, you might learn something.
16 But that's what we're talking about today.

17 My name is Ali. I'm the Acting
18 Assistant Secretary for EBSA. And, in addition
19 to just welcoming all of you, I wanted to spend a
20 few minutes talking about the proposed amendment,
21 why we're here, and what we're really hoping to
22 accomplish with today's hearing.

1 As well as some kind of procedural,
2 you know, rules of the road, like the unmute
3 button kind of stuff. So as everyone I'm sure on
4 this call knows, we published the proposal to
5 amend the procedure in March of this year.

6 We extended the comment period. And
7 about, I think, five weeks ago, we decided to, we
8 announced a public hearing. That's today. The
9 EBSA website has a lot of material on it.

10 All the public comments that we've
11 received, as well as the transcript will
12 ultimately be available, all of those things
13 you'll be able to find on our website.

14 The public hearing also marks the
15 reopening of the comment period. So the comment
16 period is now open again. It's going to remain
17 open until we publish the transcript from today's
18 hearing.

19 And then, we'll give about two weeks
20 or so after that, for people to submit any last
21 comments before we kind of close the comment
22 period and start evaluating what we have.

1 There will be a Federal Register
2 Notice that's published when the transcript's
3 available, and giving kind of a date certain
4 about the closure of the comment period.

5 And I want to just spend a few minutes
6 talking about, you know, our perspective on the
7 exemptions process and some of the thinking
8 behind the amendment that we proposed.

9 From our perspective, the exemptions
10 process is something we take very seriously. We
11 have a small, but mighty team, in the Office of
12 Exemptions Determinations that does this work.

13 And they take their obligations very
14 seriously to make the findings that Congress
15 required before they propose and will grant any
16 exemptions.

17 It's important to remember that the
18 exemptions process is about authorizing conduct
19 that Congress has otherwise made, illegal and
20 that the statute otherwise prohibits. That's
21 part of why we take this seriously.

22 I also, again, I want to give kudos to

1 the Exemptions Team, because I think they have a
2 very, a very difficult job. It's a very
3 important job, but it is very difficult.

4 And in order to do that job, it's
5 important that they can gather as much
6 information as they need in order to really
7 understand the full picture of what is going on
8 in a transaction.

9 And that's a theme, I think, you'll
10 see again and again in the proposal. There's a
11 desire by the Department to ensure that at the
12 early stages, when people are submitting an
13 application, we have the information that we
14 need, so that we can sort through it and make the
15 appropriate determination.

16 And there's some flexibility built
17 into that process so that it's not a one size
18 fits all, but can adapt to different
19 circumstances. Because there's some times when
20 something may be more probative than in other
21 contexts. But especially given that applications
22 come from one party to a transaction, and that

1 party is prohibited, has a conflict of interest
2 that makes the conduct otherwise illegal.

3 We do think that getting full and fair
4 disclosure upfront is very important. We believe
5 in having a very open and public process that has
6 a lot of transparency built into it, so that when
7 we're getting public comments, the public has the
8 ability to really understand the transaction.

9 And ensuring that the parties
10 themselves that we're relying on are independent,
11 are not affected by the conflicts of interest
12 that are the cause of an exemption application in
13 the first place.

14 And in those situations, we think
15 exemptions have an important role to play in the
16 system. And we believe that, that when we're in
17 those situations, we really can honor our
18 statutory obligations in the most effective and
19 efficient way possible.

20 And I want to stress one point that I
21 made because we do find, frequently, right now,
22 that a significant part of the exemption

1 application process is taken up in collection of
2 information because we don't quite have what we
3 need. And I think addressing that is an
4 important part of this update for us.

5 So I already mentioned that there's a
6 public comment period. This is part of a public
7 notice and comment process. You know, we went
8 through a deliberative process to develop this
9 proposal.

10 And the comments that you're providing
11 today at the hearing, the comments that you've
12 sent us already, they're incredibly helpful to
13 us.

14 The comments that maybe will be provided, I'm
15 going to maybe go out on a little bit of a limb
16 and also characterize them as incredibly helpful.

17 But the reason that this process is so
18 important to us, not just the hearing, but the
19 comments, is that it does allow us in the same
20 way as getting public comment on exemptions, it
21 allows us to identify things. That, you know, we
22 had a particular point of view, issues that we

1 maybe didn't think were as significant or thought
2 were significant, but there are nuances that we
3 need to think about again.

4 In essence, all of this work -- and I
5 know it's a lot of work that the witnesses have
6 put in, and everyone else -- all that work is
7 very important because it helps us get to a
8 better answer.

9 And so, you know, today we're going to
10 be asking a number of questions. I don't think
11 people should read too much into it. The goal
12 for us today is not really to engage in a debate,
13 or to defend, you know, a particular position, as
14 much as it is to make sure that we have a fulsome
15 record.

16 And so, you'll get a bunch of
17 questions from the individuals in the Department
18 that are panelists. That is really with an aim
19 of ensuring that we understand what you're
20 saying.

21 My experience with these hearings is
22 that witnesses tend to be a little bit more

1 interactive than the pieces of paper or comments
2 that we print out. But we do want that back and
3 forth to really understand, you know, what are
4 the underpinnings of the comments, the positions
5 that you're taking. Are there ways that it could
6 be addressed? Those kinds of things.

7 But you shouldn't take any inferences
8 about what the Department may or may not do
9 moving forward as a result of our questions.
10 Because it really is about understanding where
11 you're coming from.

12 So few procedural things. There are
13 three panels today. And the panels have two or
14 three different organizations. They're going
15 to -- the hearing agenda is available on the EBSA
16 website. If you haven't seen it, you can find it
17 there. The witnesses are going to testify in the
18 order of that agenda.

19 Each witness has ten minutes to
20 testify. You will notice over the course of the
21 hearing that for some organizations, there are
22 multiple individuals that are going to speak on

1 behalf of that organization.

2 So, that ten minute allotment isn't
3 per person. You don't kind of get 30 minutes if
4 you've got three witnesses. It's per
5 organization, not per individual.

6 You will see a member of the OED staff
7 holding up a sign, periodically. That is for
8 countdown purposes for the witnesses. There'll
9 be a sign of five minutes, one minute, a very
10 kind of terrifying stop sign. Hopefully, no one
11 will see that.

12 So once the witnesses have done their
13 testimony, there will be a Q&A. We're not going
14 to be taking questions from the audience or
15 witnesses. The goal is for the Department to
16 really expound the record here.

17 And the other thing I wanted to
18 mention is that there will be a transcript, as
19 I've mentioned. So there is a court reporter
20 transcribing the meeting. And we'll be
21 announcing the availability of the transcript and
22 the closure of the comment period in the future.

1 For those of you that are testifying,
2 please, especially for the court reporter, please
3 identify yourself and your affiliation, the
4 organization you're testifying on behalf of as
5 you speak. And, including with Q&A, it might be
6 helpful if you just maybe say your name once you
7 start to answer or chime in.

8 Please make sure that -- we are trying
9 to hold to that allotted ten minutes. Pay
10 attention when the signs come up. And for the
11 benefit of the court reporter, please, do try and
12 speak into your microphone.

13 So, folks that you'll hear from today,
14 in addition to myself, you have Tim Hauser, who's
15 the Deputy Assistant Secretary for Program
16 Operations, in his very well organized office.
17 You can see him on the screen.

18 You have Chris Cosby, who is the
19 newest member of EBSA SCS. He is the Director of
20 our Office of Exemption Determinations. From his
21 team, you have Brian Shiker, who's a Senior
22 Employee Benefit Law Specialist.

1 Megan Hansen, who is with the
2 Solicitor's Office, is one of our regulatory
3 counsels. James Butikofer, who is in our Office
4 of Research and Analysis.

5 And Susan Wilker will be, as I
6 mentioned, she's a staff member, there'll be
7 holding up those time signs. I want to
8 explicitly call out Brian.

9 He is the person who's put the most
10 time into pulling together today's hearing. It
11 is probably not a labor of love, but it is a
12 necessary task. And he's done it very well.

13 Looking forward to all the
14 conversation and all the opinions that we have
15 here today. With that, let's start with Panel
16 One. And, Adam, I think you are our first
17 witness on behalf of ABC. Okay?

18 MR. McMAHON: Great. Thanks, Ali.
19 Good morning. My name is Adam McMahon. And I am
20 testifying today on behalf of the American
21 Benefits Council. I (audio interference) --

22 ASSISTANT SECRETARY KHAWAR: The good

1 news for the rest of the witnesses is someone had
2 to have a technology issue. And you should all,
3 I don't know, provide Adam a beverage of his
4 choice, because he's really done you all a solid
5 by, you know, taking that on. We'll give him a
6 minute to see if you can rejoin and if not, maybe
7 I think Dave you're next. And we'll we may turn
8 to you and then --

9 (Simultaneous speaking.)

10 ASSISTANT SECRETARY KHAWAR: Yes,
11 let's go ahead. Dave, we'll start with you. And
12 then -- oh, okay, no, Adam, you are back. Okay.

13 MR. McMAHON: So sorry about that.
14 So, let me start again here. I don't know what
15 happened there.

16 ASSISTANT SECRETARY KHAWAR: We're not
17 going to hold that against you with your ten
18 minutes.

19 MR. McMAHON: All right. Let's start
20 again, then. All right, so, Adam McMahon, again,
21 testifying from the American Benefits Council.
22 I'm partner with David & Harman, which serves as

1 outside counsel to the American Benefits Council.

2 So first of all, I think I was
3 starting to say I'd like to thank the Department
4 for holding today's hearing, first and foremost,
5 to get additional input from the public, as well
6 as further consider all of the important ways
7 that its proposal, we believe, will impact the
8 design and operation of employee benefit plans.

9 As discussed in the comments that we
10 submitted to you all earlier this year, the
11 Council really believes that administrative
12 exemptions play a critical role in the operation
13 of plans.

14 And that over the years, exemptions
15 have helped facilitate countless transactions
16 that have actually benefitted plans and
17 participants, even though they technically create
18 prohibited transactions.

19 And given this perspective, the
20 Council is concerned, and our members are
21 concerned with the Department's recent proposal
22 that we're here to discuss today. Given that it

1 would appear to substantially scale back the
2 Department's exemption program.

3 We did not believe that it's necessary
4 for the Department to be adding the types of
5 conditions that are as prescriptive as that are
6 proposed, or by default, excluding certain
7 transactions that could benefit plans and
8 participants to deal with complex situations
9 facing plans today, or that could potentially
10 arise in the future.

11 Accordingly, the Council is here to
12 testify today to ask the Department to reconsider
13 significant portions of its proposal, consistent
14 with the comments that we found earlier this
15 year, and which as I'm about to discuss those
16 comments, I believe can generally be categorized,
17 summarized into three different categories.

18 Our first concern is that the Council
19 believes that all of the proposed changes appear
20 and have been perceived by a number of folks as
21 intended to discourage future applications for
22 exemptions.

1 All of these new conditions and new
2 requirements that are included in the procedures,
3 which we would note, we did not see a detailed
4 explanation in the preamble to the proposal
5 explaining what harms the Department believes
6 were being created by the existing procedures or
7 by exemptions that had previously been granted.
8 And/or that those procedures or the exemptions
9 were failing to protect participants or serve
10 their interests.

11 We think that all of the collective
12 changes in the proposal really send a signal to
13 us that the Department isn't necessarily
14 interested in granting as many exemptions going
15 forward. Even when those exemptions might be
16 administratively feasible in the interest of
17 plan's participants, protective of their rights,
18 as is required by the statute.

19 Some examples of those requirements
20 that we think are likely to discourage applicants
21 from seeking an exemption going forward would
22 include the proposed changes that expressly state

1 that the Department does not believe that the
2 grant of an existing exemption is determinative
3 as to whether or not it will grant an exemption
4 in the future, with similar facts, or similar
5 conflicts, similar circumstances.

6 We think all of the new requirements
7 and all the new information statements, some of
8 which we would understand are helpful to the
9 burden of collecting information.

10 Others we think just kind of go too
11 far in terms of the amount of information and the
12 amount of cost that they would create for
13 applicants.

14 Some examples of those requirements
15 that we're concerned about are the new
16 requirements provide detailed descriptions of all
17 the potential alternatives that were pursued in
18 lieu of an exemption. And again, a description
19 of why those alternatives were not pursued.

20 We're also concerned about the new
21 requirement that would newly require a
22 quantitative cost development/comp benefit

1 analysis to be included with each application.
2 As opposed to just a general showing of why
3 transaction benefits the plan's participants that
4 it's intended to help.

5 Also, we've heard a number of concerns
6 from members about all of the expansive ways in
7 which proposal would essentially seek to limit
8 the ability of applicants and qualified
9 independent fiduciaries, and other parties to
10 limit their liability as they're currently able
11 to do.

12 Collectively, we find that all of
13 these changes, we believe, again, are likely to
14 discourage applicants from coming forward and
15 seeking exemptions in the future, or working to
16 design benefit offerings that might be designed
17 in reliance on an exemption.

18 We're also concerned about the cost
19 increases that would be associated with all the
20 new information collection requirements. And we
21 believe that, collectively, all of these changes
22 mean that for employers and providers who are

1 interested in seeking exemptions, that all of
2 these changes will result in fewer choices, when
3 an exemption might otherwise be necessary and
4 beneficial with the plan, subject to important
5 safeguards in meeting those statutory
6 requirements that I just discussed.

7 The second concern that I want to
8 discuss today is the concern we have with a
9 series of changes in the proposal that we fear
10 are likely to limit the beneficial and informal
11 conversations that our members have really come
12 to appreciate with the Department's Office of
13 Exemption Determinations.

14 Our concerns in this regard,
15 generally, relate to two provisions in the
16 proposal that I want to talk about. The first is
17 the new provision in the proposal, it states that
18 the Department will no longer engage with
19 potential applicants on an anonymous basis.

20 And the second is the collection of
21 changes, which essentially say this. If an
22 applicant or potential applicant provides any

1 information to the Department, whether oral or
2 written about a potential exemption, or about a
3 potential need for an exemption, that information
4 and those conversations will create an
5 administrative record and will would be available
6 to public inspection, essentially, immediately.

7 We're concerned that all of these
8 changes would effectively leave, you know,
9 parties who are interested in seeking an
10 exemption with two unfortunate choices. The
11 first would be to come forward to the Department,
12 identify themselves, present all the specific
13 facts about their transaction.

14 And in a way that, we think, could
15 potentially negatively affect the transaction
16 when we'd have to disclose some of that
17 information, which these firms hold as
18 confidential.

19 Once they become public, they can
20 either have a negative consequence on the
21 intended transaction or on the party seeking the
22 exemption itself.

1 The second option would be to just
2 forego conversations with the Department about
3 important technical and complex prohibited
4 transaction rules. Both of which, those results
5 we believe, would be unfortunate.

6 So I'd like to just say that one of
7 the things we heard repeatedly about this issue
8 was that the Council, as well as its members,
9 have really appreciated the Department's long
10 standing willingness to have frank discussions,
11 informal discussions with the regulated
12 community.

13 We think this has helped to promote
14 compliance. We think this has been a beneficial
15 dialogue. And we'd asked the Department to
16 reconsider its proposal with respect to those
17 changes, to make sure that those types of
18 conversations can continue to occur.

19 The last point that I want to touch on
20 here today is the Council's concerns with a
21 number of the changes in the proposal that we
22 would see would appear to unnecessarily limit the

1 parties who are eligible to participate in
2 transactions, as well as the types of
3 transactions that would be eligible for an
4 exemption.

5 Again, I would point out that we feel
6 that all of these, these new limitations and
7 restrictions are being added. Notwithstanding
8 the fact that the preamble discussion
9 accompanying of the actual text of the changes
10 didn't point to specific instances or specific
11 examples of the types of harms that the
12 Department is trying to prevent, or had found to
13 be of concern with respect to the existing
14 exemption procedures or previously granted
15 exemptions.

16 I think the prime concern we have in
17 this regard has to do with the new two percent
18 independence threshold, which is, as you're all
19 aware, you've obviously looked at this, thought,
20 heard about this, would reduce, or change
21 essentially the presumption as to win a fiduciary
22 can serve as an independent fiduciary with

1 respect to one of these transactions.

2 Under the new rule, which scales back
3 the existing presumption and the existing
4 procedures, if a fiduciary receives more than
5 2 percent of its income from parties involved in
6 the transaction, they'll be deemed not to be
7 independent.

8 We believe that combined with the
9 changes to, that all the parties are actually
10 treated as a party involved in the transaction
11 for purposes of this income threshold.

12 We're concerned that this new lower
13 limit creates a barrier to entry for smaller
14 firms and could potentially disqualify firms if
15 they take on a larger client, or larger
16 transaction, notwithstanding the fact that
17 they're otherwise qualified and an expert in
18 these fiduciary matters.

19 Accordingly, Council would ask that
20 the Department removed this provision. And in
21 the alternative, we're also concerned that this
22 could be read as reflected in the Department's

1 views on other independence issues outside the
2 exemption procedures.

3 So if this is retained in the final
4 rules, we would ask that it expressly clarify
5 that the Department does not intend any
6 inferences to be drawn outside of the exemption
7 context with respect to this new two percent
8 threshold.

9 With that, I see that I am, I think,
10 just about my time. I think you've been generous
11 since I had some technical issues, so thank you
12 for that. Sorry for my internet. I told you
13 earlier it might go out. And happy to answer any
14 questions.

15 ASSISTANT SECRETARY KHAWAR: Thanks.
16 David?

17 MR. CERTNER: My name is David Certner
18 and I serve as the Legislative Counsel and Policy
19 director for AARP. And on behalf of AARP is 38
20 million members and all older Americans
21 nationwide who count on receiving adequate and
22 hard earned income from their pension plans, I

1 also appreciate the opportunity to testify today.

2 I also want to thank the Department
3 for its consideration of updated procedures
4 governing the filing and processing of prohibited
5 transactions exemption applications. The process
6 is an essential component of ERISA for protecting
7 participants and beneficiaries from conflicts of
8 interest.

9 AARP is committed to expanding and
10 improving retirement savings, so that all
11 Americans have adequate income for retirement,
12 both through Social Security, and pensions, and
13 private savings.

14 We have worked throughout our history
15 to develop and improve America's retirement
16 system, including the protection of retirement
17 funds.

18 A major priority for AARP is to assist
19 Americans in accumulating and effectively
20 managing adequate retirement assets to supplement
21 their Social Security benefits. Many of our
22 members, currently are participants in employer-

1 sponsored retirement plans.

2 And participants and beneficiaries
3 rely on these plans for their long-term
4 retirement and financial security. As such,
5 millions of Americans count on the fiduciary
6 standards that govern conduct in retirement
7 plans.

8 Fiduciaries under ERISA must exercise
9 their duties for the exclusive benefit of, and
10 with complete and undivided loyalty to plan
11 participants and beneficiaries. This is a clear
12 statutory requirement under ERISA.

13 Without proper safeguards, trillions
14 of dollars would be a greater risk and threat of
15 improper management, putting at risk the
16 retirement security of millions of participants.

17 Indeed, I think history has been very
18 clear now that biased and conflicted conduct have
19 been demonstrated to reduce retirement savings.
20 And those kinds of losses can be dramatically
21 compounded over time.

22 Now, ERISA's legislative history

1 indicates that, and I quote, "the crucible of
2 Congressional concern was the misuse and
3 mismanagement of plan assets." And therefore the
4 fiduciary standards were created.

5 The general fiduciary obligations
6 imposed by ERISA Section 404 are supplemented by
7 the specific prohibitions of Section 406. As you
8 well know, Section 406(a), virtually all
9 transactions between an employee benefit plan and
10 a party of interest are prohibited, unless a
11 statutory or administrative exemption is
12 available. And Section 406(b) prohibits various
13 forms of fiduciary self-dealing.

14 Now, Congress was, thus, very focused
15 on the potential conflict and mismanagement, and
16 concluded that the need to protect participants
17 retirement security was paramount. Although the
18 prohibited transaction provisions are per se,
19 restrictions, Congress did provide an exemption
20 procedure.

21 But as you well know, it is very clear
22 that under the procedure, an exemption would be

1 granted if, and only if, the Secretary of Labor
2 determines both that the exemption is in the
3 interest of plan participants and beneficiaries,
4 as well as protective of their rights.

5 Therefore, it's clear that prohibited
6 transactions, the procedures, fall squarely
7 within DOL's purview. In addition, it's also
8 clear that a PTE is an exception to the general
9 standards, and it's not the rule.

10 And so by definition, the issue of
11 exemptions should be limited in both scope and
12 scale. Now, AARP supports the changes to the PTE
13 process because consistent with ERISA, we think
14 it focuses more on the interests and protection
15 of participants and beneficiaries.

16 For example, AARP supports the
17 requirement that an independent appraiser,
18 auditor, or accountant include a signed and dated
19 declaration, under penalty of perjury that, to
20 the best of its knowledge and belief, all the
21 representations made in any statement supporting
22 an exemption are true and correct.

1 An independent review would provide an
2 objective third party opinion on the integrity of
3 PTE assertions, and we believe that this
4 requirement helps ensure the independence of the
5 one who's signing the documents.

6 Now again, accurate and reliable
7 financial statements are critical to investors,
8 fiduciaries, and employers alike. They are the
9 bedrock upon which workers are basing decisions
10 about their retirement security and how to invest
11 their lifetime savings.

12 They are also critical to ensuring
13 that an employer is meeting its fiduciary
14 obligations. So for these reasons, AARP supports
15 updated procedures governing the filing and
16 processing of prohibited transaction exemption
17 applications.

18 Again, we appreciate the Department's
19 interest and commitment to ensuring that
20 participants and beneficiaries are protected.
21 And I would be happy to answer more questions in
22 the question and answer period. Thank you.

1 ASSISTANT SECRETARY KHAWAR: Paul, I
2 think you're next.

3 MR. GREEN: There we go. My name is
4 Paul Green, and I'm here on behalf of the
5 National Coordinating Committee for Multiemployer
6 Plans, as its general counsel. I'm an attorney
7 in private practice at the firm Mooney, Green,
8 Saindon, Murphy & Welch.

9 And in addition to the NCCMP, I
10 represent multiemployer plans and labor
11 organizations. The NCCMP is the only national
12 organization devoted exclusively to protecting
13 the interests of multiemployer plans, as well as
14 the unions and jobs creating Americans, employers
15 of America that currently sponsored them, and the
16 more than 20 million active and retired American
17 workers and their families who rely on
18 multiemployer plans.

19 The NCCMP's purpose is to ensure an
20 environment in which multiemployer plans can
21 continue their vital role in providing a full
22 range of benefits to America's working men and

1 women.

2 As the Department is aware,
3 multiemployer plans always involve two or more
4 employers, sometimes numbering in the hundreds,
5 or even thousands, and often multiple unions.

6 Furthermore, multiemployer plans are
7 typically organized as Taft Hartley trusts, so
8 that they are administered by joint Boards of
9 Trustees composed of equal numbers of employee
10 union and employer representatives, and possibly
11 one or more neutral trustees.

12 The number and complexity of these
13 relationships can result in a very large number
14 of parties and interests. Another distinguishing
15 characteristic of multiemployer plans is that
16 they are fundamentally separate entities from the
17 stakeholders.

18 Unlike single employer plans, which
19 are often provide office space and personnel
20 directly from their sponsoring employers,
21 multiemployer plans must obtain their own office
22 space, hire their own personnel, and negotiate

1 their own contractor agreements, and more.

2 Importantly, all of the money that a
3 multiemployer trust has to pay benefits and
4 administrative costs can come from the workers
5 themselves as they're negotiated as part of the
6 total wage and benefit package.

7 In other words, any increase in costs
8 to a plan is borne by the workers. Against this
9 backdrop, we are concerned that the proposal
10 would impede the ability of multiemployer plans
11 to engage in transactions that would be
12 beneficial to these plans, participants, and
13 beneficiaries.

14 While we applaud the Department's
15 overall efforts to streamline and clarify its
16 procedures, we are concerned that proposal
17 imposes hurdles, restrictions, and outright
18 prohibitions that would arbitrarily prohibit
19 otherwise valuable and beneficial transactions,
20 and unnecessarily delay and impede others.

21 For example, the Department proposes
22 to eliminate the existing practice of permitting

1 informal off the record inquiries by plans or
2 interested parties prior to the filing of an
3 exemption request.

4 These conferences are useful both in
5 terms of informing the potential requesters as to
6 what they need to do have their exemptions
7 granted. Thereby saving them time, money, and
8 effort. But it also does the same for the
9 Department.

10 We understand the Department is
11 concerned that through either misunderstandings
12 or incomplete representations of facts, potential
13 applicants may seek to rely on representations
14 made by the Departments in these informal
15 conferences.

16 And we agree with the Department that
17 this type of reliance is unjustified. Our view,
18 however, is that prohibiting these conferences
19 altogether is an overreaction, throwing the baby
20 out with the bath water.

21 We also presume that the Department
22 intends for the procedures themselves to provide

1 the sort of information and full warnings that
2 are currently provided through the informal
3 conferences.

4 Our concern, however, is that the
5 restrictions imposed under the proposal are
6 overly categorical and themselves overreactions,
7 which impose unnecessary and in some cases
8 irrelevant obstacles in the path of engaging in
9 otherwise beneficial transactions.

10 Notably, the proposal indicates that
11 the Department will categorically reject an
12 application involving a party in interest who is
13 under any sort of investigation for any reason,
14 by any Governmental authority.

15 The Department, as well as, other
16 Government agencies frequently conduct
17 investigations involving various often routine
18 matters. These audits and investigations can
19 take years, sometimes more than five years.

20 Nevertheless, while one of these
21 investigations drags on, the subject plan is
22 effectively barred from seeking an exemption on

1 wholly unrelated matters.

2 Even more remarkably, if a plan
3 trustee is under police investigation, following
4 a traffic accident, the Department will reject
5 the application involving that plan. That's
6 absurd.

7 The restrictions related to the
8 retention of independent fiduciaries are also
9 problematic because they effectively exclude
10 unaffiliated, truly independent fiduciaries
11 through their income, asset, and insurance
12 requirements.

13 Often, however, a plan is best served
14 by independent fiduciaries with particular skill
15 sets and characteristics, whether those are
16 knowledge, and particular industry, academic
17 achievement, reputations for integrity, or some
18 other possibly unique characteristic.

19 Indeed, the Department itself
20 frequently select independent fiduciaries for
21 various purposes without any of these arbitrary
22 requirements. Although some circumstances may

1 call for the participation of a large,
2 institutional, independent fiduciary, that is not
3 always the case.

4 Additionally, as the Department is
5 aware, although ERISA 410 prohibits plans from
6 indemnifying fiduciaries from liability for the
7 breaches of duty, plans may pay the cost for
8 fiduciary insurance and the fiduciaries are then
9 permitted to pay the cost of a waiver of recourse
10 rider, typically for a nominal fee.

11 The obvious reason for this practice,
12 just because in its absence, plans would be
13 unable to find individuals willing to serve as
14 fiduciaries.

15 It's already hard enough. Moreover,
16 independent fiduciaries, including those selected
17 by the Department itself routinely engage in the
18 same insurance practice.

19 It is not clear whether plans and
20 independent fiduciary would be prohibited from
21 taking advantage of these cost saving measures
22 and that is involving administrative exemptions.

1 It is also hard to understand the principle
2 distinction between the duties and
3 responsibilities of an independent fiduciary with
4 respect to administrative exemptions, with
5 respect to other circumstances in which
6 independent producers are required.

7 And we question whether the proposal
8 pre-stages a new and dramatic restriction on the
9 ability of plans to obtain the services of truly
10 independent fiduciaries. That would be
11 incredibly problematic for all plans.

12 The proposal is also unclear how far
13 the new restrictions and requirements are
14 intended to go. We do not know if they will be
15 also applied to all future class exemptions, and
16 potentially to all existing exemptions.

17 Furthermore, although we fully support
18 the separate proposal to make the effect of
19 exemption revocations prospective only, we hope
20 that this plausible provision is not designed to
21 blunt the blow of a mass revocation of existing
22 exemptions that do not meet the newly proposed

1 standards. Such an en masse revocation would be
2 both expensive and disruptive to the plans that
3 rely on this existing exemptions.

4 The NCCMP is also concerned with the
5 proposal to automatically deny exemption
6 applications that are withdrawn may have a
7 chilling effect.

8 And when combined with the elimination
9 of the informal off the record, preliminary
10 conversations may deter plans and their
11 stakeholders not only from seeking exemptions,
12 but seeking from consulting with Department in
13 the first place.

14 This is not good for plans, the
15 participants, and beneficiaries, nor the
16 Department. The NCCMP believes that it is in the
17 interest of all stakeholders to encourage open
18 communication.

19 We also note that there are many
20 reasons for withdrawing an application. Issuing
21 a denial at all cases, however, may impose an
22 imprimatur of wrongdoing or culpability that may

1 change a perfectly lawful beneficial and
2 appropriate transaction.

3 Additionally, we agree that Congress
4 granted the Department broad authority to
5 administer ERISA's exemption process. When
6 Congress enacted on this, however, it understood
7 that Section 406, standing on its own, would make
8 nearly all transactions by covered plans
9 unlawful, and thereby destroy the very plans
10 ERISA was designed to safeguard.

11 By mandating that the Department's
12 implement and carry out the administrative
13 exemption process, Congress clearly intended that
14 it exercise its broad authority in a manner that
15 would permit beneficial transactions to occur,
16 albeit with appropriate safeguards.

17 Finally, although the NCCMP
18 acknowledges that the number and scope of
19 existing class exemptions have grown since the
20 exemption procedures were first designed, the
21 world is complicated and fluid, and new, and
22 unexpected circumstances continue to arise.

1 The very fact that Congress
2 specifically authorized individual exemptions, in
3 addition to class exemptions demonstrates its
4 clear intent that the exemption process remain
5 open and available to address new and unusual
6 circumstances. This hasn't changed.

7 For these reasons, we asked
8 Departments retain a robust exemption process,
9 rather than imposing arbitrary and unnecessary
10 hurdles. Thank you for the opportunity to appear
11 in this proceeding.

12 In addition to NCCMP comments filed in
13 May of this year, we will be filing a written
14 version of this testimony. And I look forward to
15 addressing your questions.

16 ASSISTANT SECRETARY KHAWAR: Thank you
17 to all three witnesses. I want to start with a
18 couple of questions. And maybe, first let me ask
19 Mr. Certner. I don't think we've ever received
20 an exemption application from AARP.

21 So you have kind of a unique role
22 here, as kind of representing an organization

1 that's interested in these, as kind of a member
2 of the public, but not really a party in the same
3 way. Although, I'm sure there are AARP that
4 participants in plans received exemptions.

5 We've heard from a couple of witnesses
6 today, and I'm pretty sure we'll be hearing from
7 additional witnesses later, that one part of the
8 proposal that's problematic is the revocation of
9 the ability to have anonymous conversations.

10 The question I have for you is, you
11 know, from AARP's perspective, as you're
12 reviewing these proposals, how do you think about
13 that question? And the fact that these are not
14 necessarily part of an administrative record that
15 you or other members of the public might be able
16 review?

17 MR. CERTNER: Yes, I think in some
18 respects, it is a manpower question for the
19 Department of Labor. We don't have a problem
20 with administrative Agencies, for example,
21 providing information and education into the
22 general public, whether it's a broad group or

1 individually.

2 So to the extent that you have the
3 ability to have to continue conversations like
4 that, we don't necessarily have a problem with
5 that. To the extent that people are going to
6 rely on these individual conversations before
7 you, then they should become part of a formal
8 record.

9 That may have to happen later on, and
10 may not need to happen right up front. But to
11 the extent it's really more education on what the
12 process is about and how it was worked, we
13 wouldn't necessarily have a problem with that.

14 To the extent people really are going
15 to go back and point to those conversations and
16 education, then, they should become, made part of
17 the formal record.

18 ASSISTANT SECRETARY KHAWAR: And
19 Mr. McMahon, I have a question along the same
20 lines. So one of the themes that comes across in
21 the comments on this issue is that frequently
22 when parties are coming to the Department, it's

1 in a very, very early stage.

2 They haven't even necessarily decided
3 whether a PTE application is in the best
4 interests of the participants and beneficiaries.
5 And a critical part of that decision making
6 process is the conversation with the Department,
7 the opportunity to kind of present you know,
8 maybe in broad strokes, the transaction and the
9 pros, cons, some of the ways you're thinking
10 about it. And kind of kick the tires on this
11 before you invest a lot of resources.

12 What if the Department were to modify
13 this provision so that it's only in the
14 situations where parties have actually filed an
15 application? That at that point, and if those
16 conversations would be treated as part of the
17 record?

18 Because I understand that part of the
19 concern that you and Mr. Green, and other
20 commenters have identified is really about the
21 instances where that conversation happens, but
22 there's never going to be a PTE, because there's

1 never going to be an application.

2 How are the ways in which, you know,
3 going to Mr. Certner' s point about the ability
4 for the public to kind of comment on the full
5 record, all the conversations that the
6 Department's had, what are ways in which you
7 think we could amend the proposal to address
8 these two, kind of, competing concerns? Right?

9 The need for the public to have a
10 semblance of transparency, a full record to
11 really be aware of. And the desired parties to
12 be able to have conversations that should remain
13 confidential from their perspective because it
14 never resulted in an application?

15 MR. McMAHON: No, I think that's a
16 very important distinction. And I think changes
17 that would implement that type of framework would
18 significantly benefit this proposal.

19 When it first came out and we started
20 reading through it, the changes regarding those
21 kind of informal, anonymous conversations that
22 we've had in the past, that members have had in

1 the past, were a little surprising because, you
2 know, our folks don't rely on those as binding on
3 the Department.

4 And as you mentioned, a lot of times,
5 the reason for doing that is really trying to get
6 a better sense of when an exemption would be
7 appropriate, to take the temperature of the
8 Department on whether or not it thinks an
9 exemption would be possible.

10 And then, also, let's assume an
11 exemption is needed, and the parties are
12 interested in doing it, what are the types of
13 conditions the Department will want to see in
14 order to make sure that it's protective and in
15 the interest of participants.

16 I think, just to react to what you
17 said, we generally go in, we, you know, work with
18 the clients on this. And we're always saying,
19 we're not representing the Department.
20 Generally, we can't, necessarily assume that it's
21 just, you know, that's always going to be
22 confidential.

1 But regardless of that, the ability to
2 go in on an anonymous basis is incredibly
3 helpful. As I mentioned previously, there's
4 concerns about, once you start naming parties and
5 specific transactions, there being potential
6 negative implications.

7 So your question about once there's a
8 formal application file, should that information
9 be part of the public record? I certainly would
10 believe that. And any information that's
11 provided in support of that application, you
12 know, to the extent, I know there's issues of
13 trade secrets.

14 And the new procedures are,
15 essentially, saying just don't, don't put that in
16 here. Don't be sending that. It could be
17 potentially open to the public record.

18 I think there should be some
19 consideration of whether those materials, there
20 might be opportunities for way to maybe close the
21 inspection to that.

22 But I think in, general, yes, it makes

1 sense to have that information available. I
2 don't think there would be a concern of that,
3 considering that most people already assuming
4 anything that they're including in those
5 applications, and those conversations are already
6 part of the record.

7 ASSISTANT SECRETARY KHAWAR: I want to
8 get the stop sign, so I'm going to open it up to
9 others from the Government to ask any questions.

10 MR. HAUSER: I'd like to ask a few
11 questions, I guess. And first, maybe a question
12 for you, Mr. Green. I'd just like to, I'll lead
13 it actually ask the exact question I wanted to
14 ask of Mr. McMahon. So, I'd like to pose the
15 exact same question to you.

16 I mean, so let's suppose that we
17 acknowledge your concerns about anonymous
18 conversations, and the ability to kind of kick
19 the tires on an idea before you move forward with
20 it.

21 But from your perspective, is there
22 any issue with, once you've kicked the tires and

1 you've actually moved forward with an application
2 with including, you know, making those prior
3 conversations and submissions part of the formal
4 record?

5 MR. GREEN: I would give a more
6 qualified response. I certainly agree with that,
7 or I think (audio interference) application not
8 filed, that it be kept anonymous and
9 confidential. In cases where the application
10 ultimately is filed and the Department is
11 considering it, to the extent any earlier
12 representations, presentations, whatever are
13 material to the Department's consideration of the
14 application, then certainly the Department should
15 be able to insist that it received that
16 information on a non-confidential basis. And I
17 don't have any problem with that.

18 There may be discussions off the
19 record that should stay off the record because it
20 could be nothing more than an exchange of ideas
21 with the Department.

22 And I don't know that there's any

1 particular reason, if you're just kind of feel
2 your way through in an anonymous conversation to
3 make that public because it's not part of the
4 application, and it's not part of the transaction
5 exemption.

6 MR. HAUSER: Okay. And maybe, if I
7 could follow up with just a few questions with
8 you, Mr. McMahon, just to better understand the
9 reasons you think what you think.

10 One is, and this is a couple -- you
11 indicated a few areas where you thought we had
12 simply gone too far in our demands.

13 And I guess, I'd like to better
14 understand why you think the conditions have gone
15 too far. And you mentioned three that I jotted
16 down. And I'm actually interested in hearing on
17 each of them, so.

18 But the first was, you said, you
19 thought it was problematic for us to ask for a,
20 you know, a discussion of the extent to which
21 you'd considered ways in which to achieve the
22 goals that didn't involve engaging in a

1 prohibited transaction.

2 Obviously, our rationale for that
3 provision is in part because we don't view the
4 appropriate transaction rules as mere
5 technicalities. We do think that they're there
6 for a purpose and typically involve significant
7 conflicts of interest that need to be addressed.

8 And it's at least when we're assessing
9 whether it's not, it's in the interest of
10 participants to move forward, it's good to
11 understand if there's a way that you can do the
12 transaction, or you can achieve those benefits
13 that don't involve doing something that, you
14 know, is otherwise illegal.

15 The second thing you said was that you
16 didn't think a cost-benefit kind of discussion
17 was necessarily, you know, an aid or appropriate
18 in our consideration.

19 But again, if we're required by
20 statute to make best interest findings, and to
21 determine that the transaction is in the
22 interests of participants, protective of their

1 interests, why is asking, you know, for costs and
2 benefit, kind of, to the extent you can quantify
3 or the extent you can tell us something about
4 those costs and benefits, why isn't that directly
5 relevant? And why do you think that's gone too
6 far?

7 And then, finally, the limits of
8 liability provision. You know, we, I don't think
9 we have any issue with, you know, obviously,
10 people getting insurance at sponsor expense, or
11 what have you.

12 But to the extent, you know, that
13 we're looking to an appraiser, or a fiduciary, or
14 an auditor to provide an independent check on the
15 conflicts and safeguards for the protection of
16 the plans, I think we had concerns about it not
17 turning into kind of a paper exercise of finding
18 somebody to pay for the transaction, but that,
19 who has no skin in the game.

20 So what is problematic about saying
21 that the people you hire shouldn't be in a
22 position to waive their obligation, for example,

1 to perform workman, you know, in accordance with
2 workman-like standards. Not to do negligent
3 work, you know. To comply with State and Federal
4 law in their contract obligations.

5 So in each of those, you know, I
6 apologize for the long, multi-part question. But
7 they all have sensible rationales. I'm curious
8 why you think that they're kind of beyond the
9 pale. If I understood your testimony.

10 MR. McMAHON: No, so sure, I'd happy
11 to answer them all. I'll try to answer each one
12 of those in the multi-parts. I think the point
13 that I was trying to make was more of an issue
14 of, you know, not a question of like whether or
15 not it was within the Department's ability to
16 seek the information.

17 But to the point that, it really seems
18 collectively all of the changes, and each of
19 these technical changes, and each of the way that
20 all of these things add up, that it's sending
21 message to individuals who might otherwise be
22 interested in seeking an exemption, that the

1 Department is really trying to discourage you
2 from coming in by adding all of these information
3 requests or conditions essentially as a default.

4 With respect to the alternatives
5 issue, I would say, that was concerning because I
6 think when we look at the statutory requirements
7 for granting an exemption that, you know, that
8 the exemption is in the interest of participants
9 and that it's protective of participants, I don't
10 know that we would necessarily read that as
11 being, like, there's no other available
12 alternatives possible to achieve this
13 transaction, if it is to the benefit of
14 participants for providing it.

15 I think also, providing a detailed
16 description of each of those, it raises questions
17 about to what extent are you really need to
18 reduce to writing there in your application, all
19 of your thinking on each of those processes.

20 And really thinking about, there's a
21 very wide range of ways that you can approach a
22 situation. So where do you kind of start with

1 some of those questions.

2 On the cost-benefit analysis, I think
3 the concern is that folks have seen that as
4 potentially adding costs where applicants need to
5 be going out and hiring, you know, independent
6 parties to come in and really kind of crunch the
7 numbers and provide economic analyses and those
8 types of things.

9 Whereas we believe that, by default,
10 I think at the start, it would be possible to
11 consider an exemption application based on the
12 more qualitative measurements of how it would
13 benefit participants and the costs that are
14 associated with the transaction. Rather, than
15 coming up with some kind of detailed analysis.

16 Finally, on the limits of liability,
17 I would say, I think we agree with you that, you
18 know, the parties that come in and are entrusted
19 in these transactions should be standing behind
20 their work in terms of making sure that they
21 fulfill their responsibilities under ERISA.

22 I think our concern was with just how

1 expansive those provisions were. Talking about
2 any reimbursement indirect or direct for any
3 really, essentially, any claim, or, and the
4 waivers waiving all rights. Excuse me. It's
5 that you could not waive any right that there was
6 concerns about.

7 I think one of the issues we've heard
8 about is that just with how expensive that
9 language is, that there was a concern that things
10 like having attorney's fees forwarded, even you
11 know, in a finding that this qualified,
12 independent fiduciary did not breach any duties,
13 that, that in itself would also be prohibited.

14 So I think there's concerns about just
15 what is the extent of the expansiveness of those
16 of those provisions. And, again, the fact that
17 they are so expansive and that they cover so much
18 ground, that we're concerned it was indicating
19 really a reluctance by the Department to exercise
20 its authority to grant exemptions.

21 MR. HAUSER: So if, just to follow up,
22 and then I won't ask any more questions of this

1 panel, and thank you all very much. So I think
2 it'd be helpful if you'd, if ABC does decide to
3 supplement the record, and really, if anybody
4 does here, I think it would be good to kind of
5 address those particular issues.

6 So if our job is to sort between
7 exemptions that are actually in participants'
8 interests and those that are not, where do you
9 think the line should be drawn? I mean, I don't
10 think I'm hearing you say that it's irrelevant
11 whether or not there was a non-prohibited way to
12 do the transaction.

13 I don't think I'm hearing you say that
14 it's irrelevant whether what the costs and
15 benefits actually are. So it'd be good to
16 understand, well, what is acceptable to you?

17 I mean, honestly, I think the
18 inference that should be drawn from the questions
19 we're asking is that we'd like as complete a
20 record as possible at the outset so that we could
21 make an honest and fair determination of whether
22 something is or isn't in the interests of

1 participants based on a complete record at the
2 outset.

3 Not that we have a thumb on the scale
4 for or against exemptions. But that we really do
5 need a record. And we recognize that the people
6 coming to us for exemptions have an interest in
7 getting to yes with us. And we would like to
8 make sure we know all the facts.

9 But if you think we're asking for too
10 much in the way of facts or analysis, if you
11 could tell us where you think those lines are,
12 and what you're willing to accept. And
13 similarly, on indemnification provisions, so
14 where are the lines there?

15 I mean, are you for example, do you
16 have, do you find it problematic to say you can't
17 waive your right to insist on workman like,
18 performance of your obligations as an appraiser,
19 or as an accountant?

20 Is even a negligence waiver
21 problematic? I mean, is it problematic to you to
22 say that people should be required to at least be

1 accountable for adhering to a non-negligent
2 standard? Where are those lines in your mind?

3 MR. McMAHON: I guess, I'm hearing
4 yours is a solicitation to provide supplemental
5 information, not necessarily to answer that now.
6 Because I think that's something --

7 MR. HAUSER: Well, if you have an
8 answer now, I'm happy to hear it. But, but
9 that's right. I do, I do think if, you know,
10 unless you want to tell me these, these issues
11 are all irrelevant, and we're just off-base even
12 thinking about these things, I'd like to better
13 understand. Well, where do you think we should
14 draw the line? And that that's generally, true.

15 MS. HANSEN: Can I just add one point,
16 very similar to that. And this also can be in a
17 supplemental briefing. I understand we're
18 already past our time. And it's specifically
19 with regards to the cost-benefit analysis.

20 I hear what you're saying. I heard
21 some of the response being about the timing. Or
22 there, it seemed like, there were some comments

1 about the fact that we are requesting this sort
2 of upfront.

3 And there's some concern that we would
4 need this cost-benefit, qualitative analysis to
5 even consider the application in the first place.
6 And that seemed to cause some concerns. Again,
7 and I, with respect to the time, you know, please
8 feel free to respond later in writing.

9 You know the concern I think, in part,
10 that we have is if that we don't have the cost-
11 benefit that some sort of analysis at the
12 beginning, we run the possibility of later in the
13 process, having been found ourselves where we
14 have proposed something, waiting for that
15 information, expecting that information, and then
16 if we don't get it, we're put in a difficult
17 position.

18 And so I'd be very curious to hear
19 with any information you can give about, if you
20 think there's a different timing in how that
21 would work, and what we would do.

22 What you think we should do if we

1 asked for that information in a proposal, and
2 then did not get that information, did not get
3 sufficient responses.

4 So I will leave that because it's past
5 ten. But just as you're thinking about
6 something, that's something I would be very
7 interested in, certainly.

8 MR. COSBY: Yes. And I'd also be
9 interested in knowing when you are approaching or
10 contemplating a transaction, and you're
11 encountering problems with complying with the
12 prohibited transaction rules, I would just like
13 to know, like, what's the thought is to you.

14 Do you immediately jump to concluding
15 that you need to approach the Department? Or do
16 you actually consider the alternatives of
17 executing the transaction in a non-prohibited
18 way? It just be helpful to know like, what the -
19 -

20 I know, it's probably different based
21 on the circumstances. But just understanding the
22 process of how you determine that you needed an

1 exemption, I think that would be helpful for the
2 record too.

3 MR. McMAHON: Okay, thank you.

4 ASSISTANT SECRETARY KHAWAR: Thank you
5 to the three witnesses. We really appreciated
6 your testimony and your answers. So we're going
7 to turn to our second panel. It's the American
8 Society of Appraisers and the Independent
9 Fiduciary Group.

10 Jeff, Bill, okay, great. I see both
11 of you. Jeff, I think you're first. I also have
12 to apologize, I'm going to need to step away. I
13 should be back before Q & A. And also I need to
14 apologize. There are going to be a lot of
15 apologies today.

16 Another apology is that I did not
17 introduce earlier Chris Motta, the Division Chief
18 in the Office of Exemption Determinations, he's
19 going to be participating in this panel, as well.
20 I should be back before Q & A. But in my
21 absence, Chris is going to moderate. Apologies,
22 but I'll be back as soon as I can. Thank you,

1 all. And with that, Jeff, go ahead.

2 MR. COSBY: Jeff? I don't know what
3 happened to Jeff. Bill, did you want to, since
4 you're appearing on the screen, did you just want
5 to go ahead and do yours. And then --

6 MR. RYAN: I'd be happy to Chris. No
7 problem.

8 MR. COSBY: Thank you, very much.
9 Thanks, very much, Bill.

10 MR. RYAN: Okay. Well, thank you,
11 again, and good morning. I'm Bill Ryan. I'm the
12 CEO, President, and Chief Fiduciary Officer of
13 Newport Trusts, a leading independent fiduciary.

14 I'm here to testify on behalf of a
15 group of professional independent fiduciaries
16 regarding the Department's proposed changes.
17 Again, thank you to the Department for giving us
18 the opportunity to speak and air some thoughts
19 that we have with respect to the proposal.

20 With a little bit of background on the
21 group, members of the group that submitted our
22 comment letter have been involved in over 80

1 published exemptions by the Department since
2 2002, that require an independent fiduciary. And
3 we think that's the majority of exemptions that
4 do.

5 All the professionals in the group
6 have worked productively over the years with the
7 Department during that time, and we're extremely
8 proud of our efforts. We have no doubt that our
9 efforts have enriched plans and benefitted plan
10 participants and beneficiaries.

11 And we do take our responsibilities as
12 fiduciary seriously. Therefore, we're concerned
13 by the Department's proposed changes to the
14 exemption application process.

15 My testimony outlines some of the key
16 points that we highlighted in our comment letter.
17 And for the reason below, we'd hoped that the
18 Department will reconsider the proposal.

19 First, the Department's proposal, in
20 our view, would further limit access to
21 individual prohibited transaction exemptions. As
22 such, it is inconsistent, as we understand it,

1 with Congress's intent in granting the Department
2 authority to grant individual class and other
3 exemptions. And we think it's critical to the
4 effective functioning of ERISA, and plans to
5 ensure meaningful access to exemptions.

6 As everyone knows on the panel, and
7 everyone knows that the Department, ERISA, and
8 the Code prohibit a wide array of transactions
9 involving plans and IRAs. Had it been
10 Congressional intent not to give any exemptions
11 to those prohibitions, it could have done so.

12 But we all know that that in effect
13 would make plans inoperable. Not only did
14 Congress grant statutory exemptions, but it
15 specifically granted the Department authority,
16 which was clarified in 1978, to grant exemptions
17 on either an individual or a class basis.

18 And Congress's objective in doing this
19 was to both create adequate safeguards to protect
20 plans and to make sure that the exemptions did
21 not disrupt established business practices of
22 financial institutions, who also perform

1 fiduciary functions and connections with those
2 proposals.

3 What we think in terms of the way the
4 language is characterized is, the Department
5 appears to take the view that merely seeking an
6 exemption is evidence that the plan or plans and
7 the beneficiaries are not going to be adequately
8 protected.

9 This is not our view in this case. In
10 working with members of our group, the Department
11 has determined over and over again, that the
12 exemptions that have been considered meet the
13 requirements under 408(a).

14 And one of the things that we would
15 appreciate is an explanation of why the
16 Department believes these changes are necessary
17 given our 20 year experience with them.

18 Without that explanation without a
19 little bit more background so that we could all
20 understand it, we don't believe the proposed
21 changes generally are warranted. And we also
22 believe, and we think this is important that it

1 will limit access to exemptions, as other
2 witnesses have already said.

3 Second, the Department, we hope,
4 recognizes the important role of independent
5 fiduciaries in the exemption process. And our
6 concern is, quite frankly, with some of the
7 language in the proposal.

8 We think the proposal, perhaps,
9 inadvertently underestimates the value of
10 experienced and competent professional
11 independent fiduciaries. We all take our
12 fiduciary responsibilities under 404 seriously,
13 which are the most rigorous standards under
14 American law.

15 The existence of a prohibited
16 transaction exemption does not relieve any
17 fiduciary of those obligations. Professional
18 independent fiduciaries bring special expertise
19 and relevant experience to make those difficult
20 fiduciary decisions, and by definition have
21 accumulated that experience over time.

22 As the Department knows, members of

1 our group have conducted extensive due diligence
2 on transactions, done individual negotiations on
3 favorable terms and conditions, and executed
4 numerous transactions permitted through exemptive
5 relief, which have significantly benefitted plan
6 participants and beneficiaries over the years.

7 The funding status of DB plans and
8 VEBAs have been improved through in-kind
9 contributions and subsequent management of
10 securities, real property, and other non-cash
11 assets.

12 Plans turn higher investment returns
13 by executing financial transactions at attractive
14 prices that might otherwise be prohibited because
15 of a related party interest plan.

16 We have also exercised ancillary
17 shareholder rights, enforced lower transaction
18 costs, which I think go into sort of the cost-
19 benefit analysis that was discussed. And
20 basically made sure that plans received adequate
21 compensation from parties if there had been a
22 breach.

1 Participants and beneficiaries have
2 been given high quality welfare benefits at a
3 reasonable cost through captive reinsurance
4 agreements.

5 And basically, the plan investors all
6 also have access to services performed by major
7 financial institutions undergoing abrupt
8 ownership changes during the financial crisis.

9 Qualified fiduciaries have actually
10 all been involved in of these transactions, and
11 we think provide a positive benefit. Rather than
12 seeming to recognize that benefit and making sure
13 that exemptions are feasible, the proposal
14 appears to take the view that the judgment of
15 fiduciaries is somehow tainted by our very
16 experience.

17 We're surprised by this apparent
18 disregard, and you might even say contempt, for a
19 professional experience and don't believe it's
20 deserved, on the record.

21 And we think it's inconsistent with
22 the importance the Department has previously

1 placed on the importance of knowledgeable, well-
2 trained fiduciaries in other contexts.

3 Third, and I know others have touched
4 on this, we think the Department should re-
5 clarify and rethink its approach on independence.
6 Partially because the terms that are being
7 proposed here, are to us, difficult to follow,
8 and we think unhelpfully vague. And we don't
9 believe in that case, it benefits plan
10 participants or beneficiaries.

11 Typically, under the existing
12 proposal, fiduciaries must demonstrate that a
13 minimum portion of its revenues is derived from
14 parties in interest engaged in the transaction,
15 anywhere between two and five percent. And below
16 two percent, there's a presumption, currently.

17 I can tell you, personally, but I
18 understand, you know, it's basically trust but
19 verify that our decisions are not based on
20 whether or not our firm receives revenue from a
21 particular source.

22 The thing that we value the most is

1 our integrity, and our reputation. And quite
2 frankly, we turn down business, if we think that
3 there is a conflict of interest, which I'm sure
4 the Department doesn't see, because we're not
5 telegraphing this.

6 And we have resigned from assignments
7 and assisted with orderly transitions to a
8 successor where conflict of interest has
9 occurred.

10 We are not aware of a single instance
11 where an independent fiduciary, under an
12 exemption, has performed services or improperly
13 been influenced by conflict of interest.

14 And the proposal doesn't provide any
15 backup or research with respect to this. We also
16 note and this is an admission against interest,
17 since my firm is one of the larger firms that
18 provides independent fiduciary services.

19 That the lower revenue target will
20 probably result in industry consolidation, and
21 serve as a barrier to entry to competent
22 fiduciaries, who may in fact, be running into

1 this two percent barrier.

2 We're also concerned, based on the
3 wording, that the Department has more or less
4 unfettered discretion with respect to determining
5 whether or not someone is independent.

6 And again, I think this goes to the
7 planning and the element to make sure that we're
8 all aware of both the Department's views on
9 things, as well as whether or not transactions or
10 parties should be involved with it.

11 And I believe it was already discussed
12 that it, the proposal vastly expands the number
13 of parties from whom we as fiduciaries have to be
14 independent.

15 It's not just the independent, the
16 parties in interest. It's all service providers.
17 It prevents us, for example, as a fiduciary, from
18 serving as an appraiser, even if, in fact we're
19 fully qualified to do so. It also prevents
20 others in the regulative community from talking
21 to or forming relationships with independence
22 fiduciaries.

1 We are also consulted at different
2 points about the feasibility of approaches with
3 respect to exemptions. And we think those
4 conversations are valuable. And we don't want to
5 see them somehow implicitly penalized.

6 We also note that, as I said earlier,
7 the facts and circumstances analysis of
8 independence does seem to give the Department
9 relatively unfettered discretion with respect to
10 this. And from our perspective, that lacks
11 certainty.

12 Finally, the proposed rule provides
13 the Department would consider whether an
14 independent fiduciary would have an interest in
15 quote, future transactions of the same nature or
16 type when determining that the future of
17 fiduciary is independent.

18 And that the fiduciary should not have
19 a business interest in promoting the exemption
20 transactions. We find those standards quite
21 frankly, vague, but also running afoul of the
22 notion that the fiduciaries themselves have to

1 and should be experienced, both in the processes
2 of ERISA and ideally with respect to the
3 circumstances under the terms of the exemption.

4 And the Department, when it discusses
5 exemptions has often, with the prior
6 transactions, and has not seen experience, quite
7 frankly, to be a detriment. We're guided as
8 fiduciaries by the Court's admonition in *Donovan*
9 *V. Cunningham*, which was supported by the
10 Department's litigation briefs.

11 That the appropriate measure of the
12 conduct of a fiduciary is the prudent expert's
13 standard. And a pure heart and an empty head is
14 not enough to satisfy that. So we think standard
15 prudence requires experience, and expertise born
16 of that experience.

17 And we don't think it's should be a
18 goal of the proposal to ensure that independent
19 fiduciaries who are supposed to be lending their
20 expertise to a transaction are newcomers to that.

21 Finally, we also note that there are
22 concerns that have been raised by us and by

1 others with respect to the confidentiality of
2 some information that is provided during the
3 exemption process.

4 Obviously, people have talked about
5 the prior conversations before an exemption has
6 been proposed. And totally understand that. But
7 we're also looking at some of the information
8 with respect to parties may consult with or even
9 hire an fiduciary before they proceed with
10 proposal.

11 Under the proposal, the Department
12 will require the exemption application. So this
13 is the filed application, include substantial
14 information about the process of hiring the
15 fiduciary, and the references, which would
16 implicitly be separate subject to discovery.

17 We're not sure of that kind of level
18 of detailed information, this is not our
19 information, although we do provide responses to
20 RFPs, will have appropriate safeguards because we
21 saw none in the proposal.

22 And we've also, we're quite frankly

1 aware of the dangers and difficulties of holding
2 such information confidential at different
3 points.

4 MR. SHIKER: We'd like you wrap it up.
5 We're, we're over time.

6 MR. RYAN: I apologize, Brian. And
7 with that, I'd actually, again, like to thank the
8 Department for their consideration for these
9 remarks. And stand ready to answer any
10 questions. My apologies. I did not see the
11 timer.

12 MR. CROSBY: No problem. Thank you,
13 Bill. Jeff, are you on the line now?

14 MR. TARBELL: Ready?

15 MR. CROSBY: Yes, thank you.

16 MR. TARBELL: All right, great.

17 MR. CROSBY: Proceed.

18 MR. TARBELL: Good morning. My name
19 is Jeff Tarbell, and I'm a Director with Houlihan
20 Lokey. I have more than three decades of
21 experience valuing, forming evaluations and
22 fairness opinions related to closely-held company

1 stock including matters related to employee stock
2 ownership plans.

3 I'm testifying today on behalf of, and
4 also as a member of the Board of Directors of the
5 American Society of Appraisers, or the ASA.

6 Members of the ASA are experts on the valuation
7 of closely-held businesses and generally accepted
8 valuation principles.

9 And we regularly advise ESOP and ERISA
10 trustees and fiduciaries on the fair market value
11 of plan assets for ESOP transactions, valuations,
12 and a range of other ERISA matters involving
13 asset value.

14 ASA and its members, thus, have a
15 significant interest in the proposed rule because
16 it proposes to redefine qualified independent
17 appraiser and qualified appraisal report as those
18 terms are used in the proposed procedures.

19 As set forth in our comment letter, we
20 have serious concerns about the impact of the
21 proposed regulation, and ASA opposes the proposed
22 rule for the reasons discussed in a minute here,

1 and urges the Department to withdraw the proposal
2 entirely.

3 First, the proposed rule is
4 inconsistent with the appraisal professions
5 ethical and professional commitments and
6 incompatible with the premise of fair market
7 value.

8 ASA shares the Department's policy
9 objective of ensuring that the appraiser will not
10 be pressured to deliver a valuation reflecting
11 undue influence from the fiduciary, or any other
12 party.

13 Yet, in proposing to, among other
14 things, redefine qualified appraisal report, to
15 require the report to be prepared solely on
16 behalf of the plan, and therefore, only take into
17 account the interest of the plan, and its
18 participants and beneficiaries, the Department
19 directly undermines that goal.

20 The proposed rule would create
21 internally inconsistent requirements that no
22 appraisal report prepared in accordance with

1 generally accepted ethical rules, appraisal
2 standards, and valuation principles could ever
3 satisfy.

4 Valuation professional ethical
5 standards, including those set forth in the ASA's
6 principles of appraisal practice and code of
7 ethics already require appraisers to perform
8 appraisals independently, and without bias in
9 favor of any party.

10 For example, USPAP, which sets forth
11 the generally recognized standards of the
12 profession, contains an ethics rule that imposes
13 significant conduct requirements on valuation
14 providers, including an impartiality requirement.

15 Appraisals performed in compliance
16 with USPAP will not lead to an evaluation
17 reflecting undue influence from the fiduciary, as
18 the Department appears to believe.

19 Federal regulations promulgated by the
20 IRS mirror those ethical standards, providing
21 that an ESOP can be considered a qualified trust
22 under the IRC, only if all evaluations of

1 employer securities which are not readily
2 tradable on an established securities market, are
3 by an independent appraiser.

4 Among other things, a qualified
5 independent appraiser under those regulations is
6 neither a party to the transaction nor related to
7 any party to the transaction.

8 And under IRS advisory guidance, a
9 qualified appraisal has been conducted by a
10 qualified appraiser only if it was conducted in
11 accordance with generally accepted appraisal
12 standards such as USPAP.

13 The key here is that an objective
14 appraisal does not favor the interest of any
15 party. The construct of hypothetical buyers and
16 sellers inherent to the mandatory standard of
17 fair market value for ERISA purposes, requires
18 the appraiser to ignore any party has particular
19 characteristics, interests, or motivations.

20 Simply put, fair market value must be
21 determined objectively. By requiring that a
22 qualified independent appraiser only take into

1 account the interest of the plan, and its
2 participants and beneficiaries when it produces
3 the appraisal report, the proposed rule would
4 conflict with the standard of fair market value
5 and would cause accredited appraisers to violate
6 their ethical commitments and mandatory appraisal
7 standards.

8 Considering the identity or interests
9 of an actual party to a transaction, let alone
10 doing so to the exclusion of any other party's
11 interests, as the proposed rule commands,
12 conflicts with the standard of fair market value
13 and ethical obligations.

14 Second, the proposed rules revenue
15 limitation and prohibition on indemnification
16 would degrade the quality of appraisal services
17 available in the regulated community.

18 The proposed rules redefinition of
19 qualified independent appraiser includes a limit
20 of two percent on the amount of present and
21 projected revenue an appraiser may receive from
22 parties involved in the exemption transaction

1 relative to revenues that received from all
2 sources. Such restriction is unnecessary,
3 arbitrary, and is likely to have serious adverse
4 consequences for ESOP trustees and appraisers.

5 The proposed rule has the real
6 prospect of negatively affecting the quality of
7 appraisals of ERISA plan assets by simultaneously
8 making it harder for smaller appraisers to
9 qualify as an as qualified independent appraisers
10 while also either hastening large appraisers exit
11 from the marketplace or significantly increasing
12 the cost of appraisals to the regulated
13 community.

14 For instance, a new appraisal firm
15 would be unable to offer valuation services under
16 the proposed rule. After all, an ESOP appraisers
17 first engagement would represent 100 percent of
18 annual revenue and would violate the proposed
19 rule.

20 By definition, a firm would not be
21 able to comply with a proposed rule, unless, and
22 until, they have a minimum of 50 clients where

1 each constituted no more than two percent of
2 revenues.

3 Additionally, if an appraisal firm
4 charged, for example, \$50,000 per engagement, and
5 took on 50 engagements a year its annual revenue
6 would be 2.5 million. To satisfy that two
7 percent of revenue requirement, that firm could
8 never accept more than one assignment per client
9 each year.

10 If it did, its revenue from that
11 client would double to 100,000 and represent 4
12 percent of their 2.5 million annual revenue and
13 violate the rule.

14 The proposed rule also prohibits
15 appraisal firms from including indemnification
16 agreements in their engagement agreements. Such
17 provisions are a standard part of valuation firms
18 engagement agreements, whether for ESOP, or any
19 other purpose.

20 In the appraisal of large and complex
21 ESOP companies, this prohibition would expose
22 appraisers to tens, or possibly hundreds of

1 millions of dollars of potential liability,
2 dwarfing any fees associated with the assignment.

3 Given that high risk and low reward
4 calculus, larger firms would rationally shift
5 their resources to providing financial advisory
6 services to non-ERISA clients where that risk
7 does not exist.

8 Smaller, undercapitalized firms may be
9 more likely to remain in the marketplace.

10 Smaller firms may not be as concerned as more
11 established firms about the risks of conducting
12 appraisals without indemnification or limitations
13 of liability because they are in essence,
14 judgment proof.

15 Thus, in seeking to protect plan
16 participants and beneficiaries, the proposed rule
17 would likely have the opposite effect of forcing
18 fiduciaries to rely on riskier, lower quality
19 appraisal reports from less qualified appraisers
20 from whom no meaningful recovery can be made in
21 the event of an adverse outcome.

22 To remain in the marketplace without

1 indemnification provisions, valuation firms will
2 necessarily increase their fees significantly as
3 a form of self-insurance. Indemnification
4 provisions allow firms to meaningfully reduce
5 their fees by shifting the cost of litigation
6 risk to their clients.

7 Absent such fee reductions, only the
8 deepest pocket clients could afford the services
9 of larger appraisal firms, leaving the clients of
10 more modest means to select from smaller
11 appraisers who, for the reasons previously
12 described, may face difficulty meeting the
13 proposed regulations definition of a qualified
14 independent appraiser.

15 Third, the Department has not
16 demonstrated that the proposed rule will lead to
17 improved appraisal services. The proposed rule
18 would fundamentally alter the appraisal landscape
19 with respect to ERISA plan assets.

20 Yet, the Department neither offers
21 empirical justification for the rule nor appears
22 to consider the foreseeable effects. Rather, the

1 proposed rules relies on unsupported assumptions
2 and unverifiable anecdotal views of staff who are
3 not valuation experts.

4 A proposed notice of rulemaking must
5 not only provide notice of what the Agency
6 proposes to do, but must also reveal the factual
7 basis for the proposed rule.

8 Because this rule as it relates to
9 appraisers rests on undisclosed issues
10 encountered by the Department, privately
11 developed default assumptions, and the
12 undisclosed perceptions about independence, the
13 Department's notice of proposed rulemaking is
14 deficient.

15 Finally, the Department has not
16 established empirically that there are issues
17 with appraisers independence, necessitating
18 revisions to the proposed transaction exemption
19 guidelines, or explains how the proposed rule
20 would resolve those issues.

21 The Department acknowledges that this
22 proposed rule would affect no more than 20 small

1 plans that file for PTE exemptions each year. By
2 that admission, this proposed rule appears to be
3 no more than a solution in search of a problem.

4 To that end, we fear the proposed rule
5 to be a Trojan horse. That if passed, would
6 embolden the Department to attempt to apply these
7 rules to other ERISA-related valuation areas,
8 such as employee stock option plans, where the
9 terms of the proposed rule would impact a far
10 greater number of plans both large and small.

11 In closing, I would like to emphasize
12 that the proposed rules foreseeable effect is to
13 fundamentally alter the appraisal landscape with
14 respect to ERISA plan assets.

15 For the reasons described above, the
16 rule's likely consequence will be to degrade the
17 quality and increase the cost of appraisal
18 services to the regulated community.

19 This directly contradicts Congress's
20 goal to encourage the creation of ESOPs.
21 Moreover, the proposed rule will likely have far
22 more wide ranging effects that the Department

1 appears not really considered.

2 MR. CROSBY: Your time's up.

3 MR. TARBELL: I appreciate the
4 opportunity to testify and welcome your
5 questions.

6 ASSISTANT SECRETARY KHAWAR: All
7 right. Thanks to both witnesses. Appreciate the
8 testimony. Just a couple of questions.
9 Mr. Ryan, so thinking about the current
10 independence standard, which has, you know, this
11 kind of bifurcated approach, this range two to
12 five percent. And looks at kind of earned
13 revenues, projections, all those things.

14 I mean, do you believe that something,
15 revenues in excess of 5 percent due kind of
16 signal a lack of independence? I think you
17 probably need to unmute, or I get to work on my
18 lip reading, either one.

19 MR. RYAN: I think your lip reading is
20 probably fine, Ali. Bill Ryan, from Newport
21 Trust. No, I don't think any member of our group
22 has any problem with the current range.

1 We understood the Department's concern
2 with respect to 5 percent. Now five percent for
3 a small employer might be less relevant than 5
4 percent for a large financial institution.

5 But I think that playing field has
6 been fairly well laid out. There is at least the
7 presumption to talk to the Department over post
8 five percent, if in fact there's an issue.

9 Although, quite frankly, to my
10 knowledge no one has ever done so. So I don't
11 think we have any issue whatsoever with the
12 current range. You know, the presumption below
13 two, discussion between the Department between
14 two and five, and a strong presumption/there's no
15 way that you can be independent over five.

16 ASSISTANT SECRETARY KHAWAR: Mr.
17 Tarbell, in your testimony, and I believe in the
18 ASA's comment letter, you identify the context of
19 a startup appraiser. And the problem of an
20 engagement, possibly resulting in 100 percent of
21 that firm's revenue being derived from a client.
22 How are those barriers to entry that you

1 identified being dealt with right now?

2 MR. TARBELL: Well, they're not being
3 dealt with because that that two percent
4 limitation doesn't exist today. But more
5 importantly, I think it doesn't exist in a
6 context outside of prohibited transaction
7 exemptions.

8 ASSISTANT SECRETARY KHAWAR: Right,
9 but. So if you pull up the CFR, right? And you
10 look at the text as it exists today, replace two
11 percent with five percent. A hundred percent is
12 more than five percent.

13 MR. TARBELL: That five percent
14 speaking --

15 ASSISTANT SECRETARY KHAWAR: So how
16 are you dealing with that issue for startup
17 appraisers at this time?

18 MR. TARBELL: I can't answer. That
19 I'm not in the position of a startup appraiser.
20 But more importantly, I believe this, if this
21 rule was to be established, it would be a
22 launching point for such provisions to stretch to

1 other areas of ERISA regulating.

2 ASSISTANT SECRETARY KHAWAR: I heard
3 your testimony on that point. I understand what
4 you said. So do you also, do you agree with
5 Mr. Ryan, about the current rule, the two, five
6 percent? Or do you reject the five percent
7 threshold as well?

8 MR. TARBELL: I don't think -- a
9 conflict to me is not a mathematical, it doesn't
10 lend itself to mathematical calculation. I think
11 it's more of a state of mind.

12 I think a an appraiser who properly
13 provides independent work can do so for a client
14 that represents even more than five percent of
15 its revenues.

16 I agree that there's a point at which
17 it doesn't work anymore. But I don't know that,
18 that point is universally applicable to all
19 parties.

20 ASSISTANT SECRETARY KHAWAR: So you
21 believe that it would be more fact specific and
22 context dependent?

1 MR. TARBELL: I think that's an
2 arguable. I understand the difficulty of
3 evaluating the facts of every situation and how
4 quantitative rules make that measurement easier.
5 But I think it's a bit arbitrary.

6 ASSISTANT SECRETARY KHAWAR: Okay. So
7 just maybe asking you to develop that answer a
8 little bit. So you know, as you've heard a
9 couple of times, we have a particular role in
10 this process. Right?

11 We need to ensure that parties are
12 independent, that conflicts are being adequately
13 addressed. We need to develop the record in
14 order to do that, as we are thinking about
15 exemptions.

16 You brought up the point of a state of
17 mind as reflective of independence? When we're
18 trying to develop a record, how exactly would you
19 propose we measure a state of mind?

20 MR. TARBELL: I don't have an answer
21 for that.

22 ASSISTANT SECRETARY KHAWAR: Again,

1 I'll invite others from the Department to ask
2 their questions.

3 MR. HAUSER: I have questions for both
4 panelists. And maybe, just starting with you,
5 Mr. Tarbell. First, I listened, you know,
6 intently to your discussion of what the
7 obligations are of an appraiser with respect to
8 the appraisal.

9 And you know, it may well be there's
10 some inartful wording in the preamble to our
11 document. But I can assure you that we have no
12 issues with the ASA's principles of appraisal
13 practice and code, as cited in your comment
14 letter.

15 And in particular, I mean, I think
16 we'd be happy to make quite clear, and either as
17 a preamble or text matter, that you know, the
18 obligation of the appraiser is just to
19 essentially get the valuation right within the
20 best of their abilities, and not to boost, you
21 know, the appraisal if the plans happens to be
22 sell side, or you know, reduce by side. That's

1 not what we had in mind at all.

2 We think the fiduciary and the plan is
3 best served if you just do your job accurately
4 and free from bias. So that, the standards that
5 were quoted in your letter, were that the
6 appraisers primary obligation to the client is to
7 reach complete, accurate, and credible
8 conclusions, numerical results, regardless of the
9 client's wishes or instructions in this regard.

10 And that the written numerical result
11 must be developed objectively, and without bias.
12 And it should be unrelated to the desires,
13 wishes, or needs of the client who engages the
14 appraiser.

15 Assuming we make it quite expressed
16 that we agree with those statements, does that
17 resolve your issue with respect to what we're
18 asking of the appraiser in this circumstance?

19 MR. TARBELL: It would seem to be
20 helpful. But so long as the rule also said, that
21 the appraiser must work solely in the best
22 interest of the plan and take into account only

1 the interest of the plan, those would be
2 contradictory.

3 MR. HAUSER: Well, the rule doesn't
4 say that it, that the person has to only act in
5 the interest of the plan. The rule's provision
6 relates to is your sole client is the plan.
7 That's who you're working for.

8 The concern we have, in part, is the
9 sort of thing where, for example, the appraiser
10 as a practical matter, is you know, we'd like
11 clarity as to whom it has the client
12 relationships.

13 So for example, we would not expect to
14 see preferential access to draft reports being
15 afforded to the plan's counter-party to the
16 transaction, you know. We expect to see conduct
17 consistent with that.

18 But as far as what the content of the
19 report is, we just expect accuracy. And so, I
20 mean, there may, it may be a wording issue in the
21 preamble. But what we want clarity about is your
22 client is the plan.

1 The sources you cite, acknowledge you
2 have a client. And we'd like them to be clear
3 that it's the plan in this circumstance. And
4 it's just the plan. But your obligation as far
5 as getting the numbers, right, is just to get the
6 numbers right.

7 MR. TARBELL: Well --

8 MR. HAUSER: I mean, does that answer
9 you objections? Or is there an additional
10 problem there?

11 MR. TARBELL: -- well, I'm surprised
12 to hear there's an issue with lack of clarity of
13 who our client is. I mean, that I've been, I've
14 seen a lot of ESOP appraisals and complaints
15 about ESOP appraisals. And that's not an issue
16 that I've seen.

17 I think appraisers are clear who their
18 client is. The language I'm referring to is
19 that, if the rule states that a qualified
20 independent appraiser only take into account the
21 interests of the plan, and its participants and
22 beneficiaries when it produces the report.

1 That, that's the sort of language that
2 to an appraiser, and I understand it may not be
3 read quite the same way to someone who is not,
4 tells us to put our finger on the scale and do
5 something that is in favor to the buyer, the
6 ESOP, or depending on what role ESOPs in a
7 particular case.

8 So it's language like that, that seems
9 to suggest we should, when faced with the choice
10 between, for example, two different variables,
11 we're required in that case to choose the
12 variable that favors the interest of the ESOP.
13 That is opposite to the definition of what we're
14 supposed to do in fair market value.

15 MR. HAUSER: Yes, so the good news
16 here is I can assure you, that's not the intent.
17 We have a common goal in that regard, which is
18 just serve the truth, please. And that gets us
19 where we want to go on that score.

20 And as far as the clarity about who
21 the client is, it really is a question of making
22 sure that the appraiser is answering to the plan

1 as the client. And making sure that, that
2 relationship is being treated as central.

3 In terms of, for example, access to
4 the report, access to drafts of the report, the
5 kind of conversations that are going on, you
6 know, with the parties, and especially the
7 counter-parties to the plan. So I think we can
8 clarify those things, if to the extent that's an
9 issue. And I wouldn't want anyone to think
10 otherwise.

11 You cite also in the letter, and I
12 think you cited your testimony, as one of the
13 protections we should take comfort from, the
14 ethics standards. And just with respect to stock
15 appraisers, how are those ethics standards
16 enforced? And who? What is the responsible
17 regulatory body for those?

18 MR. TARBELL: Well, as a member of the
19 ASA, we have an Ethics Chair and an Ethics
20 Committee that hears complaints from the public.
21 As a member of the Board of Directors, I often am
22 involved in determining final adjudication of

1 those kinds of complaints.

2 And there are several every year,
3 where the ASA then takes some sort of action
4 against that member, or determines not to. But
5 ethics are enforced and adjudicated by the
6 professional association, who publishes the
7 ethics that the appraiser is bound by.

8 MR. HAUSER: And is, in general, do
9 the States impose these ethics requirements? And
10 do the States require membership and these
11 associations as a condition of rendering stock
12 opinions?

13 MR. TARBELL: To my knowledge, the
14 only discipline within the appraisal community
15 that requires State licensing is real estate.
16 There is no State licensing of business
17 appraisers.

18 MR. HAUSER: Thank you. And on that
19 the issue of the, you know, waivers of liability.
20 I mean, so is it your opinion that there should
21 be no restriction whatsoever on the ability of
22 the appraiser to get a waiver of their

1 obligations under State and Federal law? What
2 are the -- what kind of waivers are, would be
3 okay with you? Or is the answer that they're all
4 okay. I mean, what --

5 MR. TARBELL: No, I believe that --
6 I'm tempted to speak generally. But I can tell
7 you from my own experience, at a couple of
8 different firms, you know, writing I'm sure a
9 thousand or more engagement letters, an
10 engagement section includes two provisions.

11 One, the indemnification. And also,
12 secondly, the standard of care. The standard of
13 care being the bar that the indemnification will
14 not apply if that standard of care is not met.

15 So generally, that's a gross
16 negligence standard. Some firms will impose a
17 negligence standard. That's a, you know,
18 individual decision subject to negotiation
19 between the client and the appraiser.

20 But the issue there is that the
21 appraiser does have skin in the game. If they
22 are negligent or grossly negligent, the

1 indemnification doesn't apply.

2 MR. HAUSER: And would you or they ask
3 that?

4 MR. TARBELL: I think that's a non-
5 lawyer's explanation of a very legal issue.

6 MR. HAUSER: Understood. Would your
7 ASA have an objection to the provision if it were
8 reworked to say that much? That what can't
9 happen is a waiver of the person's responsible
10 ability to perform work that is either negligent
11 or grossly negligent?

12 MR. TARBELL: In other words, that the
13 indemnification cannot be unilateral with no
14 exception?

15 MR. HAUSER: Well, the indemnification
16 can't go to reimbursing somebody for negligent,
17 or grossly negligent.

18 MR. TARBELL: To be honest, I believe
19 that already exists. I've never seen an
20 engagement letter that did not have a particular
21 bar that if exceeded, then indemnification was no
22 longer valid. I haven't seen every engagement

1 letter, but I think that already exists in the
2 marketplace. If not, our clients are not
3 negotiating well for their own behalf.

4 MR. HAUSER: Yes, I mean, we've
5 certainly seen disclaimers of even as to
6 negligence and the performance of appraisal work,
7 so. But that's not your practice, you don't
8 think? I mean, that's not something you've seen?

9 MR. TARBELL: No, not my practice, no.

10 MR. HAUSER: All right. And maybe
11 just with respect to the two percent issue, and I
12 don't want to take up more time with questions.
13 But to the extent you can put any color on, you
14 know, for a typical appraiser, how many
15 appraisals do they do in the course of a year?
16 What information if any do you, or the ASA have
17 on typical firm style size for appraisers,
18 typical number of engagements firms, you know.

19 MR. TARBELL: Yes.

20 MR. HAUSER: Over the course of the
21 year and the like?

22 MR. TARBELL: I'm from, you know, I

1 don't know of any strongly, certain studies on
2 that point. But what I can tell you, just from
3 being involved in this marketplace for a long
4 time is, I'm aware of a few firms in the
5 marketplace that likely have over 200 or 300 ESOP
6 clients.

7 I'm also aware of some firms that
8 serve one or two ESOP clients every year. And
9 I'm using ESOP as a -- maybe we both should say
10 ERISA clients, but. And there's a broad, broad
11 variety between.

12 Our industry is, you know, has a
13 pyramid shape. There's some large firms.
14 There's a good number of middle-sized firms. And
15 there's hundreds and hundreds of smaller firms
16 that provide, you know, between say, one and
17 three, or one and five ERISA related valuations
18 every year.

19 So I think for those, like my own firm
20 that are in that upper part of that pyramid, this
21 percentage of revenue is not an issue. It's the
22 firm that might choose to focus solely on ESOP's,

1 but be of a rather small nature.

2 And it could be it could be an
3 independent fiduciary, as well as an appraiser.
4 Because I think the rule applied equally to both.
5 It's those firms who, to be clear, there are some
6 very high quality firms that are very small.

7 But there is a lot of, also very small
8 firms that, as I said, probably don't have the
9 skills, training, insurance, or resources to
10 either do the job that I think you seek them to
11 do, or back it up with any resources if things go
12 badly.

13 MR. HAUSER: Understood, thank you.
14 And again, just to the extent you all, you know,
15 can provide any additional empirical data on, you
16 know, the kind of these, the number of
17 engagements firms take on over the course of the
18 year, the kind of distribution of size, and
19 numbers of transactions, and revenues among the
20 firms that do appraisals.

21 That probably be helpful. And then,
22 I just have, Bill, in the interest of time, I

1 think I probably just have one general, you know,
2 question or observation, which I'd like to ask
3 you to comment. That's --

4 I mean, I just want to be clear. The
5 exemption, you know, at various points in your
6 testimony, you said that it's hard to read our --
7 as I heard you, you can tell me if I'm wrong.

8 It's hard to read this proposal
9 without reading as reflecting contempt of
10 independent fiduciaries, and of kind of
11 denigrating their role.

12 And I guess I'd like to understand
13 what in particular, are you pointing to? And I
14 would, just, I've got to take issue with that for
15 a moment.

16 Because obviously, the reason the
17 provisions are in there about independent
18 appraisers, as well as about an independent
19 fiduciaries, is precisely because we think they
20 play a central role in many of our exemptions.

21 And their role is to safeguard the
22 plans and their participants from the dangers

1 posed by the prohibited transactions and by
2 conflicts of interest.

3 And it's precisely because of that
4 role we want to make sure that we have people who
5 are independent, and experts, who meet the
6 requirements set out here.

7 So it would be helpful, I think, to
8 hear from you which parts of this you think
9 reflected contempt with respect to independent
10 appraisers and independent fiduciaries, rather.

11 And reading the first sentence of
12 qualified independent fiduciary, it's any
13 individual or entity with appropriate training
14 experience and facilities, and et cetera that is
15 independent of and unrelated to.

16 I mean, our expectation that the
17 person have expertise, that they be independent,
18 and that they be up to the task is clear. And
19 these provisions are aimed at making sure that
20 those things are happening.

21 So, I mean, I'm, I just -- you
22 indicated both, that we are undermining

1 expertise, and that it shows contempt. And I'd
2 like you to just which provisions in particular,
3 you think that's true for, so we can address
4 that.

5 MR. RYAN: No, and I appreciate that
6 Tim. With respect with to expertise, obviously,
7 the Department is focused on the independence
8 problem with respect to this.

9 But part of this, I think, goes to the
10 role that a fiduciary is playing with respect to
11 these situations. There are inferences, for
12 example, if we are supervising an independent
13 appraiser.

14 We typically will talk. We are
15 kicking the tires with respect to their
16 assumptions based on our other work that we've
17 done.

18 Not only in the stock context, but
19 also in private securities, private assets,
20 things along those lines, based on the way that
21 we understand these reports to go.

22 We were concerned about the

1 implication that those conversations and, in
2 fact, our fiduciary endorsement. Because at the
3 end of the day, we own valuations.

4 We are open-ended liable with respect
5 to all of the fiduciary determinations in making
6 the decision to accept the valuation. That to us
7 implies that we should have the expertise and the
8 timing to actually talk to the appraiser.

9 And there are implications in there
10 that there have been situations where independent
11 fiduciaries have put their thumb on the scales
12 with respect to valuations.

13 Which quite frankly, to my knowledge
14 has never occurred. And I defer to the
15 Department -- it's certainly not in the exemption
16 context and I leave aside ESOP litigation.

17 But with respect to that, we were
18 struck by that, because that seemed to
19 marginalize what the role of a fiduciary was.
20 Because we actually thought, that's one of the
21 core concepts.

22 We have to be intelligent reviewers of

1 information. We have to be engaged in terms of
2 monitoring and approving it. And we don't, we
3 are not a rubber stamp. And we all take those
4 obligations seriously.

5 And the second thing, I think, with
6 respect to this. There were, the whole notion
7 that somehow we're marketing our services, or
8 that we're doing transactions with exemptions
9 simply as a marketing effort, or something along
10 those lines, truthfully, Tim, that left a bad
11 taste in my mouth.

12 We really don't market. I mean, when
13 we're going for exemptions we receive RFP
14 applications. We do have some clients who come
15 back to us if they've worked with us in the past.
16 But on the exemption side, the vast majority of
17 this has always been RFP processing.

18 So the idea that we're sort of
19 marketing -- and look, I work at organizations,
20 quite frankly, that that do market products and
21 services. I don't think any of us really do
22 that. And so that --

1 MR. HAUSER: Which? I'm sorry, but
2 which provision are you referring to there?

3 MR. RYAN: I was referring to the
4 provision of -- let's see now. That have a
5 financial interest in the transaction, in future
6 transactions. That to me is a marketing element.
7 That to me --

8 MR. HAUSER: But do you question that,
9 that's something relevant that we can consider in
10 the course of the review? Just like it's not
11 even relevant.

12 I mean, say we're looking at a
13 transaction that's fairly bespoke. And the
14 people that are in front of us are people who are
15 trying to push forward this bespoke kind of
16 transaction.

17 And that, that really hasn't yet
18 gained ground in the marketplace. Is it
19 irrelevant to us that we're, the people being
20 brought into the process are in fact, the
21 marketers? I mean, all that document says is
22 that these are things we may consider as part of

1 our total facts and circumstances.

2 MR. RYAN: I totally understand your
3 perspective, I really do. I've never seen us act
4 as a marketing element for these. I've seen us
5 bring --

6 Because quite frankly, on some levels,
7 we see ourselves as not only protecting the plan,
8 but an extension of the Department. We're not in
9 the business of advocating a particular
10 transaction or transactions.

11 And we don't, and I think most of, I
12 think the members of the group would be horrified
13 that you thought we were doing that. But that's
14 kind of the implication, Tim that bothered us,
15 quite frankly, with respect to this.

16 I totally understand that the parties
17 involved in putting forth the transaction, which
18 we have to approve is in the best interest of
19 plan participants and beneficiaries, have
20 conflicted interests with respect to doing this.

21 And they are clearly trying to sell
22 the Department a particular transaction. We've

1 always thought of ourselves, quite frankly, as
2 you know, the backstop break of rationality. Is
3 this in the plants interest? Is this a good
4 transaction for them to be in? What are the
5 benefits for this?

6 And Tim, I know you probably haven't
7 seen this, but we've turned down transactions,
8 all of us. We've told people not to do an
9 exemption process and find other ways to do this.

10 And that's a little bit behind the
11 scenes. And I totally appreciate that you
12 wouldn't have seen it. But it rubbed us the
13 wrong way when we read it, quite frankly.

14 MR. HAUSER: Thanks, Bill. I
15 appreciate your perspective on that. And I would
16 just, you know, assure you that you shouldn't
17 view it as something --

18 MR. RYAN: I'm not --

19 MR. HAUSER: It's really not --

20 (Simultaneous speaking.)

21 MR. HAUSER: -- we're not casting
22 judgment on you, your firm, or anything else.

1 We're just trying to come up with a rule that
2 gets us to the best policy.

3 MR. RYAN: But we understand. We're
4 happy to hear that, quite frankly. Because we
5 were also concerned if there was something that
6 you were pointing to that, quite frankly, we need
7 to address.

8 MR. COSBY: Just really quickly, when
9 you are saying us or we, are you referring to
10 your firm, Newport? Or --

11 MR. RYAN. I'm clearly referring to
12 Newport Trust Company on behalf of a number of
13 different independent fiduciaries. I can't
14 imagine that they disagree with what I'm saying.
15 But for the record, Chris, let me just say that
16 this is Newport Trust's position.

17 And if the Department wants us to
18 confirm that, after the testimony has been
19 circulated, if it's other members of the group,
20 or if there are any dissents, I'm sure we'd be
21 happy to do that.

22 MR. COSBY: Okay. I know we're almost

1 out of time. I just want to ask you one other
2 thing. Because in your comment letter, you
3 talked about the fiduciary liability insurance.

4 MR. RYAN: Yes.

5 MR. COSBY: All right. You had some
6 issues with that. So I think it'd be helpful to
7 supplement the record, maybe outside of the
8 hearing, with just more information about the
9 fiduciary liability insurance market.

10 You know, how readily it's available?
11 What the typical provisions are that are in type
12 of arrangements? Because you'd mentioned the
13 cost, you know, that'd be helpful to get too.
14 Just so we kind of have a full perspective about
15 what you're referring to. Because it wasn't in
16 the letter --

17 MR. RYAN: No, it absolutely wasn't
18 Chris. And I totally take that point. We've
19 been looking at it, quite frankly. I think we
20 have -- and this is not fundamental.

21 I'm fundamental to the cost
22 perspective on insurance. But number one, you

1 know, we as fiduciaries think our liability is
2 open ended with respect to our fiduciary
3 determinations to the plan.

4 So the insurance at different points
5 is one way to backstop that obligation. The
6 other is capital, quite frankly, that the
7 entities might have, or financial guarantees from
8 parents, and things along those lines.

9 We'll be happy to see what information
10 we can get with respect to the availability of
11 insurance. I do know with different points, it's
12 always a battle to try to get the coverages.

13 I think, also, one of the things that
14 might be difficult, Chris, in terms of focusing
15 on that is that it's at different points looking
16 at the insurance requirement as it's drafted
17 right now, it's not clear to me anyway, about
18 what exactly the level of insurance should be
19 with respect to a particular transaction.

20 Does it vary about the size of the
21 transaction? Does it vary about the complexity
22 of the assets? I say this, because we've had

1 billion dollar transactions that we've directed
2 for company stock through the Department's
3 approval in the exemption process.

4 I'm not honestly sure that anyone
5 could get a billion dollars' worth of insurance
6 coverage to cover that, if that was actually the
7 Department's view on this.

8 But that's anecdotal. I don't mean to
9 say that, that's -- but I think part of the
10 clarity of what exactly we're insuring to, and
11 can we satisfy this with insurance plus capital.
12 Understanding that as fiduciaries, we basically
13 have an open liability to the plans of our
14 determinations.

15 MR. COSBY: Okay. But any follow up
16 to supplement the record, you can provide to
17 counsel. You know, may have further discussions
18 with you about that. Because we've been trying
19 to get this information. It's been kind of an
20 impediment to us.

21 MR. RYAN: It's hard. I won't tell
22 you it's not hard to get this. There are

1 relatively few carriers that actually issued
2 this.

3 MR. COSBY: Yes.

4 MR. RYAN: But we'll do the best we
5 can to pull together some information.

6 MR. COSBY: Okay, thanks.

7 MS. HANSEN: And I know we're pressed
8 for time. But let me just make one quick request
9 for supplemental information from both of the
10 panelists from this session. There have been
11 references by both, you know, to sort of what the
12 state of mind is, and you know, how we get to
13 this independence.

14 And I certainly hear that we cannot
15 know what somebody is thinking. And therefore,
16 we do need to sort of lay out what the factors we
17 are going to be considering.

18 So, understanding that there are many,
19 or most or, you know, whatever the number is, a
20 fiduciaries and appraisers in the space that take
21 their job very seriously, take their ethical
22 requirements very seriously, you know, or held

1 themselves to the highest standard, they possibly
2 can.

3 When we are drafting and we are
4 writing a thing like this, we have to also think
5 about, however small it may be, you know,
6 whatever tiny subset it might be, we have to also
7 keep in our minds, the subset of people that
8 might not, themselves, for any number of reasons
9 hold themselves to the same standard,

10 Which is not to say anything about the
11 professions other than that they populated with
12 people, and people are people. And so, any
13 information, or insight, or help you can give us
14 in how we can make those decisions.

15 With the understanding that for all of
16 the firms that, you know, we understand are
17 outstanding, we understand very clearly ethical.
18 We understand everything they should be doing,
19 and then, some. We also are -- it's our
20 obligation to think about those that don't.

21 So any, any metrics, we could
22 consider, any facts and circumstances we could

1 consider, or should consider, we would greatly
2 appreciate it.

3 So just, I know our time -- but if you
4 can think about. So if you have a response,
5 great. But if you can think about that, it would
6 be greatly appreciate it.

7 MR RYAN: Megan, 30 seconds.

8 MS. HANSEN: Okay.

9 Mr. RYAN: I'm just speaking about the
10 independent fiduciary side. As we said to Ali,
11 you know, I think we're comfortable with the
12 revenue test as a percentage.

13 Okay, so the current two to five.
14 With respect to the other situations, one can
15 think of a number of things as a fiduciary that
16 would disqualify us from acting as a fiduciary,
17 obviously the statutory bar. Obviously --

18 And there are some issues that some
19 firms will obviously have with investigations,
20 you know, at different points, or even arguing
21 whether or not an open exemption is a quote
22 unquote, active proceeding with the Department.

1 But we can certainly try to come up with some
2 more qualitative approaches, minimum levels of
3 training, things along those lines.

4 MR. TARBELL: We will, as well. And
5 I do want to clarify for Tim Hauser's benefit, he
6 had asked about State issues and ethics. And I
7 was reminded by a friend here by email that CPAs
8 who practice valuations are governed by their
9 State Accountancy Boards in terms of monitoring
10 ethics.

11 MR. HAUSER: Right.

12 MR. COSBY: With that, we'll move to
13 the third panel.

14 MR. RYAN: Thank you, very much.

15 MR. TARBELL: Thank you.

16 MR. COSBY: Yes, thank you, really
17 appreciate the information you shared with us
18 today. It was very helpful --

19 MR. RYAN: Thank you.

20 MR. TARBELL: Thank you.

21 MR. COSBY: -- and in the future. So
22 on Panel 3 we have CIEBA with Michael Kreps and

1 Dennis Simmons. And we have Groom with a
2 assortment of attorneys from the firm.

3 And we also have Mr. Brad Campbell,
4 who was our Assistant Secretary in a prior
5 administration. So it's good to see you, Brad.
6 So with that we will begin with CIEBA.

7 MR. SIMMONS: Can everyone hear me,
8 okay?

9 MR. COSBY: Yes.

10 MR. SIMMONS: Okay, great. Well, good
11 morning. My name is Dennis Simmons, and I am the
12 Executive Director with CIEBA, the Committee on
13 Investment of Employee Benefit Assets. And I'm
14 primarily joined by CIEBA's colleague, Michael
15 Kreps, Principal at Groom Law Group.

16 And Michael and I've worked closely
17 together over the years on many issues,
18 transactions affecting CIEBA members that are
19 relevant to the discussion today.

20 We really do appreciate the
21 opportunity to provide testimony on the
22 Department's proposal to make changes to the

1 process for applying for exemptions from the
2 prohibited transaction rules.

3 It's an issue that's very important to
4 CIEBA members. And just, for quick context,
5 CIEBA members, CIEBA represents 114 Chief
6 Investment Fiduciaries for some of the country's
7 largest pension funds, and defined contribution,
8 and 401k plans. And as you know, we've worked
9 closely with the Department for years on any
10 number of issues.

11 So we do sincerely appreciate the
12 Department's willingness to seek input from CIEBA
13 members given that our members, you know, put the
14 fiduciary hat on every day, if you will, you
15 know, on behalf of the plans and plan
16 participants. So we share the Department's
17 commitment to protecting retirement benefits of
18 workers and retirees.

19 We are here today because we have
20 concerns with the Department's formal and
21 informal changes to the prohibited transaction
22 exemption application process, you know, over the

1 past decade really.

2 And the resulting, what we view as
3 chilling effect the changes have had on the
4 process for prudent fiduciary seeking appropriate
5 exemptive relief.

6 It's our view that the proposed rule
7 would exacerbate those problems by creating
8 unnecessary and inappropriate barriers for
9 prudent fiduciaries looking to approach the
10 Department for exemptive relief.

11 As the Department knows the prohibited
12 transaction rules are under ERISA and the
13 Internal Revenue Code. They're broadly
14 constructed. And in fact, they're so broad that
15 on their face, the rules would make the day-to-
16 day management, and administration and pension
17 plans all but impossible.

18 And that's why Congress, as we all
19 know provided statutory exemptions, and gave the
20 Department the authority to grant individual and
21 class exemptions. This important administrative
22 discretion to grant exemptions is very important

1 to CIEBA members.

2 Because, as all of us here know, the
3 system is not static. Things are changing
4 constantly. And from time to time prudent
5 fiduciaries and their business partners need to
6 work with the Department to facilitate
7 transactions beneficial to employee benefit plans
8 that would otherwise be prohibited by the strict
9 liability rules for prohibited transactions under
10 ERISA and the Code.

11 A couple of quick examples, a company
12 might need to make an in-kind contributions to
13 its pension plan for any number of reasons. A
14 plan sponsor may acquire another company with a
15 pension plan.

16 And that acquired plan may have some
17 legacy assets that could appropriately be
18 transferred in-kind to another trust in order to
19 avoid transaction costs.

20 Again, that benefits the plan and
21 ultimately its participants. Or a Chief
22 Investment Officer might simply be working with a

1 financial institution to develop a more cost
2 effective plan investment structure. And the
3 restructuring might call into question, you know,
4 those broad prohibited transaction rules.

5 So in situations like these that may
6 raise prohibited transaction questions, it's our
7 view that prudent fiduciaries will be wise to
8 approach the Department to request prohibited
9 transaction relief.

10 And in years past, the Department, to
11 its credit has welcomed prohibited transaction
12 exemption requests and informal inquiries.

13 However, the Department has made it more and more
14 costly and burdensome to apply for a prohibited
15 transaction exemption in more recent years.

16 And this has resulted in fewer and
17 fewer applications, and a pervasive view in the
18 investment fiduciary community that the
19 Department is becoming more and more unwilling to
20 issue exemptions, in all but the most narrow
21 circumstances, regardless of the potential
22 benefits to participants and the plans.

1 Unfortunately, we feel the proposed
2 rule reinforces this view by making it more
3 difficult to apply for exemptive relief. And it
4 discourages open communication between the Agency
5 and potential applicants.

6 So we're here today to add our voice
7 to some who have mentioned, you know, urging the
8 Department to change course, on the proposed
9 rule.

10 I'm going to turn it over to Michael
11 to talk about a few specific technical points
12 that we wanted to highlight under the proposed
13 rule. Michael? I'm not hearing Michael.
14 Everybody, can still hear me?

15 MR. COSBY: We can hear you. We can't
16 hear Michael though.

17 MR. SIMMONS: Is Michael's on mute?
18 Anybody can tell?

19 MR. SHIKER: Well, it looks like he,
20 his microphone isn't even --

21 ASSISTANT SECRETARY KHAWAR: I think
22 he's unmuted, but I'm not getting an audio.

1 MR. SIMMONS: I'm just checking with
2 him, real quick him real quick, via text.

3 ASSISTANT SECRETARY KHAWAR: Are the
4 any highlights you want to tell us?

5 MR. SIMMONS: Yes, I think there's
6 something I can go through a couple. We've
7 highlighted those in the letter that we submitted
8 previously.

9 But you know, one of the aspects of it
10 is that we don't see a reason to codify hard and
11 fast rules related to independent fiduciaries and
12 appraisers.

13 Particularly given that the Department
14 hasn't analyzed the impact that those
15 requirements will have on the availability of
16 qualified experts. Our members look for those
17 qualified experts.

18 Also, we don't see a reason to create
19 a prohibition on plans bearing costs associated
20 with a PTE. They're unquestionably instances in
21 which the derivative transaction exemption is in
22 the best interest of a plan, even if the plan has

1 to pay some or all of those costs.

2 So rather than adding new hurdles to
3 the application process, we would encourage the
4 Department to eliminate existing barriers and
5 rules that make it difficult to obtain an
6 exemption.

7 We also urge the Department to
8 reconsider portions of the rules that would
9 subject sensitive and confidential business
10 information to public inspection. You know, we
11 certainly support transparent and a fair process.

12 But we feel strongly that
13 communications between the Department and
14 stakeholders preceding a formal application
15 should not be included as part of the application
16 in the public record. Doing so, you know, would
17 have even more of a chilling effect, and
18 unnecessarily discouraged exemption requests.

19 So again, you know, we do appreciate
20 the time and attention to this matter. It's
21 important to our members, and happy to take
22 questions, and see if Michael has been able to

1 connect. I don't know.

2 But I think that would summarize what
3 -- you know, he and I obviously have chatted
4 before. That's pretty consistent with the letter
5 that we submitted also.

6 ASSISTANT SECRETARY KHAWAR: I
7 appreciate that, Dennis. Michael, have you been
8 able to make the technology work? Okay, well, I
9 see a hand.

10 MR. SIMMONS: The perils of virtual
11 testimony.

12 ASSISTANT SECRETARY KHAWAR: I'm not
13 sure if he was waving hello, or goodbye, or just
14 asking for help.

15 MR. SIMMONS: And the tech just isn't
16 working.

17 ASSISTANT SECRETARY KHAWAR: I don't
18 have the technical expertise. Okay.

19 MS. ITAMI: And he says he can hear,
20 but he'll dial back in.

21 ASSISTANT SECRETARY KHAWAR: Okay.
22 Well, maybe Michael, we can get to you in Q & A,

1 or spend a couple of minutes after the other
2 panelists, if there's anything you want to make
3 sure you touch on that Dennis didn't already
4 cover.

5 So we have a number of attorneys from
6 Groom, second witness. We have them listed in
7 particular, but Jennifer, I'm not sure are you
8 going to be presenting? Whoever it is, I'll turn
9 it over to the second group.

10 MS. ELLER: Thank you. Yes, this is
11 Jenny Eller. And I am joined by Michael Kreps,
12 possibly, Alli Itami, and David Levine. And
13 there are a lot of us but we're going to go
14 through our parts quickly, and, and get to our
15 ten minutes and no more.

16 We're all Principals at Groom Law
17 Group and together we lead the firm's practice
18 groups that work most directly with plan
19 fiduciaries, plan sponsors, and service providers
20 in analyzing potential transactions, and
21 considering when, and whether an exemption might
22 be necessary.

1 And we appreciate the opportunity to
2 comment and the opportunity to be here today to
3 speak with you about the proposal. As you are
4 all aware, for almost 50 years Groom attorneys
5 have worked with the Department to, you know,
6 productively try to solve problems for
7 participants and beneficiaries.

8 And we have submitted comments on the
9 proposal to change the application procedures on
10 behalf of a number of clients. But we also took
11 the unusual step of submitting comments on behalf
12 of our own firm, and asking you to testify. And
13 that's what we're doing here.

14 And we really think that our
15 experience of advising hundreds of applicants on
16 individual and class exemptions has led us to the
17 point where we know the value of a collaborative
18 process, and craft solutions that really do help
19 participants and beneficiaries.

20 And we know what happens when you
21 can't get an exemption either. Either because
22 there's not time or the process is not going to

1 pan out.

2 You know, people do, just avoid
3 transactions, that would be in many cases be sad
4 for participants and beneficiaries. So we have
5 seen sort of both of those things.

6 And, and we think that, you know, we
7 read the proposal as really sort of the beginning
8 of the end of the exemption process and access to
9 exemptions by making them more difficult, more
10 costly, and more time consuming.

11 And, you know, we totally appreciate
12 that these efforts are well-intentioned. But
13 they're really also not new. I mean, over the
14 past decade, the Department has continued to
15 impose more and more conditions, and
16 requirements, and restrictions on the application
17 process, formally and informally.

18 And sometimes refuse to grant
19 exemptions, even those that are virtually
20 identical to prior granted exemptions. And this
21 proposal seems to be kind of a culmination of
22 that effort to really clamp down on exemptions.

1 And you know, as my colleagues will
2 discuss, the proposed changes to the exemption
3 process are inconsistent with Congress' intent,
4 as we see it, and we think will be harmful to
5 participants and beneficiaries.

6 In case -- it looks like Mike is not
7 on. So I'm going to plow forward with what would
8 have been his part, and then, turn it over to
9 Alli. And just wanted to say a little bit about
10 Congressional intent.

11 Obviously, the PTE rules were intended
12 to be broad and draconian, and Congress was
13 reacting to concerns about sort of pre-ERISA
14 rules and how easy it was perhaps to skirt the
15 rules.

16 But the ERISA prohibitions, you know,
17 are really, you know, focused on a broad array of
18 transactions. Some are conflicted, and some
19 aren't.

20 We are party in interest transactions
21 which represent a large portion of exemptions
22 that have been granted over time. We really

1 don't have an inherent conflict of interest, at
2 least, not the way they're drafted.

3 Congress understood that those PTE
4 rules were so broad that they would make it all
5 but impossible for plans to administer, you know,
6 the provisions of the plan, or to undertake
7 transactions that were necessary.

8 So statutory exemptions were created.
9 And Congress knew, though, that they couldn't
10 predict what would be required and what would be
11 necessary in terms of exemptions. And so,
12 granted the Department authority to do
13 exemptions, as well.

14 And the legislative history, we think,
15 makes it really clear that Congress expected that
16 DOL would really exercise that authority. And we
17 don't think there's any indication that, that the
18 thought is we've somehow aged out of the need for
19 exemptions.

20 We know, we certainly see in our
21 practices, that they continue to be important.
22 And really want to focus it on the fact that

1 Congress did include some conditions for finding
2 an exemption to be appropriate in 408(a).

3 But really, those are all are three
4 conditions, and only three. The exemption has to
5 be administratively feasible. It has to be in
6 the interest of plan participants, and
7 beneficiaries, and protective of their rights.

8 We don't think it has to be
9 absolutely, and solely in the interest of
10 participants and beneficiaries. We think
11 Congress intended there to be a balancing. And,
12 you know, when they had a sole interest standard
13 in mind, they knew how to say that.

14 So we think that, you know, to set the
15 bar as high as it appears the proposal has done,
16 is really not consistent with the practice over
17 the last 40 some years or with Congressional
18 intent.

19 And, you know, as a result of the
20 processes, as others have brought up, has kind of
21 ground to a halt. I'm going to turn it over now
22 to Alli to talk about our specific concerns.

1 MS. ITAMI: Thank you, guys. And I
2 apologize, of course, the leaf blower showed up
3 right when I'm coming off mute. So if there's
4 background noise, again, I apologize. So the
5 Department seems to be taking the position that
6 exemptive relief is presumptively inappropriate
7 in the preamble.

8 They make a statement about
9 transactions that rely on exemptive relief, that
10 they should not be the default approach. And in
11 my experience, exemptions that rely on an
12 individual exemption have been far from the
13 default approach.

14 As Jenny mentioned, exemptive relief
15 does not cover 404. So it does not cover
16 prudence and loyalty violations. And often, the
17 individual exemptions also don't provide conflict
18 of interest relief.

19 When it does provide conflict of
20 interest relief, there's often the use of an
21 independent entity, so that those conflicts of
22 interest are cured before we even get to the

1 exemption application.

2 So we think it's a little bit of a
3 false narrative to say that all exemptions permit
4 prohibited conflicts. You'll see this
5 presumption against exemptions and the
6 precipitous decline in the number of exemptions
7 that have been granted year over year.

8 Despite the fact, as Jenny said, that
9 we think the need for exemptive relief is fairly
10 consistent, or perhaps even growing with
11 innovation.

12 And we think that, in issuing fewer
13 and fewer and exemptions, plans have been forced
14 to forego transactions that would have benefitted
15 their participants and their beneficiaries.

16 If an exemption can improve retirement
17 outcomes, or could entice sponsors to provide
18 richer, health and welfare offerings, the
19 Department should really want to be part of that
20 process.

21 We have our letter with all of our
22 specific concerns laid out. But generally, they

1 include the unnecessary changes to the
2 independence requirements and the transparency
3 rules that we think are going to chill open and
4 honest communication between the Department and
5 the regulated community.

6 We're also pretty concerned about the
7 lack of predictable outcomes. In short, we view
8 this proposal as a de facto end to the program
9 for most purposes.

10 We think that it will further limit
11 the Department's opportunities to engage
12 constructively with plans and to influence
13 important plan transactions. With that, I'll
14 turn it to David Levine for our ask.

15 MR. LEVINE: And I know our time is
16 getting close. So our ask is very simple. We
17 respectfully request that the Department actually
18 withdraw where we are with the proposal and sort
19 of rethink its approach to providing exemptive
20 relief.

21 As Jenny, and others, and Alli have
22 pointed out, Congress granted the Department

1 broad-ranging authority that they can exercise to
2 issue exemptions because the creators of ERISA
3 recognized, it's just impossible to write
4 statutory rules that exempts all sorts of
5 situations or cover all situations, but also
6 protecting participants and beneficiaries.

7 And they recognized that there are
8 ways that you can protect both. We recognize
9 that there's a need to calibrate this authority
10 with coordination with regulated entities and
11 stakeholders.

12 But as Alli just noted, we think this
13 takes you towards chilling that type of
14 engagement, rather than the other way. Instead,
15 what we get out of this, and some of the other
16 speakers noted this as well, is that this change
17 almost increases regulatory burden, and
18 especially on small businesses.

19 We've been talking about lack of
20 people in the marketplace and small business is
21 always a concern. And diversity of insights is a
22 way to keep it so that it's not people being

1 loaded all up in one direction.

2 And we strongly believe that that's
3 opposite of what Congress intended. And
4 individual transaction exemptions are great if
5 they are granted.

6 So rather than viewing PTEs as last
7 resort, individual PTEs as a last resort, we
8 should really be working together more to figure
9 out how we actually utilize these.

10 Alli said it well. I can tell you
11 when we're getting plan sponsors, coming for an
12 individual exemption is really the last choice.
13 When people have tried to find their solution.
14 And to throw more barriers up in this process --
15 and I know Dennis mentioned this as well, is
16 challenging.

17 Making the process simpler, more
18 predictable, and less expensive, which means less
19 work for lawyers. But that is okay. It's
20 actually a good outcome here.

21 A functioning process where we're not
22 slowly, winnowing to zero, the number of

1 exemptions might even speed up the EXPRO process
2 and increase efficiency for the Department.

3 We know the Department has limited
4 resources, and we want to not waste your
5 resources, as well. So that's the basics of our
6 request. So thank you.

7 MS. ITAMI: Thank you.

8 ASSISTANT SECRETARY KHAWAR: All
9 right. Oh, looks like Michael just -- we can
10 maybe give you a couple minutes after Brad, if
11 your audio is working, Michael.

12 MR. KREPS: I think Jenny covered it.
13 Thanks, though, I appreciate it.

14 ASSISTANT SECRETARY KHAWAR: All
15 right. Brad, right over to you.

16 MR. CAMPBELL: Very much. I had a
17 wonderful lesson prepared, a history lesson of
18 what Congress was doing with the prohibited
19 transaction rules, how broad they are, and how
20 vital and important a part of that process, the
21 robust exemption program at the Department is.
22 But rather than read it all, let just associate

1 myself with the comments, a number (audio
2 interference) now that the exemption program is
3 not something that should be rare and unusual,
4 but is actually a vital part of making ERISA
5 adapt to circumstances, to address things that
6 need to be addressed.

7 And I think, historically, the
8 Department has recognized that. I do want to
9 take a second to look at some of the numbers.
10 Because I think it's really instructive to show
11 how, in practice in recent years, the Department
12 has put in place changes that restrict
13 exemptions, that this proposal really is the
14 culmination of.

15 So let's compare a couple of periods
16 from 2005 to 2012, which is the last four years
17 of the Bush Administration and the first four
18 years of the Obama Administration, two different
19 parties, two different philosophies of
20 governance.

21 They granted 185 individual
22 exemptions, which is an average of 23 per year,

1 and 120 EXPRO examples, 18 per year. So overall,
2 that's about 41 exemptions granted each and every
3 year of those eight years.

4 This really started to reverse in
5 recent years. If we look at the period from 2017
6 to the present, so the four years of the Trump
7 Administration and almost the first two years of
8 the Biden Administration, so almost six years,
9 the Department's granted only 29 exemptions in
10 total.

11 Individual exemptions that's less than
12 five a year, and only for EXPRO exemptions in
13 that period. The last one being in 2020. There
14 haven't been any the last two years. So it
15 raises the question of what happened?

16 You know have the prohibited
17 transaction rules materially changed? Have you
18 all found bad actors who were abusing granted
19 exemptions and harming participants? And answer
20 to both of those questions is, no, that doesn't
21 appear to be the case.

22 So why are we seeing a 90 percent,

1 almost 90 percent reduction in granted exemptions
2 over that period? And what does appear to have
3 changed is the Department's view of its role in
4 using the exemption program.

5 Now this proposal has significant new
6 restrictions on who may apply for an exemption.
7 It puts what I have to call it, gag order, on
8 anonymous communications with the Department.
9 And its restrictions on using experienced,
10 independent fiduciaries, and other professionals.

11 It almost seems designed to further
12 prevent some of those applications, as other
13 witnesses today have noticed. And under such a
14 system, the people who are going to be harmed the
15 most are going to be participants.

16 It's the regular workers and union
17 members who would have benefitted from an
18 exemption that their plan fiduciaries now are
19 unlikely to apply for if this proposal were to be
20 carried into final form as it has been here.

21 So a couple of things I want to focus
22 on in particular. The Department states in the

1 proposal that it ordinarily is not going to
2 consider applications from parties who are under
3 investigation by any Federal or State entity for
4 violations of any Federal or State law.

5 And it states in the preamble that the
6 rationale for this is that the Department has to
7 screen out, quote bad actors, and quote be
8 completely free from doubt regarding the
9 transaction and the motivation of the parties
10 involved in order to make its findings under
11 408(a).

12 The glaring problem with this, of
13 course, is that being under investigation has
14 nothing to do with whether one is a bad actor or
15 has actually committed a violation.

16 Entire industries are under regular
17 investigation, whether it's called exams,
18 reviews, audits, whatever it might be, as part of
19 their sort of ordinary, regulatory regimes.

20 And it's not clear exactly how the
21 Department would propose to handle some of those
22 very material issues. I also think it's worth

1 noting that EBSA, itself, when it's using its own
2 targeted investigation techniques, focusing on
3 actual ERISA violations, finds violations only
4 two out of three times.

5 In other words, one out of every three
6 investigations, roughly speaking, finds no
7 violations. So when you put all that together,
8 these restrictions don't do anything to remove
9 the Department's doubt.

10 But it does, in all likelihood, it
11 would prevent many, if not most large plans,
12 labor organizations, employee organizations from
13 applying for exemptions because somewhere,
14 someone is investigating them for something.

15 And I think that this is an example of
16 the concerns that a lot of us have looking at
17 this. The proposal doesn't provide any evidence
18 that there has been abuse of these exemptions.

19 And you know, I think it's worth
20 mentioning, as others have, going to the
21 Department for an exemption and requesting one is
22 not the first stop in the process. It's very far

1 down the list of options that people find
2 enticing, given the cost, the expense, the
3 uncertainty.

4 Further, they're inviting a Federal
5 enforcement agency with specialized expertise to
6 review their practices. It could lead to an
7 investigation. Certainly, going to lead to a lot
8 of scrutiny.

9 You know, entities don't willingly
10 walk up to the Department to do that if they're
11 trying to think they can fool the Department into
12 approving something that's abusive, or not in the
13 best interest of participants.

14 They're doing it because they've
15 concluded it is how we need to address a real
16 problem that's going to benefit plans and plan
17 participants.

18 I mentioned the gag order, before.
19 And again, I know that's a loaded term, but I
20 think it's relevant. We're very concerned that
21 this would essentially say the Department's
22 officials can't have these anonymous informal

1 discussions, which have been immensely helpful
2 over many years.

3 Now in the preamble, the Department
4 explains sort of why it proposed this. And it
5 seems to be to solve this problem of pre-
6 submission applicants providing an incomplete set
7 of facts, or avoiding material facts.

8 And then, trying to argue when the
9 formal process yields a result they don't like,
10 that really, they have some claim of relying. I
11 don't think that's first of all, true in the
12 sense that no one having these informal
13 discussions is actually under the impression they
14 get to rely on those.

15 The formal processes is the outcome.
16 Secondly, even if that is a problem, and that is
17 actually occurring, issuing a gag order on
18 discussions isn't a solution reasonably tailored
19 to address the problem.

20 And it ignores the reality that being
21 forced to publicly indicate interest in an
22 exemption, even if it's just to examine its bare

1 feasibility could have some negative
2 repercussions on plans and participants.

3 There are situations where that type
4 of public activity could actually harm the very
5 plan or participants that could be benefitted by
6 an exemption, if it made sense to pursue that.

7 So I think there's a very valuable
8 role here, which is why other agencies like the
9 IRS, have formal programs, permitting anonymous
10 applications and anonymous discussions with
11 participants, or with parties and interests, so
12 to speak.

13 I also wanted to speak to issues of
14 precedent. One of the things this proposal does
15 that worries me very much is it officially
16 disavows precedent. And it does so in a way that
17 that's overly expansive.

18 Basically, I don't believe an Agency
19 can reasonably conclude that when you have two
20 entities who are similarly situated, with
21 essentially the same set of circumstances, can be
22 treated differently.

1 Now, that's different than saying that
2 the Agency can evolve its policy positions over
3 time. That it can adjust conditions. That it
4 can make new policies. If the Department
5 determines the change is necessary, it can do
6 that through the exemption process.

7 But it can't take the official
8 position, as it does in this proposal, that
9 recent administrative decisions can be willfully
10 ignored to achieve different outcomes for
11 different people.

12 To me, that sounds more like a
13 reservation of right for what would be an
14 arbitrary and capricious administrative action,
15 rather than notice that these policy positions
16 may evolve over time.

17 I also would like to note that while
18 the preamble says it is the current policy of the
19 Department to not be bound by precedent, that's
20 not actually the case. The current exemptive
21 procedures regulation doesn't address this issue.
22 But EXPRO, Class Exemption 96-62 does.

1 And I think it's worth noting that,
2 that is in fact a formal regulation. Class
3 exemption, yes, but a regulation for purposes,
4 the Administrative Procedure Act, adopted by
5 notice and comment rulemaking that should be
6 binding on the Department.

7 And EXPRO is rooted in precedent. In
8 fact, it has a presumption in favor of precedent.
9 If you apply through the EXPRO process, where you
10 find to substantially similar investigations
11 within the last five years, then the Department
12 is presumed to have approved both at the
13 tentative and the final stages that exemption,
14 unless the Department affirmatively says no.

15 So silence by the Department means
16 that exemption will be put into place, will be
17 granted. And I think that is the written policy
18 that actually embodies the Department's official
19 position that precedent does matter.

20 I think it's also worth noting that
21 the issue about two prior exemptions in the last
22 five years was intended to address this notion

1 that they would represent the current policies of
2 the Department.

3 So there is built into the EXPRO
4 process a consideration that one can't just reach
5 back to 1982, to argue that that's relevant in
6 2022.

7 So the last issue I want to address
8 here is concerns about the independent fiduciary,
9 and other professionals issues. There's a very
10 troubling notion in this proposal, to my mind,
11 that an experienced independent fiduciary is
12 conflicted precisely because of their experience
13 and because they can market that experience.

14 And worse, I'm concerned that the
15 decision about when this degree of experience and
16 marketability leads to a conflict is something
17 the Department has reserved to itself to decide
18 based on rather vague and subjective grounds.

19 You know, this is kind of two
20 concerning things at once. It's kind of a
21 reversal of fiduciary norms, in which experience
22 would normally be a valued consideration. And

1 it's a deserving reservation of right for the
2 Government to make the decision about which
3 service providers are eligible.

4 ASSISTANT SECRETARY KHAWAR: Brad,
5 could you try to wrap up?

6 MR. CAMPBELL: Absolutely. Let me
7 just go ahead and say, thank you. I'm happy to
8 answer any questions you have. And I appreciate
9 the opportunity to testify.

10 ASSISTANT SECRETARY KHAWAR: Thanks to
11 all the witnesses. And I appreciate, Michael,
12 especially your perseverance with your technology
13 challenges. Hopefully, we can hear from you
14 during the Q & A.

15 A couple of questions. First, Brad,
16 you, I don't think touched on this as much in
17 your testimony. But I believe in your written
18 comment, another issue that you raised is kind of
19 with respect to this under investigation point.

20 A lack of clarity about, you know,
21 what matters and what doesn't for purposes of
22 being under investigation. I think you ask the

1 question about whether an audit counted as an
2 investigation, or a routine compliance review, or
3 kind of the different terminologies that exists
4 across Government agencies.

5 And whether something rose to the
6 threshold of what the Department was talking
7 about in the proposal. Again, I mean, all of
8 these questions are just about developing the
9 record.

10 So for the sake of this, just assume
11 that we're not going to not ask any questions,
12 not ask for any information in this case. And in
13 that scenario, I guess, one thing I was curious
14 about.

15 I mean, there are standards that are
16 out there. For public companies, there's
17 triggers that the SEC has for reporting on
18 something that could have a material impact on a
19 company's performance. Are there standards like
20 that, that you think would be helpful to kind of
21 better enunciate what matters and what doesn't?

22 MR. CAMPBELL: Well, I think the real

1 threshold of what should matter and what
2 shouldn't, is really embodied in the current
3 procedural regulation at 33, which say you need,
4 you know, we ordinarily are not going to consider
5 an exemption request from someone who's under
6 investigation by one of the relevant Agencies for
7 an ERISA based violation.

8 That strikes me is perfectly
9 reasonable. It's the expansion to any other law.
10 Which raises a question, first, of how is that
11 relevant to, you know, a transaction? And again,
12 in my letter, I gave examples of various sorts of
13 what would seem to me relatively irrelevant
14 questions to raise.

15 To your point about what would be a an
16 equivalent investigation to a DOL investigation.
17 I think it's almost impossible to answer that
18 because the breadth of your scope here.

19 It means we'd have to look down to
20 State law to determine whether -- who knows what
21 the issue could be. It could be a campaign
22 finance disclosure violation. What's an

1 investigation in that context? That's in the
2 State of New Jersey that's equivalent to a DOL
3 investigation?

4 Yes, just really almost impossible to
5 answer that question. I think the better
6 approach is to get back to the issue of disclose
7 things that are actually relevant to the ERISA
8 world, limited transactions phase, not any other
9 violation anywhere.

10 ASSISTANT SECRETARY KHAWAR: So on
11 that point, the current procedure, as you said,
12 is focused on investigations or actions by the
13 Department, the service, or the PBGC. I think
14 are those three entities explicitly named.

15 Are there situations where, you know,
16 is there anything beyond that that could be
17 relevant? I'm thinking, for example, about you
18 brought up State laws.

19 What if there's been embezzlement from
20 an employee benefit plan, and that's under
21 investigation by a State authority for possible
22 criminal prosecution?

1 It's not an investigation that EBSA's
2 involved in. But there has been theft, and it's
3 going to be prosecuted, or is being prosecuted
4 under criminal laws. I can see that having
5 significant value for us and understanding.

6 Because it could, for example, give us
7 an indication about the qualities of the internal
8 controls that, that organization has, and tell us
9 something about the level of concern, the level
10 of oversight, the conditions that would lead to
11 having an exemption if we were to close one.

12 And so, really, I'm curious, because
13 you've talked a couple of times about this
14 concept of, you know, the relevance to the
15 transaction.

16 And I guess my question is, are there
17 situations where you think having information
18 beyond just those three agencies would be helpful
19 for the Department?

20 And do you have a sense of where you
21 would draw that line? Obviously, the line that
22 we've drawn is not where you would draw it. But

1 is there something in between? Or is it your
2 position that really we should just stick with
3 the current procedure and not go beyond?

4 MR. CAMPBELL: Well, I think that
5 issue is otherwise already addressed in the
6 current exemption procedures regulation, in that,
7 that would be a material fact relevant to this
8 plan that seeking the exemption, that would need
9 to be disclosed in the course of the application.

10 So the issue you're raising is, how do
11 we define when we bar, essentially, from
12 applying? Versus how do we know what the
13 relevant facts are, so we can assess whether to
14 grant this application?

15 I would submit that rather than trying
16 to bar at the front end, where you have to get
17 into issues of, well, how do we know what's going
18 on in this State or that State? Or how do we
19 define the difference?

20 Perhaps it would be better to say that
21 sort of issue is material, would need to be
22 disclosed, and we will take that into account in

1 deciding whether we're going to do this. Not at
2 the front end.

3 ASSISTANT SECRETARY KHAWAR: Thanks,
4 that's helpful. So if I'm trying to adopt an
5 approach along those lines, right? So I'm going
6 to maybe rephrase your statement. And tell me
7 whether you agree or disagree with it.

8 But if we were to adopt a different
9 approach, that is less a presumption of a denial,
10 or that an exemption would be inappropriate, and
11 more focused on the kind of information that the
12 Department wants. Right?

13 That as part of an application, here
14 are areas where we would want to know what's
15 going on with the organization. Would that
16 satisfy your concerns with this issue?

17 MR. CAMPBELL: I think that would be
18 an improvement over the proposal. Again, I
19 question whether it's actually necessary given
20 the language in the current exemption, regarding,
21 you know, material information.

22 But ultimately, I think how you worded

1 such a requirement would really be what you'd
2 have to evaluate. In other words, in order to
3 assess how what you just described would work, it
4 would really depend on the words on the page.

5 ASSISTANT SECRETARY KHAWAR: Okay. I
6 think I might reserve the remainder of my time,
7 such as it is until later. But I'll turn it over
8 to others. I may come back and ask more
9 questions and analysis.

10 MR. HAUSER: Recognizing the time, and
11 just ask a couple of questions. And the first,
12 maybe, it's for both Brad and Dennis. But if
13 anyone else wanted to chime in, that'd be great.
14 And it's essentially the same question that was
15 asked in the first panel.

16 I understand the concern about cutting
17 off, you know, kind of anonymous conversations,
18 or exploratory conversations about, you know,
19 whether a contemplated approach to an exemption
20 is even worth bothering with and that sort of
21 thing.

22 And the question I have, though, is,

1 once we, so let's say, we do something with that
2 provision. But once the conversation occurs, if
3 the party decides to move forward with the
4 exemption, is there a view that whatever
5 information was exchanged, as part of that
6 conversation should not be part of the record?

7 Or is it acceptable in your mind for
8 it to be part of the record at that point? And
9 this isn't just a point about, you know, like
10 protecting the Department from people saying they
11 were, they had insurance that we don't think we
12 really had.

13 I mean, it's also a question of those
14 conversations like this hearing, and like,
15 virtually every conversation we engage with, and
16 with people can affect our thinking. And the
17 question is, should those conversations be part
18 of the public record, given that they can and,
19 and often do affect our thinking. So Brad,
20 Dennis? Whoever wants to go.

21 MR. SIMMONS: This is Dennis. I'll
22 just give a, you know, a quick thought. Is that,

1 you know, it would seem to me that capturing
2 relevant discussions in whatever is formally
3 issued would be the place to do that.

4 That way, all the, you know, there
5 could be some review of that before it's
6 published. So, you know, generally speaking, I
7 think applicants would want to be as open as they
8 can be with the Department when they come in for
9 a request.

10 And I guess the concern would be, you
11 know, there may be some potential blindsiding if,
12 you know, if some of those early conversations
13 are, you know, captured so that, again, bringing
14 those into whatever's formally issued.

15 And, in which my understanding is that
16 would be reviewed by both parties before that
17 gets issued. It would be, you know, maybe the
18 best bet, the best way to handle that.

19 MR. KREPS: From the CIEBA perspective
20 and kind of talking to the members, they need the
21 opportunity to talk to their regulators and get
22 some feedback on exactly what you all think about

1 things, and whether it's worth pursuing
2 something.

3 And you know, the risk that, that
4 becomes public, seriously chills that that
5 speech. And I think we can differentiate between
6 a formal record, which, you know, gives the
7 public a sense and an idea of your thinking and
8 the assumptions you all relied on in reaching a
9 conclusion and making an administrative
10 determination from preliminary, and maybe less
11 formal conversations about possible courses of
12 conduct. Those are, those are -- I think
13 there's, maybe not exactly a bright line there,
14 but pretty close.

15 MR. HAUSER: Well, in these
16 hypothetical circumstances, where we had the
17 earlier conversation before people were ready to
18 make a formal submission, I mean, is there a
19 thought that part of what would be revealed would
20 in some sense, be confidential information or
21 business secrets?

22 That, I mean, the concern I have is,

1 if we've given that, and it's something that
2 potentially is going to affect our decision
3 making, how do we then, not in fairness to the
4 public and the process, disclose that as part of
5 the process?

6 Or is the thought that, no, at all
7 stages, we, you know, we would expect that all
8 the relevant material including any anything like
9 that would come out?

10 MR. LEVINE: And, Tim, there's some
11 history on this if you look, for instance, at the
12 parallel agency, you look at -- you look at the
13 IRS. They have in the employee benefits area,
14 you can get access to certain private letter
15 ruling type of files, which in some ways is a
16 good analogy to an exemption discussion, here.

17 There, they have a pre-submission
18 program that is non-binding, just like a informal
19 chat with the Department itself is a non-binding
20 type of experience.

21 So I think that there is a real look
22 -- even looking at that precedent out there, to

1 be able to say, let's have the informal, non-
2 binding.

3 It also addresses your concern about
4 people going off on imprecise items. Although, I
5 think I would probably beg to differ that
6 sometimes people are hiding the ball, if that's
7 implied.

8 I don't think they are. I think
9 sometimes people are still figuring it out at
10 that point. But I think what we could do is, at
11 worst, the Department says, we need to, if you're
12 going to come in for the exemption, you need to
13 put all your facts back in writing to us for
14 anything that's relevant.

15 So nobody is trying to trip up the
16 Department by saying, hey, we had a chat, we told
17 you everything, but that's not on the record.
18 But now we expect you to rule on it. It gets
19 woven into the process, where you have to submit
20 it as part of the exemption application.

21 But that way, that allows free, up,
22 proactive communication, without, in the sense

1 putting the Department in a place where
2 stakeholders and others don't see the
3 information.

4 MR. HAUSER: So following that
5 suggestion, what if I wrote the rule the following
6 way. And I'm just interested again, in your
7 reaction, Brad's, Dennis'.

8 So what if we said, by all means have
9 your preliminary conversation, kick the tires,
10 we're not going to let it, you know, the pre-
11 submission conference, kind of pre-submission
12 stuff essentially turned into an all but name
13 only the actual process?

14 But that subject to those kinds of
15 constraints, go ahead, have your conversation.
16 But then, if you want to move forward with the
17 formal conversation, a stipulation is going to be
18 everything you've presented to us as a relevant
19 fact is going to be included in this record.

20 And that's, that's, that's just, you
21 know, that otherwise you, it's another
22 transaction. We just won't consider. Is that

1 the proposal? And would that be acceptable?

2 MR. KREPS: I'm going to give that a
3 little more thought and come up with some written
4 comments. I do think that, you know, to the
5 extent in what you're saying, Tim, is the things
6 we have put in writing to you all, you know, that
7 form the basis of your decisions, it could be a
8 component of that.

9 That is, for example, corporate
10 revenue streams from certain lines of business
11 that should be, should likely be redacted and
12 removed from the record, even if they are
13 formally submitted or protected in some way,
14 because it could cause harm to the applicants if
15 released.

16 I think if other than that, kind of
17 those confidential business questions, you know,
18 it does seem to be preferable, as opposed to the
19 proposal to make that limited, more limited
20 subset public.

21 I would say that at times, during
22 conversations about exemptions, the Department

1 will ask questions that aren't necessarily
2 relevant to the decision making process, but
3 they're things that Department wants to know.

4 They, and maybe they think they're
5 relevant at the beginning, but they don't turn
6 out to be relevant at the end. And, you know,
7 applicants are obliged to answer those. And so,
8 let me just give you an extreme example, Tim.

9 This is going to sound kind of
10 ridiculous, but I think it makes the point. If
11 you asked me, you know, is your dog sick? Or are
12 you divorced? That stuff's not relevant to an
13 exemption application.

14 You probably wouldn't ask it, but you
15 might ask something. And I say no. Does that go
16 in the formal record that gets publicly
17 disclosed? Because I'd be obliged to answer it
18 for fear of annoying the regulators and causing,
19 you know, causing a problem with the exemption
20 application.

21 MR. HAUSER: Sure, I take the point.
22 And I don't want to belabor this much more, but I

1 just want to go back to the confidential business
2 stuff. Stuff, maybe you want to keep secret, but
3 you want us to hear it.

4 And the question, I guess, I have is,
5 how do we square that with a public proceeding?
6 And what approach is to do what was what David
7 suggested, or, you know, essentially say, look,
8 if you're going to move forward, we're going to
9 have to disclose that stuff.

10 This is supposed to be a public
11 process. If you're telling us something,
12 presumably you want us to think about it. Or are
13 you really, or are people really maintaining that
14 there ought to be some confidential business
15 things that you want us to take into account as
16 part of this process, but that we not disclose to
17 the public?

18 And I guess if you could, you're
19 welcome to wait and give us written comments.
20 But it would be good to understand how to
21 navigate the apparent tension between a kind of a
22 public open process and that notion.

1 MR. KREPS: And guess what? You know,
2 following up on that, doesn't FOIA present
3 already a framework for that consideration, Tim?
4 I mean, don't we have already a statutory means
5 for determining the types of information that
6 should be disclosed publicly related to Agency
7 decision making? And there's extensive case law
8 on what constitutes protected and exempt
9 confidential and business information.

10 MR. HAUSER: Yes. So if you'd like to
11 make a comment along those lines, you're
12 certainly welcome to. But, but FOIA is
13 addressing a separate set of issues from this,
14 which is about having a public process in which,
15 you know, people can kind of fully participate in
16 the discussion of what it is the Agency should
17 do, based on full knowledge of the facts, so.

18 But I don't, again, I, I've taken
19 longer on this than I should have. I just wanted
20 to ask one more. And, and I'm letting Brad off
21 the hook completely, which, like violates up a
22 personal rule. But I've got to do it anyway.

1 And that's --

2 MR. CAMPBELL: Let me save you the
3 trouble. I'll associate myself with Michael's
4 remarks.

5 MR. HAUSER: All right, there you go.
6 The second question, and this is actually maybe -
7 - actually, I take it back. So this is for maybe
8 Brad and David. But both of you made the point
9 that, coming to the Department of Labor for an
10 exemption is a last resort, kind of the, one of
11 the last things we considered.

12 And I guess, I just, is, is that in
13 any tension in your mind with the apparent
14 objection to our asking people to tell us, you
15 know.

16 I mean, it's not dispositive under the
17 exemption, but, but we ask people to tell us,
18 what did you consider that didn't involve getting
19 an exemption as ways of achieving your goals?
20 And it seems like well, if you've already done
21 that work, how much of a burden is that actually
22 imposing?

1 MR. CAMPBELL: Well, to be clear, I
2 didn't say it was a last resort. I said it was
3 down the list. Nobody says to themselves, let's
4 engage in what's going to be likely an 18-month
5 to three-year process, with a lot of expense,
6 difficulty, and disclosure to a Federal
7 regulatory and enforcement agency, without having
8 some thought about it in advance.

9 At the same time, that doesn't mean
10 that it is the last resort or the only
11 alternative. And I think one of the key points
12 here is the Department, just in my experience,
13 from some recent exemptions I've been involved
14 in, seems to be implying that, you know, we
15 aren't that interested in granting an exemption
16 unless it truly is a last resort.

17 Is there any other way you could do
18 this that wouldn't involve this? I don't think
19 that's the right analysis. I think the right
20 analysis should be, is this going to be
21 beneficial to participants? And if it is, it
22 should be in the running among the options.

1 To your point about disclosing all the
2 additional options, I'm not sure that's really
3 relevant for the Department's analysis. The
4 issue for the Department is what's in 408.

5 And so, requiring me to disclose a
6 whole bunch of internal thoughts and
7 deliberations about completely unrelated issues,
8 like who else I talked to, to get bids on this
9 alternative approach that doesn't involve the
10 Department at all.

11 Seems to me pulling in a lot more
12 information that gets even more into some of
13 these privacy issues that were skirting with your
14 previous questions.

15 MR. HAUSER: So, but in your view, are
16 you saying that it's irrelevant to the analysis
17 of what's in the participants interest, whether
18 there were available alternatives that didn't
19 implicate the prohibited transaction rules?
20 That, that's just irrelevant?

21 MR. CAMPBELL: I think that it
22 certainly can be largely irrelevant. There, I

1 concede to you there could be a case where maybe
2 that is relevant. But I think here we're
3 balancing the question of, if it is relevant, can
4 you get to that with a materiality review?

5 As opposed to, hey, give me your
6 thoughts on everything else you considered?
7 Those really are two very different questions.
8 And I think an Agency has an obligation to have
9 some limitations on the information it's seeking
10 to collect and the burden that presents.

11 MR. HAUSER: Well, I agree with you
12 there. David?.

13 MR. LEVINE: And I would agree with
14 Brad. I'm going to do what he did with Michael.
15 I'll second what Brad said here. And I think
16 there's also a second point.

17 That there's a privileged discussion
18 here. That some of these decisions, there's
19 views from a compliance standpoint and other
20 areas that when you're discussing this with
21 counsel, when this gets immediately put out there
22 that directly undermines the fundamental

1 principle here that people should have privilege
2 in talking to their counsel in this process.

3 So I think that Brad's point about
4 materiality, and like I can think of specific
5 exemptions, situations where we went in and did
6 not obtain one, where what part of the problem
7 was, is underneath at all we did look at other
8 options.

9 And we considered them, but the
10 challenge was, there was no perfection there.
11 There was things that we thought were imprecise,
12 and we thought that it was best for participants
13 not to go down those roads.

14 But in the end to Brad's point was it
15 in the best interest of the participants and
16 beneficiaries to go for the exemption? Did we
17 think at best? Yes.

18 Should we have to go through all the
19 legal analysis, and bluntly, risk analysis of
20 doing it other ways? No. This is, doing that
21 encourages people to hide the ball, rather than
22 do it.

1 And none of us want to hide the ball.
2 We want a collaborative relationship, not one of
3 saying, we hope that Department doesn't pick it
4 up. Because I think all of us here, we want to
5 work together, not against.

6 MR. HAUSER: Okay, I'm sorry, David,
7 I was going to stop here. But I just I don't
8 understand the last hide the ball point. So how
9 does are asking you to disclose something, I
10 encourage you to hide the ball? I don't mean,
11 personally.

12 MR. LEVINE: No, no. I don't think
13 anybody here is trying to hide the ball. And I
14 knew you would grab on a term like that. But it
15 encourages folks to basically, to say, the DOL
16 isn't an option. What, what? Because --

17 MR. HAUSER: Why?

18 MR. LEVINE: -- if we're going to have
19 to lay out our internal thoughts. I think folks
20 would rather find a productive way through the
21 process. And that is our number one objective
22 here.

1 And it's going to make people nervous
2 that they have to lay out well, we considered
3 these strategies, and it didn't work. Because
4 it's almost a second guessing type of situation
5 of why wasn't this right. And there can be
6 reasons that are just more confidential that are
7 not relevant even to ERISA, that necessarily
8 they're underlying this.

9 MR. HAUSER: Thank you. That's all I
10 have if anyone else would like to answer any
11 questions.

12 MS. HANSEN: I have just one point.
13 And again, like other comments, it's late in the
14 panel, so please feel free to respond, not only
15 right now, if you wish.

16 But one just point of tension that I
17 would appreciate additional information about is
18 I'm hearing both throughout this entire panel,
19 this idea that, you know, if the Department has
20 granted an exemption previously, there's this
21 presumption that other exemptions now also need
22 to be or should be granted.

1 And at the same time, I'm hearing, you
2 know, this concern that some of the information
3 that is presented as part of the discussions, or
4 the application process, you know, should not be
5 disclosed to the public.

6 Which sets up a situation where it
7 sounds like what I am hearing, and what I'm
8 asking for information about, and how to
9 reconcile this tension, is that we should both as
10 a Department hear the information, but not make
11 it public.

12 But also be willing, and in fact, be
13 presumed to grant applications where the person
14 coming in, the applicant who by definition, does
15 not know and cannot know that they have all the
16 information about why we granted an earlier
17 exemption.

18 So there is a concern and attention
19 there, that if you can address that in written
20 comments preferably, given the time, I would
21 greatly appreciate.

22 MR. CAMPBELL: Well if I might be

1 permitted a chance to answer it. I think you've
2 put your finger on something that, frankly, I
3 found troubling about the Department's practices
4 in recent years.

5 Which is essentially ignoring that
6 EXPRO exists, or in fact, as have I've been
7 personally told, do not apply via EXPRO, even if
8 you might meet its criteria, because we're not
9 going to consider that application.

10 The Department has created an actual
11 regulation with a presumption of precedent. And
12 that should be available for use, not something
13 the Department uses selectively. So I do have a
14 concern that this whole proposal really places
15 EXPRO in limbo.

16 And if it is the Department's
17 intention to repeal it, that needs to be
18 something expressly dealt with, not something
19 that is kind of hidden through the back door of
20 changing these procedures.

21 MS. HANSEN: Understanding how the
22 repeal process works, let's be clear that this

1 proposal does not get to EXPRO. But I would
2 still appreciate tension, as those points have
3 been raised during this hearing today.

4 MR. MOTTA: And I'll just, you know,
5 clarify some things on EXPRO. You know, we often
6 discourage people from applying for EXPRO
7 requests, if we think they have, you know, if the
8 cases are, we don't view them as being
9 substantially similar, which is in our sole
10 discretion.

11 Or if we think that the proposed
12 arrangement is subject to possibly changing views
13 or evolving views within the Department. So it's
14 done mostly as a courtesy, so applicants don't go
15 through the time and expense of going through an
16 EXPRO request when it's a deal breaker, right,
17 right from the start.

18 People are always free to apply. We
19 don't have the authority to say, never apply for
20 an EXPRO request. People are always free to
21 apply. And we would redirect them to the
22 individual exemption request.

1 MR. CAMPBELL: Well, and Chris, I
2 certainly appreciate that point. I do think,
3 though, that the bold statement in this proposal
4 that we are not bound by past precedent is
5 directly in tension with how EXPRO is structured.
6 So I do think there's an issue there that --

7 MR. MOTTA: Yes, I appreciate that,
8 you know. And just a bit more on EXPRO. If
9 someone submits an EXPRO request, you know, what
10 we do in the office, we'll open up the prior
11 exemption requests, and sometimes they'll each be
12 a 500 page application.

13 And, you know, so we're comparing
14 1,000 pages of documents to another 500 page
15 document. And if we see something in those
16 documents that, you know, cause us concern, might
17 be a little bit different those, those thoughts
18 may not have been expressed in the prior summary
19 of facts and representations, which might be just
20 a couple of pages long.

21 So it's, I appreciate the difficulty.
22 But I, you know, I don't think, you know, the

1 public should take a lot of comfort in some of
2 our prior exemptions, just because not everything
3 can possibly --

4 A 500-page application is difficult to
5 boil into a summary of facts and reps. If there
6 are a lot of other thoughts captured in those
7 1,500 pages before us that cause concern, it
8 might give us reason to move it over to the
9 individual exemption space.

10 MR. COSBY: I wanted to ask Brad, a
11 question about, excuse me. You talked about
12 precedent, and the fact that the proposal takes
13 away from it and I was just wondering, is your
14 concern, because you also acknowledge that
15 there's policy changes, there's reasons that we'd
16 have to change based on, to change our prior
17 position based on current circumstances.

18 So I was just wondering, is your
19 concern more that the prior people wouldn't be
20 treated the same? Like if someone had a prior
21 exemption?

22 You know, there would be a different

1 standard that would apply. So it would be an
2 unlevel playing field. Is that? I was just
3 trying to understand if that's what your primary
4 concern is?

5 MR. CAMPBELL: Yes, I'm saying the way
6 that proposal is written with the just expressed
7 disavowal of precedent having any meaning for
8 future decisions of the Department, that such a
9 strong statement is generally inconsistent with
10 sort of how law in America works.

11 And that it's inconsistent with how
12 EXPRO works. And it's inconsistent with the
13 Department's past behavior. At the same time,
14 obviously, the Department is able to make policy
15 changes. It's not beholden to always do the same
16 thing.

17 And as I said, before, you know, what
18 was true in 1982, may not be true in 2022. So
19 obviously, there is an ability for the
20 Department, as Chris was suggesting, you know, in
21 a case where the policy is changing, then that's
22 something that Department is certainly authorized

1 to do and embodied to do.

2 I think the way this is written,
3 though, it really is in tension with EXPRO and
4 raises the question of, would you, in current
5 time treat two similar exemptions in the same
6 way?

7 Or would you have an ever evolving
8 policy that each iteration is now changing, so
9 really, there is no clear precedent. There is a
10 new review in every circumstance. And I think
11 that's, that's kind of a concern to me, the way
12 that, that it's written in the proposal.

13 MR. HAUSER: Just sticking with what's
14 written in the proposal, the statement in the
15 proposal and it, you know, we'll take all of your
16 thoughts here into consideration. And, as we,
17 you know, consider a final.

18 But we don't say that prior
19 determinations aren't relevant, that they're not
20 to be considered. We don't deny that we're
21 subject to arbitrary and capricious review. And
22 we don't maintain an ability to do things that

1 are arbitrary and capricious.

2 The language, literally, just says,
3 you shouldn't assume it's determinative in every
4 case. I mean, when you get right down to it.
5 And there isn't a statement here that we don't
6 care about what we did in the past, that it's not
7 relevant.

8 Simply that it's not determinative.
9 So when you come in and apply to us, you will
10 still, you should expect to hear questions, and
11 to provide answers, and to go through this
12 process. But, but I understand the concerns you
13 raise.

14 MR. CAMPBELL: Okay. I would say that
15 probably we each characterize the other's
16 position in the most rhetorically advantageous
17 way. So maybe we should discuss this in more
18 detail as we go along with comments.

19 ASSISTANT SECRETARY KHAWAR: Any other
20 questions from DOL? Okay, thank you to the
21 panelists. Thank you to all of the witnesses
22 today, as well as the folks on the government

1 side. A lot of work went into this hearing, not
2 just for us in putting it together, but to all of
3 you for preparing your testimony.

4 I really appreciate you're your
5 patience and willingness to answer our questions.
6 As I said, at the start, the comment period is
7 now reopened. It will be open for a few weeks.

8 There will be a Federal Register
9 notice announcing close. And, you know, we
10 obviously, encourage any and all comments. If
11 you've heard things today that trigger thoughts,
12 we want to hear them. It will result in a better
13 product.

14 The other thing I would just say is,
15 just reiterate a point that you've heard from
16 various of us at various points this morning.
17 Which is, from our perspective, one of the goals
18 of the exemption procedure is to ensure that
19 there's more clarity about the Department's
20 expectations and the kind of information that
21 we're going to be looking for.

22 Because one of the inefficiencies that

1 we see in the process, right now, is a lot of
2 back and forth, simply to gain the documentation
3 that we need to really fully examine a
4 transaction, and evaluate it, and make the
5 statutory findings that we need to.

6 There has been a lot of conversation
7 today, with most of the witnesses, lavishing
8 praise on the Department's approach in the
9 proposal.

10 But in seriousness, the point I want
11 to make is that, as you've heard us ask a number
12 of times, one thing that will be very helpful for
13 us is, particularly in the areas where, you know,
14 the view of commenters is not that we shouldn't
15 be asking about something, but that the way the
16 proposal structured, it was maybe overbroad, is
17 going to result in the Department collecting
18 irrelevant information.

19 Any thoughts that any commenters have
20 on how we should draw those lines in a different
21 manner, or whether you think that the existing
22 procedures are kind of where we should be, and

1 that we shouldn't be making any changes because
2 none of this stuff actually matters.

3 Those are all areas that are going to
4 be very helpful for us as we consider all these
5 comments, ultimately, and figure out how we move
6 forward. But with that, thank you, again,
7 appreciate the engagement. Looking forward to
8 reading comments. And we are adjourned. Thank
9 you.

10 (Whereupon, the above-entitled matter
11 went off the record at 12:10 p.m.)
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17
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A

- a.m** 1:11 4:2
AARP 1:19 3:6 26:19,19
 27:9,18 30:12,16
 31:14 42:20 43:3
AARP's 43:11
ABC 14:17 58:2
abilities 94:20
ability 8:8 20:8 34:10
 39:9 43:9 44:3 46:3
 48:1 49:18 54:15
 100:21 102:10 184:19
 185:22
able 5:13 20:10 43:15
 46:12 50:15 83:21
 129:22 130:8 166:1
 184:14
above-entitled 189:10
abrupt 70:7
absence 38:12 63:21
Absent 86:7
absolutely 115:17
 136:9 154:6
absurd 37:6
abuse 147:18
abusing 144:18
abusive 148:12
academic 37:16
accept 59:12 84:8
 109:6
acceptable 58:16 162:7
 168:1
accepted 78:7 80:1
 81:11
access 65:20 66:5 68:1
 70:6 96:14 99:3,4
 133:8 165:14
accident 37:4
accompanying 24:9
accomplish 4:22
account 79:17 82:1
 95:22 97:20 159:22
 170:15
accountable 60:1
Accountancy 121:9
accountant 30:18 59:19
accredited 82:5
accumulated 68:21
accumulating 27:19
accuracy 96:19
accurate 31:6 95:7
accurately 95:3
achieve 51:21 52:12
 55:12 151:10
achievement 37:17
achieving 172:19
acknowledge 49:17
 97:1 183:14
- acknowledges** 41:18
 87:21
acquire 125:14
acquired 125:16
act 96:4 112:3 152:4
acting 1:12,14 3:3 4:17
 120:16
action 100:3 151:14
actions 157:12
active 32:16 120:22
activity 150:4
actor 146:14
actors 144:18 146:7
actual 24:9 82:9 147:3
 167:13 180:10
Adam 1:21 14:16,19
 15:3,12,20
adapt 7:18 143:5
add 54:20 60:15 127:6
added 24:7
adding 17:4 55:2 56:4
 129:2
addition 4:18 13:14
 30:7 32:9 42:3,12
additional 16:5 43:7
 97:9 105:15 174:2
 178:17
Additionally 38:4 41:3
 84:3
address 42:5 46:7 58:5
 108:3 114:7 143:5
 148:15 149:19 151:21
 152:22 153:7 179:19
addressed 11:6 52:7
 93:13 143:6 159:5
addresses 166:3
addressing 9:3 42:15
 171:13
adequate 26:21 27:11
 27:20 66:19 69:20
adequately 67:7 93:12
adhering 60:1
Adjourn 3:20
adjourned 189:8
adjudicated 100:5
adjudication 99:22
adjust 151:3
administer 41:5 135:5
administered 33:8
administration 1:14
 122:5 124:16 143:17
 143:18 144:7,8
Administration's 4:5
administrative 4:8
 16:11 22:5 29:11 34:4
 38:22 39:4 41:12
 43:14,20 124:21
 151:9,14 152:4 164:9
- administratively** 18:16
 136:5
admission 72:16 88:2
admonition 75:8
adopt 160:4,8
adopted 152:4
advance 173:8
advantage 38:21
advantageous 186:16
adverse 83:3 85:21
advise 78:9
advising 132:15
advisory 81:8 85:5
advocating 112:9
affect 22:15 87:22
 162:16,19 165:2
affiliation 13:3
affirmatively 152:14
afford 86:8
afforded 96:15
afoul 74:21
aged 135:18
agencies 36:16 43:20
 150:8 155:4 156:6
 158:18
agency 87:5 127:4
 148:5 150:18 151:2
 165:12 171:6,16
 173:7 175:8
agenda 11:15,18
ago 5:7
agree 35:16 41:3 50:6
 56:17 92:4,16 95:16
 160:7 175:11,13
agreements 34:1 70:4
 84:16,16,18
ahead 15:11 64:1,5
 154:7 167:15
aid 52:17
aim 10:18
aimed 107:19
air 64:18
albeit 41:16
Ali 1:11,14 4:17 14:18
 89:20 120:10
alike 31:8
Alli 131:12 134:9
 136:22 139:21 140:12
 141:10
ALLISON 2:12
allotment 12:2
allotted 13:9
allow 9:19 86:4
allows 9:21 166:21
alter 86:18 88:13
alternative 25:21
 173:11 174:9
alternatives 19:17,19
- 55:4,12 62:16 174:18
altogether 35:19
amend 4:7 5:5 46:7
amendment 1:3 4:20
 6:8
America 32:15 184:10
America's 27:15 32:22
American 1:21 2:5 3:5
 3:12 14:20 15:21 16:1
 32:16 63:7 68:14 78:5
Americans 26:20 27:11
 27:19 28:5 32:14
amount 19:11,12 82:20
analogy 165:16
analyses 56:7
analysis 14:4 20:1 56:2
 56:15 59:10 60:19
 61:4,11 69:19 74:7
 161:9 173:19,20
 174:3,16 176:19,19
analyzed 128:14
analyzing 131:20
ancillary 69:16
And/or 18:8
anecdotal 87:2 117:8
announced 5:8
announcing 12:21
 187:9
annoying 169:18
annual 83:18 84:5,12
anonymous 21:19 43:9
 46:21 48:2 49:17 50:8
 51:2 145:8 148:22
 150:9,10 161:17
answer 10:8 13:7 26:13
 31:21,22 54:11,11
 60:5,8 77:9 91:18
 93:7,20 97:8 101:3
 144:19 154:8 156:17
 157:5 169:7,17
 178:10 180:1 187:5
answering 98:22
answers 63:6 186:11
anybody 58:3 127:18
 177:13
anymore 92:17
anyway 116:17 171:22
apologies 63:15,21
 77:10
apologize 54:6 63:12
 63:14 77:6 137:2,4
apology 63:16
apparent 70:17 170:21
 172:13
appear 17:1,19 23:22
 42:10 144:21 145:2
appearing 64:4
appears 67:5 70:14

80:18 86:21 88:2 89:1
136:15
applaud 34:14
applicable 92:18
applicant 21:22,22
179:14
applicants 18:20 19:13
20:8,14 21:19 35:13
56:4 127:5 132:15
149:6 163:7 168:14
169:7 181:14
application 7:13 8:12
9:1 20:1 36:12 37:5
40:20 42:20 45:3,15
46:1,14 48:8,11 50:1
50:7,9,14 51:4 55:18
56:11 61:5 65:14
76:12,13 123:22
129:3,14,15 132:9
133:16 138:1 159:9
159:14 160:13 166:20
169:13,20 179:4
180:9 182:12 183:4
applications 7:21 17:21
27:5 31:17 40:6 49:5
110:14 126:17 145:12
146:2 150:10 179:13
applied 39:15 105:4
apply 88:6 101:14
102:1 126:14 127:3
145:6,19 152:9 180:7
181:18,19,21 184:1
186:9
applying 123:1 147:13
159:12 181:6
appraisal 78:17 79:4,14
79:22 80:1,6 81:9,11
81:14 82:3,6,16 83:14
84:3,15,20 85:19 86:9
86:17,18 88:13,17
94:8,12,21 100:14
103:6
appraisals 80:8,15 83:7
83:12 85:12 97:14,15
103:15 105:20
appraiser 30:17 53:13
59:18 73:18 78:17
79:9 81:3,5,10,18,22
82:19,21 86:14 90:19
91:19 92:12 94:7,18
95:14,18,21 96:9
97:20 98:2,22 100:7
100:22 101:19,21
103:14 105:3 108:13
109:8
appraisers 2:5 3:12
63:8 78:5 80:7 82:5
83:4,8,9,10,16 84:22

85:19 86:11 87:9,17
91:17 95:6 97:17
99:15 100:17 103:17
106:18 107:10 118:20
128:12
appreciate 21:12 27:1
31:18 67:15 89:3,7
108:5 113:11,15
120:2,6 121:17
122:20 123:11 129:19
130:7 132:1 133:11
142:13 154:8,11
178:17 179:21 181:2
182:2,7,21 187:4
189:7
appreciated 23:9 63:5
approach 55:21 62:15
71:5 89:11 124:9
126:8 137:10,13
139:19 157:6 160:5,9
161:19 170:6 174:9
188:8
approaches 74:2 121:2
approaching 62:9
appropriate 7:15 41:2
41:16 47:7 52:4,17
75:11 76:20 107:13
124:4 136:2
appropriately 125:17
approval 117:3
approve 112:18
approved 152:12
approving 110:2
148:12
arbitrarily 34:18
arbitrary 37:21 42:9
83:3 93:5 151:14
185:21 186:1
area 165:13
areas 51:11 88:7 92:1
160:14 175:20 188:13
189:3
arguable 93:2
argue 149:8 153:5
arguing 120:20
arrangement 181:12
arrangements 115:12
array 66:8 134:17
ASA 78:5,6,14,21 79:8
99:19 100:3 102:7
103:16
ASA's 80:5 90:18 94:12
aside 109:16
asked 23:15 42:7 62:1
121:6 161:15 169:11
asking 10:10 53:1
58:19 59:9 93:7 95:18
130:14 132:12 172:14

177:9 179:8 188:15
aspects 128:9
assertions 31:3
assess 159:13 161:3
assessing 52:8
asset 37:11 78:13
assets 2:14,18 3:16
27:20 29:3 69:11
78:11 83:7 86:19
88:14 108:19 116:22
122:13 125:17
assignment 84:8 85:2
assignments 72:6
assist 27:18
Assistant 1:12,14 3:3
4:3,18 13:15 14:22
15:10,16 26:15 32:1
42:16 44:18 49:7 63:4
89:6 90:16 91:8,15
92:2,20 93:6,22 122:4
127:21 128:3 130:6
130:12,17,21 142:8
142:14 154:4,10
157:10 160:3 161:5
186:19
assisted 72:7
associate 142:22 172:3
associated 20:19 56:14
85:2 128:19
association 100:6
associations 100:11
assortment 122:2
assume 47:10,20
155:10 186:3
assuming 49:3 95:15
assumptions 87:1,11
108:16 164:8
assure 94:11 98:16
113:16
attempt 88:6
attention 13:10 129:20
179:18
attorney 32:6
attorney's 57:10
attorneys 122:2 131:5
132:4
attractive 69:13
audience 12:14
audio 14:21 50:7
127:22 142:11 143:1
audit 155:1
auditor 30:18 53:14
audits 36:18 146:18
authority 36:14 41:4,14
57:20 66:2,15 124:20
135:12,16 140:1,9
157:21 181:19
authorized 42:2 184:22

authorizing 6:18
automatically 40:5
availability 12:21
116:10 128:15
available 5:12 6:3 11:15
22:5 29:12 42:5 49:1
55:11 82:17 115:10
174:18 180:12
average 143:22
avoid 125:19 133:2
avoiding 149:7
aware 24:19 33:2 38:5
46:11 72:10 73:8 77:1
104:4,7 132:4

B

baby 35:19
back 11:2 15:12 17:1
25:2 44:15 63:13,20
63:22 105:11 110:15
130:20 153:5 157:6
161:8 166:13 170:1
172:7 180:19 188:2
backdrop 34:9
background 64:20
67:19 137:4
backstop 113:2 116:5
backup 72:15
bad 110:10 144:18
146:7,14
badly 105:12
balancing 136:11 175:3
ball 166:6 176:21 177:1
177:8,10,13
bar 101:13 102:21
120:17 136:15 159:11
159:16
bare 149:22
barred 36:22
barrier 25:13 72:21
73:1
barriers 90:22 124:8
129:4 141:14
based 56:11 59:1 62:20
71:19 73:2 108:16,20
153:18 156:7 171:17
183:16,17
basically 69:20 70:5
71:18 117:12 150:18
177:15
basics 142:5
basing 31:9
basis 21:19 48:2 50:16
66:17 87:7 168:7
bath 35:20
battle 116:12
bearing 128:19
becoming 126:19

bedrock 31:9
beg 166:5
beginning 61:12 133:7
 169:5
behalf 12:1 13:4 14:17
 14:20 26:19 32:4
 64:14 78:3 79:16
 103:3 114:12 123:15
 132:10,11
behavior 184:13
beholden 184:15
belabor 169:22
belief 30:20
believe 8:4,16 16:7 17:3
 17:16 19:1 20:13,21
 23:5 25:8 31:3 48:10
 56:9 67:20,22 70:19
 71:9 73:11 80:18
 89:14 90:17 91:20
 92:21 101:5 102:18
 141:2 150:18 154:17
believes 16:11 17:19
 18:5 40:16 67:16
beneficial 21:4,10
 23:14 34:12,19 36:9
 41:1,15 125:7 173:21
beneficiaries 27:7 28:2
 28:11 30:3,15 31:20
 34:13 40:15 45:4
 65:10 67:7 69:6 70:1
 71:10 79:18 82:2
 85:16 97:22 112:19
 132:7,19 133:4 134:5
 136:7,10 138:15
 140:6 176:16
benefit 2:14,18 3:16
 13:11,22 16:8 17:7
 19:22 20:16 28:9 29:9
 34:6 46:18 53:2 55:13
 56:13 61:11 69:19
 70:11,12 121:5
 122:13 125:7 148:16
 157:20
benefits 1:14,21 3:5 4:5
 14:21 15:21 16:1 20:3
 27:21 32:22 34:3
 52:12 53:4 58:15 70:2
 71:9 113:5 123:17
 125:20 126:22 165:13
benefitted 16:16 65:9
 69:5 138:14 145:17
 150:5
bespoke 111:13,15
best 30:20 37:13 45:3
 52:20 94:20 95:3,21
 112:18 114:2 118:4
 128:22 148:13 163:18
 163:18 176:12,15,17

bet 163:18
better 10:8 47:6 51:8,13
 60:12 155:21 157:5
 159:20 187:12
beverage 15:3
beyond 54:8 157:16
 158:18 159:3
bias 80:8 95:4,11
biased 28:18
Biddle 2:9 3:18
Biden 144:8
bids 174:8
bifurcated 89:11
Bill 63:10 64:3,9,11
 77:13 89:20 105:22
 113:14
billion 117:1,5
binding 47:2 152:6
 166:2
bit 9:15 10:22 64:20
 67:19 93:5,8 113:10
 134:9 138:2 182:8,17
blindsiding 163:11
blow 39:21
blower 137:2
blunt 39:21
bluntly 176:19
Board 78:4 99:21
Boards 33:8 121:9
body 99:17
boil 183:5
bold 182:3
boost 94:20
born 75:15
borne 34:8
bothered 112:14
bothering 161:20
bound 100:7 151:19
 182:4
Brad 122:3,5 142:10,15
 154:4,15 161:12
 162:19 171:20 172:8
 175:14,15 183:10
Brad's 167:7 176:3,14
BRADFORD 2:9
breach 57:12 69:22
breaches 38:7
breadth 156:18
break 113:2
breaker 181:16
Brian 1:17 13:21 14:8
 77:6
briefing 60:17
briefs 75:10
bright 164:13
bring 68:18 112:5
bringing 163:13
broad 41:4,14 43:22

45:8 104:10,10
 124:14 126:4 134:12
 134:17 135:4 142:19
broad-ranging 140:1
broadly 124:13
brought 93:16 111:20
 136:20 157:18
built 7:16 8:6 153:3
bunch 10:16 174:6
burden 19:9 140:17
 172:21 175:10
burdensome 126:14
Bush 143:17
business 66:21 72:2
 74:19 100:16 112:9
 125:5 129:9 140:20
 164:21 168:10,17
 170:1,14 171:9
businesses 78:7
 140:18
Butikofer 1:15 14:3
button 5:3
buyer 98:5
buyers 81:15

C

C-O-N-T-E-N-T-S 3:1
calculation 92:10
calculus 85:4
calibrate 140:9
call 5:4 14:8 38:1 126:3
 145:7
called 146:17
campaign 156:21
Campbell 2:9 122:3
 142:16 154:6 155:22
 159:4 160:17 172:2
 173:1 174:21 179:22
 182:1 184:5 186:14
capital 116:6 117:11
capricious 151:14
 185:21 186:1
captive 70:3
captured 163:13 183:6
capturing 163:1
care 101:12,13,14
 186:6
carried 145:20
carriers 118:1
carry 41:12
case 38:3 67:9 71:9
 98:7,11 134:6 144:21
 151:20 155:12 171:7
 175:1 184:21 186:4
cases 36:7 40:21 50:9
 133:3 181:8
casting 113:21
categorical 36:6

categorically 36:11
categories 17:17
categorized 17:16
cause 8:12 61:6 82:5
 168:14 182:16 183:7
causing 169:18,19
central 99:2 106:20
CEO 64:12
certain 6:3 17:6 104:1
 165:14 168:10
certainly 48:9 50:6,14
 62:7 103:5 109:15
 118:14 121:1 129:11
 135:20 148:7 171:12
 174:22 182:2 184:22
certainty 74:11
Certner 1:19 26:17,17
 42:19 43:17
Certner' 46:3
cetera 107:14
CFR 91:9
Chair 99:19
challenge 176:10
challenges 154:13
challenging 141:16
chance 180:1
change 24:20 41:1
 127:8 132:9 140:16
 151:5 183:16,16
changed 42:6 144:17
 145:3
changes 17:19 18:12
 18:22 20:13,21 21:2,9
 21:21 22:8 23:17,21
 24:9 25:9 30:12 46:16
 46:20 54:18,19 64:16
 65:13 67:16,21 70:8
 122:22 123:21 124:3
 134:2 139:1 143:12
 183:15 184:15 189:1
changing 125:3 180:20
 181:12 184:21 185:8
characteristic 33:15
 37:18
characteristics 37:15
 81:19
characterize 9:16
 186:15
characterized 67:4
charged 84:4
Chartered 2:11,12,15
 2:16 3:17
chat 165:19 166:16
chatted 130:3
check 53:14
checking 128:1
Chief 63:17 64:12 123:5
 125:21

chill 139:3
chilling 40:7 124:3
 129:17 140:13
chills 164:4
chime 13:7 161:13
choice 15:4 98:9
 141:12
choices 21:2 22:10
choose 98:11 104:22
Chris 1:15 13:18 63:17
 63:21 64:6 114:15
 115:18 116:14 182:1
 184:20
CHRISTOPHER 1:17
CIEBA 121:22 122:6,12
 122:18 123:4,5,5,12
 125:1 163:19
CIEBA's 122:14
circulated 114:19
circumstance 95:18
 97:3 185:10
circumstances 7:19
 19:5 37:22 39:5 41:22
 42:6 62:21 74:7 75:3
 112:1 119:22 126:21
 143:5 150:21 164:16
 183:17
cite 97:1 99:11
cited 94:13 99:12
claim 57:3 149:10
clamp 133:22
clarified 66:16
clarify 26:4 34:15 71:5
 99:8 121:5 181:5
clarity 96:11,21 97:12
 98:20 117:10 154:20
 187:19
class 39:15 41:19 42:3
 66:2,17 124:21
 132:16 151:22 152:2
clear 28:11,18 29:21
 30:5,8 38:19 42:4
 94:16 97:2,17 105:5
 106:4 107:18 116:17
 135:15 146:20 173:1
 180:22 185:9
clearly 41:13 112:21
 114:11 119:17
client 25:15 84:8,11
 90:21 92:13 95:6,13
 96:6,11,22 97:2,13,18
 98:21 99:1 101:19
client's 95:9
clients 47:18 83:22
 85:6 86:6,8,9 103:2
 104:6,8,10 110:14
 132:10
close 5:21 48:20 139:16

158:11 164:14 187:9
closely 122:16 123:9
closely-held 77:22 78:7
closing 88:11
closure 6:4 12:22
code 4:11 66:8 80:6
 94:13 124:13 125:10
codify 128:10
collaborative 132:17
 177:2
colleague 122:14
colleagues 134:1
collect 175:10
collecting 19:9 188:17
collection 9:1 20:20
 21:20
collective 18:11
collectively 20:12,21
 54:18
color 103:13
combined 25:8 40:8
come 7:22 13:10 21:11
 22:11 34:4 56:6,18
 110:14 114:1 121:1
 161:8 163:8 165:9
 166:12 168:3 186:9
comes 44:20
comfort 99:13 183:1
comfortable 120:11
coming 11:11 20:14
 44:22 55:2 56:15 59:6
 137:3 141:11 172:9
 179:14
commands 82:11
comment 5:6,15,15,21
 6:4 9:6,7,20 12:22
 46:4 64:22 65:16
 78:19 90:18 94:13
 106:3 115:2 132:2
 152:5 154:18 171:11
 187:6
commenters 45:20
 188:14,19
comments 5:10,21 8:7
 9:10,11,14,19 11:1,4
 16:9 17:14,16 42:12
 44:21 60:22 132:8,11
 143:1 168:4 170:19
 178:13 179:20 186:18
 187:10 189:5,8
commitment 31:19
 123:17
commitments 79:5
 82:6
committed 27:9 146:15
Committee 1:20 2:13
 2:17 3:7,16 32:5
 99:20 122:12

common 98:17
communication 40:18
 127:4 139:4 166:22
communications
 129:13 145:8
community 23:12 73:20
 82:17 83:13 88:18
 100:14 126:18 139:5
companies 84:21
 155:16
company 2:4 77:22
 114:12 117:2 125:11
 125:14
company's 155:19
compare 143:15
comparing 182:13
compensation 69:21
competent 68:10 72:21
competing 46:8
complaints 97:14 99:20
 100:1
complete 28:10 58:19
 59:1 95:7
completely 146:8
 171:21 174:7
complex 17:8 23:3
 84:20
complexity 33:12
 116:21
compliance 23:14
 80:15 155:2 175:19
complicated 41:21
comply 54:3 83:21
complying 62:11
component 27:6 168:8
composed 33:9
compounded 28:21
concede 175:1
concept 158:14
concepts 109:21
concern 17:18 21:7,8
 24:13,16 29:2 36:4
 45:19 49:2 56:3,22
 57:9 61:3,9 68:6 90:1
 96:8 140:21 158:9
 161:16 163:10 164:22
 166:3 179:2,18
 180:14 182:16 183:7
 183:14,19 184:4
 185:11
concerned 16:20,21
 19:15,20 20:18 22:7
 25:12,21 34:9,16
 35:11 40:4 57:18
 65:12 73:2 85:10
 108:22 114:5 139:6
 148:20 153:14
concerning 55:5

153:20
concerns 20:5 21:14
 23:20 46:8 48:4 49:17
 53:16 57:6,14 61:6
 75:22 78:20 123:20
 134:13 136:22 138:22
 147:16 153:8 160:16
 186:12
conclude 150:19
concluded 29:16
 148:15
concluding 62:14
conclusion 164:9
conclusions 95:8
condition 100:11
conditions 17:5 18:1
 47:13 51:14 55:3 69:3
 133:15 136:1,4 151:3
 158:10
conduct 6:18 8:2 28:6
 28:18 36:16 75:12
 80:13 96:16 164:12
conducted 69:1 81:9,10
conducting 85:11
conference 167:11
conferences 35:4,15,18
 36:3
confidential 22:18
 46:13 47:22 50:9 77:2
 129:9 164:20 168:17
 170:1,14 171:9 178:6
confidentiality 76:1
confirm 114:18
conflict 8:1 29:15 72:3
 72:8,13 82:4 92:9
 135:1 137:17,19
 153:16
conflicted 28:18 112:20
 134:18 153:12
conflicts 8:11 19:5 27:7
 52:7 53:15 82:12
 93:12 107:2 137:21
 138:4
Congress 6:14,19
 29:14,19 41:3,6,13
 42:1 66:14 124:18
 134:12 135:3,9,15
 136:1,11 139:22
 141:3 142:18
Congress' 134:3
Congress's 66:1,18
 88:19
Congressional 29:2
 66:10 134:10 136:17
connect 130:1
connections 67:1
cons 45:9
consequence 22:20

88:16
consequences 83:4
consider 16:6 56:11
 61:5 62:16 74:13
 86:22 111:9,22
 119:22 120:1,1 146:2
 156:4 167:22 172:18
 180:9 185:17 189:4
consideration 27:3
 48:19 50:13 52:18
 77:8 153:4,22 171:3
 185:16
considered 51:21 67:12
 80:21 89:1 172:11
 175:6 176:9 178:2
 185:20
considering 49:3 50:11
 82:8 118:17 131:21
consistent 17:13 30:13
 96:17 130:4 136:16
 138:10
consolidation 72:20
constantly 125:4
constituted 84:1
constitutes 171:8
constraints 167:15
construct 81:15
constructed 124:14
constructively 139:12
consult 76:8
consulted 74:1
consulting 40:12
consuming 133:10
contains 80:12
contemplated 161:19
contemplating 62:10
contempt 70:18 106:9
 107:9 108:1
content 96:18
context 26:7 90:18 91:6
 92:22 108:18 109:16
 123:4 157:1
contexts 7:21 71:2
continue 23:18 32:21
 41:22 44:3 135:21
continued 133:14
contract 54:4
contractor 34:1
contradictory 96:2
contradicts 88:19
contribution 123:7
contributions 69:9
 125:12
controls 158:8
convened 1:11
courses 14:14
 45:6,21 51:2 162:2,6
 162:15 164:17 167:9

167:15,17 188:6
conversations 21:11
 22:4 23:2,18 40:10
 43:9 44:3,6,15 45:16
 46:5,12,21 49:5,18
 50:3 74:4 76:5 99:5
 109:1 161:17,18
 162:14,17 163:12
 164:11 168:22
Coordinating 1:20 3:7
 32:5
coordination 140:10
core 109:21
corporate 168:9
correct 30:22
Cosby 1:15 13:18 62:8
 64:2,8 114:8,22 115:5
 117:15 118:3,6
 121:12,16,21 122:9
 127:15 183:10
cost 19:12,22 20:18
 38:7,9,21 70:3 83:12
 86:5 88:17 115:13,21
 126:1 148:2
cost- 61:10 69:18
cost-benefit 52:16 56:2
 60:19 61:4
costly 126:14 133:10
costs 34:4,7 53:1,4
 56:4,13 58:14 69:18
 125:19 128:19 129:1
Council 1:21 3:5 14:21
 15:21 16:1,11,20
 17:11,18 23:8 25:19
Council's 23:20
counsel 16:1 26:18
 32:6 117:17 175:21
 176:2
counsels 14:3
count 26:21 28:5
countdown 12:8
counted 155:1
counter-parties 99:7
counter-party 96:15
countless 16:15
country's 123:6
couple 42:18 43:5
 51:10 89:8 93:9 101:7
 125:11 128:6 131:1
 142:10 143:15 145:21
 154:15 158:13 161:11
 182:20
course 11:20 103:15,20
 105:17 111:10 127:8
 137:2 146:13 159:9
courses 164:11
court 12:19 13:2,11
Court's 75:8

courtesy 181:14
cover 57:17 117:6
 131:4 137:15,15
 140:5
coverage 117:6
coverages 116:12
covered 41:8 142:12
CPAs 121:7
craft 132:18
create 16:17 19:12 22:4
 66:19 79:20 128:18
created 18:6 29:4 135:8
 180:10
creates 25:13
creating 32:14 124:7
creation 88:20
creators 140:2
credible 95:7
credit 126:11
criminal 157:22 158:4
crisis 70:8
criteria 180:8
critical 16:12 31:7,12
 45:5 66:3
CROSBY 77:12,15,17
 89:2
crucible 29:1
crunch 56:6
culmination 133:21
 143:14
culpability 40:22
Cunningham 75:9
cured 137:22
curious 54:7 61:18
 155:13 158:12
current 89:9,22 90:12
 92:5 120:13 151:18
 151:20 153:1 156:2
 157:11 159:3,6
 160:20 183:17 185:4
currently 20:10 27:22
 32:15 36:2 71:16
cutting 161:16

D

dangers 77:1 106:22
data 105:15
date 6:3
dated 30:18
Dave 15:7,11
David 1:19 2:16 15:22
 26:16,17 131:12
 139:14 170:6 172:8
 175:12 177:6
Davis 1:21
day 109:3 123:14
 124:16
day-to- 124:15

DB 69:7
de 139:8
deal 17:8 181:16
dealing 91:16
dealt 91:1,3 180:18
debate 10:12
decade 124:1 133:14
decades 77:20
decide 58:2 153:17
decided 5:7 45:2
decides 162:3
deciding 160:1
decision 45:5 101:18
 109:6 153:15 154:2
 165:2 169:2 171:7
decisions 31:9 68:20
 71:19 119:14 151:9
 168:7 175:18 184:8
declaration 30:19
decline 138:6
deemed 25:6
deepest 86:8
default 17:6 55:3 56:9
 87:11 137:10,13
defend 10:13
defer 109:14
deficient 87:14
define 159:11,19
defined 123:7
definition 30:10 68:20
 83:20 86:13 98:13
 179:14
degrade 82:16 88:16
degree 153:15
delay 34:20
deliberations 174:7
deliberative 9:8
deliver 79:10
demands 51:12
demonstrate 71:12
demonstrated 28:19
 86:16
demonstrates 42:3
denial 40:21 160:9
denigrating 106:11
Dennis 2:17 122:1,11
 130:7 131:3 141:15
 161:12 162:20,21
Dennis' 167:7
deny 40:5 185:20
Department's 16:21
 17:2 21:12 23:9 25:22
 31:18 34:14 41:11
 46:6 50:13 54:15
 64:16 65:13,19 73:8
 75:10 79:8 87:13 90:1
 117:2,7 122:22
 123:12,16,20 139:11

144:9 145:3 147:9
 148:21 152:18 174:3
 180:3,16 184:13
 187:19 188:8
Departments 35:14
 42:8
depend 161:4
dependent 92:22
depending 98:6
Deputy 13:15
derivative 128:21
derived 71:13 90:21
described 86:12 88:15
 161:3
description 19:18
 55:16
descriptions 19:16
deserved 70:20
deserving 154:1
design 16:8 20:16
designed 20:16 39:20
 41:10,20 145:11
desire 7:11
desired 46:11
desires 95:12
Despite 138:8
destroy 41:9
detail 186:18
detailed 18:3 19:16
 55:15 56:15 76:18
deter 40:10
determination 7:15
 58:21 164:10
determinations 6:12
 13:20 21:13 63:18
 109:5 116:3 117:14
 185:19
determinative 19:2
 186:3,8
determine 52:21 62:22
 156:20
determined 67:11
 81:21
determines 30:2 100:4
 151:5
determining 73:4 74:16
 99:22 171:5
detriment 75:7
develop 9:8 27:15 93:7
 93:13,18 126:1
developed 87:11 95:11
developing 155:8
development/comp
 19:22
devoted 32:12
dial 130:20
dialogue 23:15
differ 166:5

difference 159:19
different 7:18 11:14
 17:17 61:20 62:20
 74:1 77:2 98:10 101:8
 114:13 116:4,11,15
 120:20 143:18,19
 151:1,10,11 155:3
 160:8 175:7 182:17
 183:22 188:20
differentiate 164:5
differently 150:22
difficult 7:2,3 61:16
 68:19 71:7 116:14
 127:3 129:5 133:9
 183:4
difficulties 77:1
difficulty 86:12 93:2
 173:6 182:21
diligence 69:1
direct 57:2
directed 117:1
direction 141:1
directly 33:20 53:4
 79:19 88:19 131:18
 175:22 182:5
director 13:19 26:19
 77:19 122:12
Directors 78:4 99:21
disagree 114:14 160:7
disavowal 184:7
disavows 150:16
discipline 100:14
disclaimers 103:5
disclose 22:16 157:6
 165:4 170:9,16 174:5
 177:9
disclosed 159:9,22
 169:17 171:6 179:5
disclosing 174:1
disclosure 8:4 156:22
 173:6
discourage 17:21 18:20
 20:14 55:1 181:6
discouraged 129:18
discourages 127:4
discovery 76:16
discretion 73:4 74:9
 124:22 181:10
discuss 16:22 17:15
 21:8 134:2 186:17
discussed 16:9 21:6
 69:19 73:11 78:22
discusses 75:4
discussing 175:20
discussion 24:8 51:20
 52:16 90:13 94:6
 122:19 165:16 171:16
 175:17

discussions 23:10,11
 50:18 117:17 149:1
 149:13,18 150:10
 163:2 179:3
dispositive 172:16
disqualify 25:14 120:16
disregard 70:18
disrupt 66:21
disruptive 40:2
dissents 114:20
distinction 39:2 46:16
distinguishing 33:14
distribution 105:18
diversity 140:21
Division 63:17
divorced 169:12
document 94:11 111:21
 182:15
documentation 188:2
documents 31:5 182:14
 182:16
dog 169:11
doing 47:5,12 52:13
 66:18 82:10 110:8
 112:13,20 119:18
 129:16 132:13 142:18
 148:14 176:20,20
DOL 135:16 156:16
 157:2 177:15 186:20
DOL's 30:7
dollar 117:1
dollars 28:14 85:1
dollars' 117:5
Donovan 75:8
door 180:19
double 84:11
doubt 65:8 146:8 147:9
draconian 134:12
draft 96:14
drafted 116:16 135:2
drafting 119:3
drafts 99:4
drags 36:21
dramatic 39:8
dramatically 28:20
draw 60:14 158:21,22
 188:20
drawn 26:6 58:9,18
 158:22
Drinker 2:9 3:18
due 69:1 89:15
duties 28:9 39:2 57:12
duty 38:7
dwarfing 85:2

E

E 2:3
earlier 16:10 17:14

26:13 50:11 63:17
 74:6 164:17 179:16
early 7:12 45:1 163:12
earned 26:22 89:12
easier 93:4
easy 134:14
EBSA 4:4,18 5:9 11:15
 13:19 147:1
EBSA's 158:1
economic 56:7
EDT 1:11
education 43:21 44:11
 44:16
effect 39:18 40:7 66:12
 85:17 88:12 124:3
 129:17
effective 8:18 66:4
 126:2
effectively 22:8 27:19
 36:22 37:9
effects 86:22 88:22
efficiency 142:2
efficient 8:19
effort 35:8 110:9 133:22
efforts 34:15 65:8,9
 133:12
eight 144:3
either 22:20 35:11
 66:17 83:10 89:18
 94:16 102:10 105:10
 132:21,21
element 73:7 111:6
 112:4
eligible 24:1,3 154:3
eliminate 34:22 129:4
elimination 40:8
Eller 2:11 131:10,11
email 121:7
embezzlement 157:19
embodied 156:2 185:1
embodies 152:18
embolden 88:6
emphasize 88:11
empirical 86:21 105:15
empirically 87:16
employee 1:14 2:14,18
 3:16 4:4 13:22 16:8
 29:9 33:9 78:1 88:8
 122:13 125:7 147:12
 157:20 165:13
employer 31:13 33:10
 33:18 81:1 90:3
employer- 27:22
employers 20:22 31:8
 32:14 33:4,20
empty 75:13
en 40:1
enacted 41:6

encountered 87:10
encountering 62:11
encourage 40:17 88:20
 129:3 177:10 187:10
encourages 176:21
 177:15
ended 116:2
endorsement 109:2
enforced 69:17 99:16
 100:5
enforcement 148:5
 173:7
engage 10:12 21:18
 34:11 38:17 139:11
 162:15 173:4
engaged 71:14 110:1
engagement 83:17 84:4
 84:16,18 90:20 101:9
 101:10 102:20,22
 140:14 189:7
engagements 84:5
 103:18 105:17
engages 95:13
engaging 36:8 51:22
enriched 65:9
ensure 7:11 31:4 32:19
 66:5 75:18 93:11
 187:18
ensuring 8:9 10:19
 31:12,19 79:9
entice 138:17
enticing 148:2
entire 146:16 178:18
entirely 79:2
entities 33:16 116:7
 140:10 148:9 150:20
 157:14
entity 107:13 137:21
 146:3
entrusted 56:18
entry 25:13 72:21 90:22
enunciate 155:21
environment 32:20
equal 33:9
equally 105:4
equivalent 156:16
 157:2
ERISA 4:10,11 27:6
 28:8,12 29:6 30:13
 38:5 41:10 56:21 66:4
 66:7 75:2 78:9,12
 81:17 83:7 86:19
 88:14 92:1 104:10,17
 124:12 125:10 134:16
 140:2 143:4 147:3
 156:7 157:7 178:7
ERISA's 4:9 28:22 41:5
ERISA-related 88:7

ESOP 78:9,11 80:21
 83:4,16 84:18,21
 97:14,15 98:6,12
 104:5,8,9 109:16
ESOP's 104:22
ESOPs 88:20 98:6
especially 7:21 13:2
 99:6 140:18 154:12
essence 10:4 85:13
essential 27:6
essentially 20:7 21:21
 22:6 24:21 48:15 55:3
 57:3 94:19 148:21
 150:21 159:11 161:14
 167:12 170:7 180:5
established 66:21 81:2
 85:11 87:16 91:21
estate 100:15
et 107:14
ethical 79:5 80:1,4,20
 82:6,13 118:21
 119:17
ethics 80:7,12 99:14,15
 99:19,19 100:5,7,9
 121:6,10
evaluate 161:2 188:4
evaluating 5:22 93:3
evaluation 80:16
evaluations 77:21
 80:22
event 85:21
Everybody 127:14
evidence 67:6 147:17
evolve 151:2,16
evolving 181:13 185:7
exacerbate 124:7
exact 49:13,15
exactly 93:18 116:18
 117:10 146:20 163:22
 164:13
examine 149:22 188:3
example 30:16 34:21
 43:20 53:22 59:15
 73:17 80:10 84:4 96:9
 96:13 98:10 99:3
 108:12 147:15 157:17
 158:6 168:9 169:8
examples 18:19 19:14
 24:11 125:11 144:1
 156:12
exams 146:17
exceeded 102:21
exception 30:8 102:14
excess 89:15
exchange 50:20
exchanged 162:5
exclude 37:9
excluding 17:6

exclusion 82:10
exclusive 28:9
exclusively 32:12
excuse 57:4 183:11
executed 69:3
executing 62:17 69:13
Executive 122:12
exempt 171:8
exemptions 4:9 6:7,9
 6:12,16,18 7:1 8:15
 9:20 16:12,14 17:22
 18:7,8,14,15 20:15
 21:1 24:15 30:11 35:6
 38:22 39:4,15,16,22
 40:3,11 41:19 42:2,3
 43:4 57:20 58:7 59:4
 59:6 65:1,3,21 66:3,5
 66:10,14,16,20 67:12
 68:1 70:13 74:3 75:5
 88:1 91:7 93:15
 106:20 110:8,13
 123:1 124:19,21,22
 126:20 132:16 133:9
 133:19,20,22 134:21
 135:8,11,13,19
 137:11,17 138:3,5,6
 138:13 140:2 141:4
 142:1 143:13,22
 144:2,9,11,12,19
 145:1 147:13,18
 152:21 168:22 173:13
 176:5 178:21 183:2
 185:5
exemptive 69:4 124:5
 124:10 127:3 137:6,9
 137:14 138:9 139:19
 151:20
exempts 140:4
exercise 28:8 41:14
 53:17 57:19 135:16
 140:1
exercised 69:16
exist 85:7 91:4,5
existence 68:15
existing 18:6 19:2
 24:13 25:3,3 34:22
 39:16,21 40:3 41:19
 71:11 129:4 188:21
exists 91:10 102:19
 103:1 155:3 180:6
exit 83:10
expanding 27:9
expands 73:12
expansion 156:9
expansive 20:6 57:1,17
 150:17
expansiveness 57:15
expect 96:13,16,19

165:7 166:18 186:10
expectation 107:16
expectations 187:20
expected 135:15
expecting 61:15
expense 53:10 148:2
 173:5 181:15
expensive 40:2 57:8
 141:18
experience 10:21 67:17
 68:19,21 70:16,19
 75:6,15,16 77:21
 101:7 107:14 132:15
 137:11 153:12,13,15
 153:21 165:20 173:12
experienced 68:10 75:1
 145:9 153:11
expert 25:17
expert's 75:12
expertise 68:18 75:15
 75:20 107:17 108:1,6
 109:7 130:18 148:5
experts 78:6 87:3 107:5
 128:16,17
explaining 18:5
explains 87:19 149:4
explanation 18:4 67:15
 67:18 102:5
explicitly 14:8 157:14
exploratory 161:18
expose 84:21
expound 12:16
expressed 95:15
 182:18 184:6
expressly 18:22 26:4
 180:18
EXPRO 142:1 144:1,12
 151:22 152:7,9 153:3
 180:6,7,15 181:1,5,6
 181:16,20 182:5,8,9
 184:12 185:3
extended 5:6
extension 112:8
extensive 69:1 171:7
extent 44:2,5,11,14
 48:12 50:11 51:20
 53:2,3,12 55:17 57:15
 99:8 103:13 105:14
 168:5
extreme 169:8
extremely 65:7

F

face 86:12 124:15
faced 98:9
facilitate 16:15 125:6
facilities 107:14
facing 17:9

- fact** 24:8 25:16 42:1
 43:13 57:16 61:1
 72:22 73:18 90:8
 92:21 109:2 111:20
 124:14 135:22 138:8
 152:2,8 159:7 167:19
 179:12 180:6 183:12
facto 139:8
factors 118:16
facts 19:4 22:13 35:12
 59:8,10 74:7 93:3
 112:1 119:22 149:7,7
 159:13 166:13 171:17
 182:19 183:5
factual 87:6
Faegre 2:9 3:18
failing 18:9
fair 8:3 58:21 78:10
 79:6 81:17,20 82:4,12
 98:14 129:11
fairly 90:6 111:13 138:9
fairness 77:22 165:3
fall 30:6
false 138:3
families 32:17
far 19:11 39:12 51:12
 51:15 53:6 88:9,21
 96:18 97:4 98:20
 137:12 147:22
fast 128:11
favor 80:9 81:14 98:5
 152:8
favorable 69:3
favours 98:12
fear 21:9 88:4 169:18
feasibility 74:2 150:1
feasible 18:16 70:13
 136:5
Federal 6:1 54:3 80:19
 101:1 146:3,4 148:4
 173:6 187:8
fee 38:10 86:7
feedback 163:22
feel 4:13,14 24:5 51:1
 61:8 127:1 129:12
 178:14
fees 57:10 85:2 86:2,5
fewer 21:2 126:16,17
 138:12,13
fiduciaries 20:9 28:8
 31:8 37:8,10,14,20
 38:6,8,14,16 39:10
 64:15 68:5,11,18 70:9
 70:15 71:2,12 72:22
 73:13,22 74:22 75:8
 75:19 78:10 85:18
 106:10,19 107:10
 109:11 114:13 116:1
 117:12 118:20 123:6
 124:9 125:5 126:7
 128:11 131:19 145:10
 145:18
fiduciary 2:3 3:11 24:21
 24:22 25:4,18 28:5
 29:4,5,13 31:13 38:2
 38:8,20 39:3 53:13
 57:12 63:9 64:12,13
 65:2,12 67:1 68:12,17
 68:20 72:11,18 73:17
 74:14,17,18 75:12
 76:9,15 79:11 80:17
 95:2 105:3 107:12
 108:10 109:2,5,19
 115:3,9 116:2 120:10
 120:15,16 123:14
 124:4 126:18 153:8
 153:11,21
field 90:5 184:2
figure 141:8 189:5
figuring 166:9
file 48:8 88:1
filed 42:12 45:14 50:8
 50:10 76:13
files 165:15
filing 1:3 4:7 27:4 31:15
 35:2 42:13
final 26:3 99:22 145:20
 152:13 185:17
finally 41:17 53:7 56:16
 74:12 75:21 87:15
finance 156:22
financial 28:4 31:7
 66:22 69:13 70:7,8
 85:5 90:4 111:5 116:7
 126:1
find 5:13 8:21 11:16
 20:12 38:13 59:16
 74:20 113:9 141:13
 148:1 152:10 177:20
finding 53:17 57:11
 136:1
findings 6:14 52:20
 146:10 188:5
finds 147:3,6
fine 89:20
finger 98:4 180:2
firm 32:7 71:20 72:17
 83:14,20 84:3,7
 103:17 104:19,22
 113:22 114:10 122:2
 132:12
firm's 90:21 131:17
firms 22:17 25:14,14
 72:17 84:15,17 85:4,8
 85:10,11 86:1,4,9
 101:8,16 103:18
 104:4,7,13,14,15
 105:5,6,8,17,20
 119:16 120:19
first 8:13 14:16 16:2,4
 17:18 21:16 22:11
 40:13 41:20 42:18
 46:19 49:11 51:18
 61:5 63:11 65:19 79:3
 83:17 94:5 107:11
 143:17 144:7 147:22
 149:11 154:15 156:10
 161:11,15
fits 7:18
five 5:7 12:9 36:19
 71:15 89:12 90:2,8,14
 90:15 91:11,12,13
 92:5,6,14 104:17
 120:13 144:12 152:11
 152:22
flexibility 7:16
fluid 41:21
focus 104:22 135:22
 145:21
focused 29:14 108:7
 134:17 157:12 160:11
focuses 30:14
focusing 116:14 147:2
FOIA 171:2,12
folks 13:13 17:20 47:2
 56:3 177:15,19
 186:22
follow 51:7 57:21 71:7
 117:15
following 37:3 167:4,5
 171:2
fool 148:11
forced 138:13 149:21
forcing 85:17
forego 23:2 138:14
foremost 16:4
foreseeable 86:22
 88:12
form 86:3 145:20 168:7
formal 44:7,17 48:8
 50:3 123:20 129:14
 149:9,15 150:9 152:2
 164:6,11,18 167:17
 169:16
formally 133:17 163:2
 163:14 168:13
forming 73:21 77:21
forms 29:13
forth 11:3 78:19 80:5,10
 112:17 188:2
forward 11:9 14:13
 18:15,21 20:14 22:11
 42:14 49:19 50:1
 52:10 111:15 134:7
 162:3 167:16 170:8
 189:6,7
forwarded 57:10
found 17:14 24:12
 61:13 144:18 180:3
four 143:16,17 144:6
framework 46:17 171:3
frank 23:10
frankly 68:6 72:2 74:21
 75:7 76:22 90:9
 109:13 110:20 112:6
 112:15 113:1,13
 114:4,6 115:19 116:6
 180:2
free 4:13,14 61:8 95:4
 146:8 166:21 178:14
 181:18,20
frequently 8:21 36:16
 37:20 44:21
friend 121:7
front 44:10 111:14
 159:16 160:2
fulfill 56:21
full 7:7 8:3 32:21 36:1
 46:4,10 115:14
 171:17
fully 39:17 73:19
 171:15 188:3
fulsome 10:14
functioning 66:4
 141:21
functions 67:1
fundamental 115:20,21
 175:22
fundamentally 33:16
 86:18 88:13
funding 69:7
funds 27:17 123:7
further 16:6 65:20
 117:17 139:10 145:11
 148:4
Furthermore 33:6
 39:17
future 12:22 17:10,21
 19:4 20:15 39:15
 74:15,16 111:5
 121:21 184:8

G

gag 145:7 148:18
 149:17
gain 188:2
gained 111:18
game 53:19 101:21
gather 7:5
general 20:2 29:5 30:8
 32:6 43:22 48:22
 100:8 106:1

generally 17:16 21:15
47:17,20 60:14 67:21
78:7 80:1,11 81:11
101:6,15 138:22
163:6 184:9
generous 26:10
getting 8:3,7 9:20 53:10
59:7 97:5 127:22
139:16 141:11 172:18
give 5:19 6:22 15:5 50:5
61:19 66:10 74:8
119:13 142:10 158:6
162:22 168:2 169:8
170:19 175:5 183:8
given 7:21 16:19,22
67:17 70:2 85:3
123:13 128:13 148:2
160:19 162:18 165:1
179:20
gives 164:6
giving 6:3 64:17
glaring 146:12
goal 10:11 12:15 75:18
79:19 88:20 98:17
goals 51:22 172:19
187:17
goodbye 130:13
govern 28:6
governance 143:20
governed 121:8
governing 27:4 31:15
government 36:16 49:9
154:2 155:4 186:22
Governmental 36:14
grab 177:14
grant 6:15 19:2,3 57:20
66:2,14,16 124:20,22
133:18 159:14 179:13
granted 18:7 24:14 30:1
35:7 41:4 66:15
133:20 134:22 135:12
138:7 139:22 141:5
143:21 144:2,9,18
145:1 152:17 178:20
178:22 179:16
granting 18:14 55:7
66:1 173:15
greater 28:14 88:10
greatly 120:1,6 179:21
Green 1:20,20 32:3,4,7
45:19 49:12 50:5
Groom 2:11,12,14,16
3:17 122:1,15 131:6
131:16 132:4
gross 101:15
grossly 101:22 102:11
102:17
ground 57:18 111:18

136:21
grounds 153:18
group 2:4,11,12,15,16
3:11,17 43:22 63:9
64:15,21,21 65:5
67:10 69:1 89:21
112:12 114:19 122:15
131:9,17
groups 131:18
growing 138:10
grown 41:19
guarantees 116:7
guess 4:12 49:11 51:13
60:3 106:12 155:13
158:16 163:10 170:4
170:18 171:1 172:12
guessing 178:4
guidance 81:8
guided 75:7
guidelines 87:19

H

halt 136:21
hand 130:9
handle 146:21 163:18
Hansen 1:16 14:1 60:15
118:7 120:8 178:12
180:21
happen 44:9,10 102:9
happened 15:15 64:3
144:15
happening 107:20
happens 45:21 94:21
132:20
happy 26:13 31:21
54:10 60:8 64:6 94:16
114:4,21 116:9
129:21 154:7
hard 26:22 38:15 39:1
106:6,8 117:21,22
128:10
harder 83:8
harm 150:4 168:14
Harman 15:22
harmed 145:14
harmful 134:4
harming 144:19
Harmon 1:22
harms 18:5 24:11
Hartley 33:7
hastening 83:10
hat 123:14
Hauser 1:16 13:14
49:10 51:6 57:21 60:7
94:3 96:3 97:8 98:15
100:8,18 102:2,6,15
103:4,10,20 105:13
111:1,8 113:14,19,21

121:11 161:10 164:15
167:4 169:21 171:10
172:5 174:15 175:11
177:6,17 178:9
185:13
Hauser's 121:5
he'll 130:20
head 75:13
health 138:18
hear 13:13 60:8,20
61:18 97:12 107:8
114:4 118:14 122:7
127:14,15,16 130:19
154:13 170:3 179:10
186:10 187:12
heard 20:5 23:7 24:20
43:5 57:7 60:20 92:2
93:8 106:7 187:11,15
188:11
hearing 1:5,11 3:20 4:4
4:6,13,22 5:8,14,18
9:11,18 11:15,21
14:10 16:4 43:6 51:16
58:10,13 60:3 115:8
127:13 162:14 178:18
179:1,7 181:3 187:1
hearings 10:21
hears 99:20
heart 75:13
held 118:22
hello 130:13
help 20:4 119:13
130:14 132:18
helped 16:15 23:13
helpful 9:12,16 13:6
19:8 48:3 58:2 62:18
63:1 95:20 105:21
107:7 115:6,13
121:18 149:1 155:20
158:18 160:4 188:12
189:4
helps 10:7 31:4
hey 166:16 175:5
hidden 180:19
hide 176:21 177:1,8,10
177:13
hiding 166:6
high 70:2 85:3 105:6
136:15
higher 69:12
highest 119:1
highlight 127:12
highlighted 65:16
128:7
highlights 128:4
hire 33:22 53:21 76:9
hiring 56:5 76:14
historically 143:7

history 27:14 28:17,22
135:14 142:17 165:11
hold 13:9 15:17 22:17
119:9
holding 4:6 12:7 14:7
16:4 77:1
honest 58:21 102:18
139:4
honestly 58:17 117:4
honor 8:17
hook 171:21
hope 39:19 68:3 177:3
hoped 65:17
Hopefully 12:10 154:13
hoping 4:21
horrified 112:12
horse 88:5
Houlihan 2:6 77:19
hundred 91:11
hundreds 33:4 84:22
104:15,15 132:15
hurdles 34:17 42:10
129:2
hypothetical 81:15
164:16

I

idea 49:19 110:18 164:7
178:19
ideally 75:2
ideas 50:20
identical 133:20
identified 45:20 91:1
identify 9:21 13:3 22:12
90:18
identity 82:8
ignore 81:18
ignored 151:10
ignores 149:20
ignoring 180:5
II 2:2
III 2:3,8
illegal 6:19 8:2 52:14
imagine 114:14
immediately 22:6 62:14
175:21
immensely 149:1
impact 16:7 78:20 88:9
128:14 155:18
impartiality 80:14
impede 34:10,20
impediment 117:20
implement 41:12 46:17
implicate 174:19
implication 109:1
112:14
implications 48:6 109:9
implicitly 74:5 76:16

implied 166:7
implies 109:7
implying 173:14
importance 70:22 71:1
important 6:17 7:3,5
 8:4,15 9:4,18 10:7
 16:6 21:4 23:3 46:16
 67:22 68:4 123:3
 124:21,22 129:21
 135:21 139:13 142:20
importantly 34:2 91:5
 91:20
impose 36:7 40:21
 100:9 101:16 133:15
imposed 29:6 36:5
imposes 34:17 80:12
imposing 42:9 172:22
impossible 124:17
 135:5 140:3 156:17
 157:4
imprecise 166:4 176:11
impression 149:13
imprimatur 40:22
improper 28:15
improperly 72:12
improve 27:15 138:16
improved 69:8 86:17
improvement 160:18
improving 27:10
in-kind 69:8 125:12,18
inadvertently 68:9
inappropriate 124:8
 137:6 160:10
inartful 94:10
include 18:22 30:18
 76:13 136:1 139:1
included 18:2 20:1
 129:15 167:19
includes 82:19 101:10
including 13:5 27:16
 38:16 49:4 50:2 78:1
 80:5,14 84:15 165:8
income 25:5,11 26:22
 27:11 37:11
incompatible 79:6
incomplete 35:12 149:6
inconsistent 65:22
 70:21 79:4,21 134:3
 184:9,11,12
increase 34:7 86:2
 88:17 142:2
increases 20:19 140:17
increasing 83:11
incredibly 9:12,16
 39:11 48:2
indemnification 59:13
 82:15 84:15 85:12
 86:1,3 101:11,13

102:1,13,15,21
indemnifying 38:6
independence 24:18
 26:1 31:4 71:5 73:21
 74:8 87:12,17 89:10
 89:16 93:17 108:7
 118:13 139:2
independent 2:3 3:11
 8:10 20:9 24:22 25:7
 30:17 31:1 37:8,10,14
 37:20 38:2,16,20 39:3
 39:6,10 53:14 56:5
 57:12 63:8 64:13,15
 65:2 68:4,11,18 72:11
 72:18 73:5,14,15
 74:14,17 75:18 78:16
 81:3,5,22 82:19 83:9
 86:14 90:15 92:13
 93:12 97:20 105:3
 106:10,17,18 107:5,9
 107:10,12,15,17
 108:12 109:10 114:13
 120:10 128:11 137:21
 145:10 153:8,11
independently 80:8
indicate 149:21
indicated 51:11 107:22
indicates 29:1 36:10
indicating 57:18
indication 135:17 158:7
indirect 57:2
individual 4:8 12:5 42:2
 44:6 65:21 66:2,17
 69:2 101:18 107:13
 124:20 132:16 137:12
 137:17 141:4,7,12
 143:21 144:11 181:22
 183:9
individually 44:1
individuals 10:17 11:22
 38:13 54:21
industries 146:16
industry 37:16 72:20
 104:12
inefficiencies 187:22
inference 58:18
inferences 11:7 26:6
 108:11
influence 79:11 80:17
 139:12
influenced 72:13
informal 21:10 23:11
 35:1,14 36:2 40:9
 46:21 123:21 126:12
 148:22 149:12 165:18
 166:1
informally 133:17
information 7:6,13 9:2

19:7,9,11 20:20 22:1
 22:3,17 36:1 43:21
 48:8,10 49:1 50:16
 54:16 55:2 60:5 61:15
 61:15,19 62:1,2 76:2
 76:7,14,18,19 77:2
 103:16 110:1 115:8
 116:9 117:19 118:5,9
 119:13 121:17 129:10
 155:12 158:17 160:11
 160:21 162:5 164:20
 167:3 171:5,9 174:12
 175:9 178:17 179:2,8
 179:10,16 187:20
 188:18
informing 35:5
inherent 81:16 135:1
innovation 138:11
inoperable 66:13
input 16:5 123:12
inquiries 35:1 126:12
insight 119:13
insights 140:21
insist 50:15 59:17
inspection 22:6 48:21
 129:10
instance 72:10 83:14
 165:11
instances 24:10 45:21
 128:20
institution 90:4 126:1
institutional 38:2
institutions 66:22 70:7
instructions 95:9
instructive 143:10
insurance 37:11 38:8
 38:18 53:10 105:9
 115:3,9,22 116:4,11
 116:16,18 117:5,11
 162:11
insuring 117:10
integrity 31:2 37:17
 72:1
intelligent 109:22
intend 26:5
intended 17:21 20:4
 22:21 39:14 41:13
 134:11 136:11 141:3
 152:22
intending 4:13
intends 35:22
intent 42:4 66:1,10
 98:16 134:3,10
 136:18
intention 180:17
intently 94:6
interactive 11:1
interest 8:1,11 18:16

27:8 29:10 30:3 31:19
 36:12 40:17 47:15
 52:7,9,20 55:8 59:6
 69:15 71:14 72:3,8,13
 72:16 73:16 74:14,19
 78:15 79:17 81:14
 82:1 95:22 96:1,5
 98:12 105:22 107:2
 111:5 112:18 113:3
 128:22 134:20 135:1
 136:6,9,12 137:18,20
 137:22 148:13 149:21
 174:17 176:15
interested 18:14 21:1
 22:9 35:2 43:1 47:12
 51:16 54:22 62:7,9
 167:6 173:15
interesting 4:15
interests 18:10 30:14
 32:13 33:14 45:4
 52:22 53:1 58:8,22
 81:19 82:8,11 97:21
 112:20 150:11
interference 14:21 50:7
 143:2
internal 4:10 124:13
 158:7 174:6 177:19
internally 79:21
internet 26:12
introduce 63:17
invest 31:10 45:11
investigating 147:14
investigation 36:13
 37:3 146:3,13,17
 147:2 148:7 154:19
 154:22 155:2 156:6
 156:16,16 157:1,3,21
 158:1
investigations 36:17,18
 36:21 120:19 147:6
 152:10 157:12
investment 2:13,17
 3:16 69:12 122:13
 123:6 125:22 126:2
 126:18
investors 31:7 70:5
invite 94:1
inviting 148:4
involve 33:3 51:22 52:6
 52:13 172:18 173:18
 174:9
involved 25:5,10 64:22
 70:10 73:10 82:22
 99:22 104:3 112:17
 146:10 158:2 173:13
involving 36:12,17 37:5
 38:22 66:9 78:12
IRAs 66:9

IRC 80:22

irrelevant 36:8 58:10,14
60:11 111:19 156:13
174:16,20,22 188:18IRS 80:20 81:8 150:9
165:13issue 15:2 23:7 30:10
44:21 49:22 53:9
54:13 55:5 90:8,11
91:16 95:17 96:20
97:12,15 99:9 100:19
101:20 102:5 103:11
104:21 106:14 123:3
126:20 140:2 151:21
152:21 153:7 154:18
156:21 157:6 159:5
159:10,21 160:16
174:4 182:6issued 118:1 163:3,14
163:17issues 9:22 26:1,11
48:12 57:7 58:5 60:10
87:9,16,20 94:12
115:6 120:18 121:6
122:17 123:10 146:22
150:13 153:9 159:17
171:13 174:7,13issuing 40:20 138:12
149:17

it'd 58:2,15 115:6

it'll 4:14

Itami 2:12 130:19
131:12 137:1 142:7

items 166:4

iteration 185:8

J

James 1:15 14:3

Jeff 63:10,11 64:1,2,3
77:13,19

JEFFREY 2:5

Jennifer 2:11 131:7

Jenny 131:11 137:14
138:8 139:21 142:12

Jersey 157:2

job 7:2,3,4 58:6 95:3
105:10 118:21

jobs 32:14

join 4:13

joined 4:4 122:14
131:11

joint 33:8

jotted 51:15

judgment 70:14 85:14
113:22

jump 62:14

justification 86:21

Kkeep 119:7 140:22
170:2

kept 50:8

key 65:15 81:13 173:11

Khawar 1:12,14 3:3 4:3
14:22 15:10,16 26:15
32:1 42:16 44:18 49:7
63:4 89:6 90:16 91:8
91:15 92:2,20 93:6,22
127:21 128:3 130:6
130:12,17,21 142:8
142:14 154:4,10
157:10 160:3 161:5
186:19

kick 45:10 49:18 167:9

kicked 49:22

kicking 108:15

kinds 11:6 28:20 100:1
167:14knew 135:9 136:13
177:14

knowing 62:9

knowledge 30:20 37:16
90:10 100:13 109:13
171:17

knowledgeable 71:1

knows 5:4 66:6,7 68:22
124:11 156:20

Kreps 2:13 121:22

122:15 131:11 142:12
163:19 168:2 171:1

kudos 6:22

Llabor 1:1 14:11 30:1
32:10 43:19 147:12
172:9lack 89:16 97:12 139:7
140:19 154:20

lacks 74:10

laid 90:6 138:22

landscape 86:18 88:13
language 57:9 67:4
68:7 97:18 98:1,8
160:20 186:2large 33:13 38:1 83:10
84:20 88:10 90:4
104:13 134:21 147:11

largely 174:22

larger 25:15,15 72:17
85:4 86:9

largest 123:7

late 178:13

launching 91:22

lavishing 188:7

law 2:11,12,14,16 3:17
13:22 54:4 68:14101:1 122:15 131:16
146:4 156:9,20 171:7
184:10

lawful 41:1

laws 157:18 158:4

lawyer's 102:5

lawyers 141:19

lay 118:16 177:19 178:2

lead 49:12 80:16 86:16
131:17 148:6,7
158:10

leading 64:13

leads 153:16

leaf 137:2

learn 4:15

leave 4:14 22:8 62:4
109:16

leaving 86:9

led 132:16

left 110:10

legacy 125:17

legal 102:5 176:19

legislative 26:18 28:22
135:14

lend 92:10

lending 75:19

lesson 142:17,17

let's 14:15 15:11,19

47:10 49:16 111:4
143:15 162:1 166:1
173:3 180:22

letter 64:22 65:16 78:19

90:18 94:14 95:5

99:11 102:20 103:1

115:2,16 128:7 130:4

138:21 156:12 165:14

letters 101:9

letting 171:20

level 76:17 116:18
158:9,9

levels 112:6 121:2

Levine 2:16 131:12

139:14,15 165:10

175:13 177:12,18

liability 20:10 38:6 53:8

56:16 85:1,13 100:19

115:3,9 116:1 117:13

125:9

liable 109:4

licensing 100:15,16

lieu 19:18

lifetime 31:11

likelihood 147:10

limb 9:15

limbo 180:15

limit 20:7,10 21:10

23:22 25:13 65:20

68:1 82:19 139:10

limitation 82:15 91:4
limitations 24:6 85:12
175:9

limited 30:11 142:3

157:8 168:19,19

limits 53:7 56:16

line 58:9 60:14 77:13

158:21,21 164:13

lines 44:20 59:11,14

60:2 108:20 110:10

116:8 121:3 160:5

168:10 171:11 188:20

lip 89:18,19

list 148:1 173:3

listed 131:6

listened 94:5

literally 186:2

litigation 75:10 86:5

109:16

little 9:15 10:22 47:1

64:20 67:19 93:8

113:10 134:9 138:2

168:3 182:17

LLP 1:22 2:10 3:18

loaded 141:1 148:19

Lokey 2:6 77:20

long 23:9 54:6 95:20

104:3 182:20

long-term 28:3

longer 21:18 102:22

171:19

look 42:14 55:6 91:10

110:19 128:16 143:9

144:5 156:19 165:11

165:12,12,21 170:7

176:7

looked 24:19

looking 14:13 53:13

76:7 111:12 115:19

116:15 124:9 147:16

165:22 187:21 189:7

looks 89:12 127:19

134:6 142:9

losses 28:20

lot 5:9 8:6 10:5 45:11

47:4 63:14 97:14

105:7 131:13 147:16

148:7 173:5 174:11

183:1,6 187:1 188:1,6

love 14:11

low 85:3

lower 25:12 69:17

72:19 85:18

loyalty 28:10 137:16

M

maintain 185:22

maintaining 170:13

major 27:18 70:6
majority 65:3 110:16
making 45:5 50:2 56:20
 70:12 83:8 98:21 99:1
 107:19 109:5 127:2
 133:9 141:17 143:4
 164:9 165:3 169:2
 171:7 189:1
management 28:15
 69:9 124:16
managing 27:20
mandating 41:11
mandatory 81:16 82:6
manner 41:14 188:21
manpower 43:18
March 5:5
marginalize 109:19
market 78:10 79:6 81:2
 81:17,20 82:4,12
 98:14 110:12,20
 115:9 153:13
marketability 153:16
marketers 111:21
marketing 110:7,9,19
 111:6 112:4
marketplace 83:11 85:9
 85:22 103:2 104:3,5
 111:18 140:20
marks 5:14
mass 39:21
masse 40:1
material 5:9 50:13
 146:22 149:7 155:18
 159:7,21 160:21
 165:8
materiality 175:4 176:4
materially 144:17
materials 48:19
mathematical 92:9,10
matter 94:17 96:10
 129:20 152:19 156:1
 189:10
matters 25:18 36:18
 37:1 78:1,12 154:21
 155:21 189:2
McMAHON 1:21 14:18
 14:19 15:13,19,20
 44:19 46:15 49:14
 51:8 54:10 60:3 63:3
mean 20:22 49:16 58:9
 58:17 59:15,21 89:14
 94:15 96:20 97:8,13
 100:20 101:4 103:4,8
 106:4 107:16,21
 110:12 111:12,21
 117:8 133:13 155:7
 155:15 162:13 164:18
 164:22 171:4 172:16

173:9 177:10 186:4
meaning 184:7
meaningful 66:5 85:20
meaningfully 86:4
means 86:10 141:18
 152:15 156:19 167:8
 171:4
measure 75:11 93:19
measurement 93:4
measurements 56:12
measures 38:21
meet 39:22 67:12 107:5
 180:8
meeting 12:20 21:5
 31:13 86:12
Megan 1:16 14:1 120:7
member 12:6 13:19
 14:6 43:1 78:4 89:21
 99:18,21 100:4
members 16:20 20:6
 21:11 23:8 26:20
 27:22 43:15 46:22
 64:21 67:10 68:22
 78:6,14 112:12
 114:19 122:18 123:4
 123:5,13,13 125:1
 128:16 129:21 145:17
 163:20
membership 100:10
men 32:22
mention 12:18
mentioned 9:5 12:19
 14:6 47:4 48:3 51:15
 115:12 127:7 137:14
 141:15 148:18
mentioning 147:20
mere 52:4
merely 67:5
message 54:21
met 101:14
metrics 119:21
Michael 2:13 121:22
 122:14,16 127:10,13
 127:13,16 129:22
 130:7,22 131:11
 142:9,11 154:11
 175:14
Michael's 127:17 172:3
microphone 13:12
 127:20
middle-sized 104:14
mighty 6:11
Mike 134:6
million 26:20 32:16
 84:6,12
millions 28:5,16 85:1
mind 60:2 92:11 93:17
 93:19 95:1 118:12

136:13 153:10 162:7
 172:13
minds 119:7
minimum 71:13 83:22
 121:2
minute 12:2,9 15:6
 78:22
minutes 4:20 6:5 11:19
 12:3,9 13:9 15:18
 131:1,15 142:10
mirror 80:20
mismanagement 29:3
 29:15
misunderstandings
 35:11
misuse 29:2
moderate 63:21
modest 86:10
modify 45:12
moment 106:15
money 34:2 35:7
monitoring 110:2 121:9
Mooney 1:20 32:7
morning 14:19 64:11
 77:18 122:11 187:16
motivation 146:9
motivations 81:19
Motta 1:17 63:17 181:4
 182:7
mouth 110:11
move 49:19 52:10
 121:12 162:3 167:16
 170:8 183:8 189:5
moved 50:1
moving 11:9
multi-part 54:6
multi-parts 54:12
multiemployer 1:20 3:8
 32:5,10,13,18,20 33:3
 33:6,15,21 34:3,10
multiple 11:22 33:5
Murphy 1:21 32:8
mute 127:17 137:3

N

name 4:17 13:6 14:19
 26:17 32:3 77:18
 122:11 167:12
named 157:14
naming 48:4
narrative 138:3
narrow 126:20
national 1:20 3:7 32:5
 32:11
nationwide 26:21
nature 74:15 105:1
navigate 170:21
NCCMP 32:9,11 40:4,16

41:17 42:12
NCCMP's 32:19
nearly 41:8
necessarily 18:13
 43:14 44:4,13 45:2
 47:20 52:17 55:10
 60:5 86:2 169:1 178:7
necessary 14:12 17:3
 21:3 67:16 131:22
 135:7,11 151:5
 160:19
necessitating 87:17
need 7:6,14 9:3 10:3
 22:3 29:16 35:6 44:10
 46:9 52:7 55:17 56:4
 59:5 61:4 62:15 63:12
 63:13 89:17 93:11,13
 114:6 118:16 125:5
 125:12 135:18 138:9
 140:9 143:6 148:15
 156:3 159:8,21
 163:20 166:11,12
 178:21 188:3,5
needed 47:11 62:22
needs 95:13 180:17
negative 22:20 48:6
 150:1
negatively 22:15 83:6
negligence 59:20
 101:16,17 103:6
negligent 54:2 101:22
 101:22 102:10,11,16
 102:17
negotiate 33:22
negotiated 34:5
negotiating 103:3
negotiation 101:18
negotiations 69:2
neither 81:6 86:20
nervous 178:1
neutral 33:11
never 45:22 46:1,14
 84:8 102:19 109:14
 112:3 181:19
Nevertheless 36:20
new 18:1,1 19:6,7,15,20
 20:20 21:17 24:6,17
 25:2,12 26:7 39:8,13
 41:21 42:5 48:14
 83:14 129:2 133:13
 145:5 151:4 157:2
 185:10
newcomers 75:20
newest 13:19
newly 19:21 39:22
Newport 2:4 64:13
 89:20 114:10,12,16
news 15:1 98:15

noise 137:4
nominal 38:10
non- 102:4 166:1
non-binding 165:18,19
non-cash 69:10
non-confidential 50:16
non-ERISA 85:6
non-negligent 60:1
non-prohibited 58:11
 62:17
normally 153:22
norms 153:21
Notably 36:10
note 18:3 40:19 72:16
 74:6 75:21 151:17
noted 140:12,16
notice 6:2 9:7 11:20
 87:4,5,13 151:15
 152:5 187:9
noticed 145:13
noting 147:1 152:1,20
notion 74:22 110:6
 152:22 153:10 170:22
notwithstanding 24:7
 25:16
nuances 10:2
number 10:10 17:20
 20:5 23:21 33:12,13
 41:18 73:12 88:10
 103:18 104:14 105:16
 114:12 115:22 118:19
 119:8 120:15 123:10
 125:13 131:5 132:10
 138:6 141:22 143:1
 177:21 188:11
numbering 33:4
numbers 33:9 56:7 97:5
 97:6 105:19 143:9
numerical 95:8,10
numerous 69:4

O

Obama 143:18
objection 102:7 172:14
objections 97:9
objective 31:2 66:18
 79:9 81:13 177:21
objectively 81:21 95:11
obligation 53:22 94:18
 95:6 97:4 116:5
 119:20 175:8
obligations 6:13 8:18
 29:5 31:14 54:4 59:18
 68:17 82:13 94:7
 101:1 110:4
obliged 169:7,17
observation 106:2
obstacles 36:8

obtain 33:21 39:9 129:5
 176:6
obvious 38:11
obviously 24:19 52:2
 53:9 76:4 106:16
 108:6 120:17,17,19
 130:3 134:11 158:21
 184:14,19 187:10
occur 23:18 41:15
occurred 72:9 109:14
occurring 149:17
occurs 162:2
OED 12:6
off-base 60:11
offer 83:15
offerings 20:16 138:18
offers 86:20
office 6:11 13:16,20
 14:2,3 21:12 33:19,21
 63:18 182:10
Officer 64:12 125:22
official 151:7 152:18
officially 150:15
officials 148:22
older 26:20
once 12:12 13:6 22:19
 48:4,7 49:22 153:20
 162:1,2
open 5:16,17 8:5 40:17
 42:5 48:17 49:8 116:2
 117:13 120:21 127:4
 139:3 163:7 170:22
 182:10 187:7
open-ended 109:4
Opening 3:3
operation 16:8,12
Operations 13:16
opinion 31:2 100:20
opinions 14:14 77:22
 100:12
opportunities 48:20
 139:11
opportunity 27:1 42:10
 45:7 64:18 89:4
 122:21 132:1,2 154:9
 163:21
opposed 20:2 168:18
 175:5
opposes 78:21
opposite 85:17 98:13
 141:3
option 23:1 88:8 177:16
options 148:1 173:22
 174:2 176:8
oral 22:1
order 7:4,6 11:18 47:14
 93:14 125:18 145:7
 146:10 148:18 149:17
 161:2
orderly 72:7
ordinarily 146:1 156:4
ordinary 146:19
organization 12:1,5
 13:4 32:12 42:22
 158:8 160:15
organizations 11:14,21
 32:11 110:19 147:12
 147:12
organized 13:16 33:7
other's 186:15
ought 170:14
outcome 85:21 141:20
 149:15
outcomes 138:17 139:7
 151:10
outlines 65:15
outright 34:17
outset 58:20 59:2
outside 16:1 26:1,6
 91:6 115:7
outstanding 119:17
overall 34:15 144:1
overbroad 188:16
overly 36:6 150:17
overreaction 35:19
overreactions 36:6
oversight 158:10
ownership 70:8 78:2

P

P 2:9
P-R-O-C-E-E-D-I-N-G-S
 4:1
P.C 1:21
p.m 189:11
package 34:6
page 3:2 161:4 182:12
 182:14
pages 182:14,20 183:7
pale 54:9
pan 133:1
panel 1:19 2:2,8 3:4,10
 3:15 14:15 58:1 63:7
 63:19 66:6 121:13,22
 161:15 178:14,18
panelists 10:18 94:4
 118:10 131:2 186:21
panels 11:13,13
paper 11:1 53:17
parallel 165:12
paramount 29:17
parents 116:8
part 6:21 8:22 9:4,6
 34:5 43:7,14 44:7,16
 45:5,16,18 48:9 49:6
 50:3 51:3,4 52:3 61:9
 84:17 96:8 104:20
 108:9 111:22 117:9
 129:15 134:8 138:19
 142:20 143:4 146:18
 160:13 162:5,6,8,17
 164:19 165:4 166:20
 170:16 176:6 179:3
Partially 71:6
participants 16:17 17:8
 18:9,17 20:3 27:7,22
 28:2,11,16 29:16 30:3
 30:15 31:20 34:12
 40:15 43:4 45:4 47:15
 52:10,22 55:8,9,14
 56:13 59:1 65:10 69:6
 70:1 71:10 79:18 82:2
 85:16 97:21 106:22
 112:19 123:16 125:21
 126:22 132:7,19
 133:4 134:5 136:6,10
 138:15 140:6 144:19
 145:15 148:13,17
 150:2,5,11 173:21
 174:17 176:12,15
participants' 58:7
participate 24:1 171:15
participating 63:19
participation 38:1
particular 9:22 10:13
 37:14,16 51:1 58:5
 71:21 81:18 93:9
 94:15 98:7 102:20
 106:13 108:2 112:9
 112:22 116:19 131:7
 145:22
particularly 128:13
 188:13
parties 8:9 20:9 22:9
 24:1 25:5,9 33:14
 35:2 44:22 45:14
 46:11 47:11 48:4 56:6
 56:18 69:21 71:14
 73:10,13,16 76:8
 82:22 92:19 93:11
 99:6 112:16 143:19
 146:2,9 150:11
 163:16
partner 15:22
partners 125:5
parts 107:8 131:14
party 7:22 8:1 22:21
 25:10 29:10 31:2
 36:12 43:2 69:15
 79:12 80:9 81:6,7,15
 81:18 82:9 134:20
 162:3
party's 82:10
passed 88:5

path 36:8
patience 187:5
Paul 1:20 32:1,4
pay 13:9 34:3 38:7,9
 53:18 129:1
PBGC 157:13
penalized 74:5
penalty 30:19
pension 26:22 123:7
 124:16 125:13,15
pensions 27:12
people 5:20 7:12 10:11
 44:5,14 49:3 53:10,21
 59:5,22 76:4 107:4
 111:14,14,19 113:8
 119:7,12,12,12 133:2
 140:20,22 141:13
 145:14 148:1 151:11
 162:10,16 164:17
 166:4,6,9 170:13
 171:15 172:14,17
 176:1,21 178:1 181:6
 181:18,20 183:19
perceived 17:20
percent 24:17 25:5 26:7
 71:15,16 73:1 82:20
 83:17 84:1,7,12 89:12
 89:15 90:2,2,4,8,20
 91:3,11,11,11,12,13
 92:6,6,14 103:11
 144:22 145:1
percentage 104:21
 120:12
perceptions 87:12
perfection 176:10
perfectly 41:1 156:8
perform 54:1 66:22
 80:7 102:10
performance 59:18
 103:6 155:19
performed 70:6 72:12
 80:15
perils 130:10
period 5:6,15,16,22 6:4
 9:6 12:22 31:22 144:5
 144:13 145:2 187:6
periodically 12:7
periods 143:15
perjury 30:19
permit 41:15 138:3
permitted 38:9 69:4
 180:1
permitting 34:22 150:9
perseverance 154:12
person 12:3 14:9 96:4
 107:17 179:13
person's 102:9
personal 171:22

personally 71:17
 177:11 180:7
personnel 33:19,22
perspective 6:6,9 16:19
 43:11 46:13 49:21
 74:10 112:3 113:15
 115:14,22 163:19
 187:17
pervasive 126:17
phase 157:8
philosophies 143:19
pick 177:3
picture 7:7
pieces 11:1
place 8:13 40:13 61:5
 143:12 152:16 163:3
 167:1
placed 71:1
places 180:14
plan 21:4 28:10 29:3,9
 30:3 34:8 36:21 37:2
 37:5,13 65:9 67:6
 69:5,15 70:5 71:9
 78:11 79:16,17 82:1
 83:7 85:15 86:19
 88:14 95:2,22 96:1,5
 96:6,22 97:3,4,21
 98:22 99:7 112:7,19
 116:3 123:15 125:13
 125:14,15,16,20
 126:2 128:22,22
 131:18,19 135:6
 136:6 139:13 141:11
 145:18 148:16 150:5
 157:20 159:8
plan's 18:17 20:3 96:15
planning 73:7
plans 1:20 3:8 16:8,13
 16:16 17:7,9 26:22
 28:1,3,7 32:6,10,13
 32:18,20 33:3,6,15,18
 33:21 34:10,12 35:1
 38:5,7,12,19 39:9,11
 40:2,10,14 41:8,9
 43:4 53:16 65:9 66:4
 66:9,13,20 67:6 69:7
 69:12,20 78:2 88:1,8
 88:10 94:21 106:22
 117:13 123:8,15
 124:17 125:7 126:22
 128:19 135:5 138:13
 139:12 147:11 148:16
 150:2
plants 113:3
plausible 39:20
play 8:15 16:12 106:20
playing 90:5 108:10
 184:2

please 13:2,2,8,11 61:7
 98:18 178:14
plow 134:7
plus 117:11
pocket 86:8
point 8:20 9:22 23:19
 24:5,10 44:15 45:15
 46:3 54:12,17 60:15
 91:22 92:3,16,18
 93:16 104:2 115:18
 132:17 154:19 156:15
 157:11 162:8,9
 166:10 169:10,21
 172:8 174:1 175:16
 176:3,14 177:8
 178:12,16 182:2
 187:15 188:10
pointed 139:22
pointing 106:13 114:6
points 65:16 74:2 77:3
 106:5 116:4,11,15
 120:20 127:11 173:11
 181:2 187:16
police 37:3
policies 151:4 153:1
policy 26:18 79:8 114:2
 151:2,15,18 152:17
 183:15 184:14,21
 185:8
populated 119:11
portion 71:13 134:21
portions 17:13 129:8
pose 49:14
posed 107:1
position 10:13 53:22
 61:17 91:19 114:16
 137:5 151:8 152:19
 159:2 183:17 186:16
positions 11:4 151:2,15
positive 70:11
possibility 61:12
possible 8:19 47:9
 55:12 56:10 58:20
 157:21 164:11
possibly 33:10 37:18
 84:22 90:20 119:1
 131:12 181:12 183:3
post 90:7
potential 19:17 21:19
 21:22 22:2,3 29:15
 35:5,12 48:5 85:1
 126:21 127:5 131:20
 163:11
potentially 17:9 22:15
 25:14 39:16 48:17
 56:4 165:2
practical 96:10
practice 32:7 34:22

38:11,18 80:6 94:13
 103:7,9 121:8 131:17
 136:16 143:11
practices 66:21 135:21
 148:6 180:3
praise 188:8
pre- 149:5 167:10
pre-ERISA 134:13
pre-stages 39:8
pre-submission 165:17
 167:11
preamble 18:4 24:8
 94:10,17 96:21 137:7
 146:5 149:3 151:18
precedent 150:14,16
 151:19 152:7,8,19
 165:22 180:11 182:4
 183:12 184:7 185:9
preceding 129:14
precipitous 138:6
precisely 106:19 107:3
 153:12
predict 135:10
predictable 139:7
 141:18
preferable 168:18
preferably 179:20
preferential 96:14
preliminary 40:9
 164:10 167:9
premise 79:6
prepared 79:15,22
 142:17
preparing 187:3
prescriptive 17:5
present 1:13 22:12 45:7
 82:20 144:6 171:2
presentations 50:12
presented 167:18 179:3
presenting 131:8
presents 175:10
President 64:12
presiding 1:12
pressed 118:7
pressured 79:10
presumably 170:12
presume 35:21
presumed 152:12
 179:13
presumption 24:21
 25:3 71:16 90:7,12
 138:5 152:8 160:9
 178:21 180:11
presumption/there's
 90:14
presumptively 137:6
pretty 43:6 130:4 139:6
 164:14

prevent 24:12 145:12
 147:11
prevents 73:17,19
previous 174:14
previously 18:7 24:14
 48:3 70:22 86:11
 128:8 178:20
prices 69:14
primarily 122:14
primary 95:6 184:3
prime 24:16
Principal 122:15
Principals 131:16
principle 39:1 176:1
principles 78:8 80:2,6
 94:12
print 11:2
prior 35:2 50:2 75:5
 76:5 122:4 133:20
 152:21 182:10,18
 183:2,16,19,20
 185:18
priority 27:18
privacy 174:13
private 27:13 32:7
 108:19,19 165:14
privately 87:10
privilege 176:1
privileged 175:17
proactive 166:22
probably 14:11 62:20
 72:20 89:17,20 105:8
 105:21 106:1 113:6
 166:5 169:14 186:15
probative 7:20
problem 43:19 44:4,13
 50:17 64:7 77:12 88:3
 89:22 90:19 97:10
 108:8 146:12 148:16
 149:5,16,19 169:19
 176:6
problematic 37:9 39:11
 43:8 51:19 53:20
 59:16,21,21
problems 62:11 124:7
 132:6
procedural 5:1 11:12
 156:3
procedure 5:5 29:20,22
 152:4 157:11 159:3
 187:18
procedures 1:3 4:7
 18:2,6,8 24:14 25:4
 26:2 27:3 30:6 31:15
 34:16 35:22 41:20
 48:14 78:18 132:9
 151:21 159:6 180:20
 188:22

proceed 76:9 77:17
proceeding 42:11
 120:22 170:5
process 6:7,10,18 7:17
 8:5 9:1,7,8,17 27:5
 30:13 41:5,13 42:4,8
 44:12 45:6 61:13
 62:22 65:14 68:5 76:3
 76:14 93:10 111:20
 113:9 117:3 123:1,22
 124:4 129:3,11
 132:18,22 133:8,17
 134:3 138:20 141:14
 141:17,21 142:1,20
 147:22 149:9 151:6
 152:9 153:4 165:4,5
 166:19 167:13 169:2
 170:11,16,22 171:14
 173:5 176:2 177:21
 179:4 180:22 186:12
 188:1
processes 55:19 75:1
 136:20 149:15
processing 1:3 4:8 27:4
 31:16 110:17
producers 39:6
produces 82:2 97:22
product 187:13
productive 177:20
productively 65:6 132:6
products 110:20
profession 80:12
professional 64:15
 68:10,17 70:19 79:5
 80:4 100:6
professionals 65:5
 145:10 153:9
professions 79:4
 119:11
program 13:15 17:2
 139:8 142:21 143:2
 145:4 165:18
programs 150:9
prohibit 34:18 66:8
prohibited 1:3 4:9 8:1
 16:18 23:3 27:4 29:10
 29:18 30:5 31:16
 38:20 52:1 57:13
 62:12 65:21 68:15
 69:14 91:6 107:1
 123:2,21 124:11
 125:8,9 126:4,6,8,11
 126:14 138:4 142:18
 144:16 174:19
prohibiting 35:18
prohibition 82:15 84:21
 128:19
prohibitions 29:7 34:18

66:11 134:16
prohibits 6:20 29:12
 38:5 84:14
projected 82:21
projections 89:13
promote 23:13
promoting 74:19
promulgated 80:19
proof 85:14
proper 28:13
properly 92:12
property 69:10
proposal 4:7 5:4 7:10
 9:9 16:7,21 17:13
 18:4,12 20:7 21:9,16
 21:17 23:16,21 34:9
 34:16 36:5,10 39:7,12
 39:18 40:5 43:8 46:7
 46:18 62:1 64:19
 65:18,19 68:7,8 70:13
 71:12 72:14 73:12
 75:18 76:10,11,21
 79:1 106:8 122:22
 132:3,9 133:7,21
 136:15 139:8,18
 143:13 145:5,19
 146:1 147:17 150:14
 151:8 153:10 155:7
 160:18 168:1,19
 180:14 181:1 182:3
 183:12 184:6 185:12
 185:14,15 188:9,16
proposals 43:12 67:2
propose 6:15 93:19
 146:21
proposed 4:20 6:8 17:6
 17:19 18:22 39:22
 61:14 64:16 65:13
 67:20 71:7 74:12 76:6
 78:15,18,21,21 79:3
 79:20 82:3,11,14,18
 83:5,16,18,21 84:14
 85:16 86:13,16,17
 87:1,4,7,13,18,19,22
 88:2,4,9,12,21 124:6
 127:1,8,12 134:2
 149:4 181:11
proposes 34:21 78:16
 87:6
proposing 79:13
pros 45:9
prosecuted 158:3,3
prosecution 157:22
prospect 83:6
prospective 39:19
protect 18:9 29:16
 66:19 85:15 140:8
protected 31:20 67:8

168:13 171:8
protecting 27:6 32:12
 112:7 123:17 140:6
 162:10
protection 27:16 30:14
 53:15
protections 99:13
protective 18:17 30:4
 47:14 52:22 55:9
 136:7
proud 65:8
provide 15:3 19:16
 29:19 31:1 33:19
 35:22 53:14 56:7 60:4
 70:11 72:14 76:19
 87:5 104:16 105:15
 117:16 122:21 137:17
 137:19 138:17 147:17
 186:11
provided 9:14 36:2
 48:11 76:2 124:19
providers 20:22 73:16
 80:14 131:19 154:3
provides 21:22 72:18
 74:12 92:13
providing 9:10 32:21
 43:21 55:14,15 80:20
 85:5 139:19 149:6
provision 21:17 25:20
 39:20 45:13 52:3 53:8
 96:5 102:7 111:2,4
 162:2
provisions 21:15 29:18
 57:1,16 59:13 84:17
 86:1,4 91:22 101:10
 106:17 107:19 108:2
 115:11 135:6
prudence 75:15 137:16
prudent 75:12 124:4,9
 125:4 126:7
PTE 30:8,12 31:3 45:3
 45:22 88:1 128:20
 134:11 135:3
PTEs 4:9 141:6,7
public 1:5,11 4:5 5:8,10
 5:14 8:5,7,7 9:6,6,20
 16:5 22:6,19 43:2,15
 43:22 46:4,9 48:9,17
 51:3 99:20 129:10,16
 150:4 155:16 162:18
 164:4,7 165:4 168:20
 170:5,10,17,22
 171:14 179:5,11
 183:1
publicly 149:21 169:16
 171:6
publish 5:17
published 5:4 6:2 65:1

163:6
publishes 100:6
pull 91:9 118:5
pulling 14:10 174:11
pure 75:13
purpose 32:19 52:6
 84:19
purposes 12:8 25:11
 37:21 81:17 139:9
 152:3 154:21
pursue 150:6
pursued 19:17,19
pursuing 164:1
purview 30:7
push 111:15
put 10:6 14:9 48:15
 61:16 81:20 98:4
 103:13 109:11 123:13
 143:12 147:7 152:16
 166:13 168:6 175:21
 180:2
puts 145:7
putting 28:15 112:17
 167:1 187:2
pyramid 104:13,20

Q

Q&A 12:13 13:5
qualified 20:8 25:17
 50:6 57:11 70:9 73:19
 78:16,17 79:14 80:21
 81:4,9,10,22 82:19
 83:9 85:19 86:13
 97:19 107:12 128:16
 128:17
qualify 83:9
qualitative 56:12 61:4
 121:2
qualities 158:7
quality 70:2 82:16 83:6
 85:18 88:17 105:6
quantify 53:2
quantitative 19:22 93:4
question 31:22 39:7
 43:10,13,18 44:19
 48:7 49:11,13,15 54:6
 54:14 98:21 106:2
 111:8 126:3 144:15
 155:1 156:10 157:5
 158:16 160:19 161:14
 161:22 162:13,17
 170:4 172:6 175:3
 183:11 185:4
questions 10:10,17
 11:9 12:14 26:14
 31:21 42:15,18 49:9
 49:11 51:7 55:16 56:1
 57:22 58:18 77:10

89:5,8 94:2,3 103:12
 126:6 129:22 144:20
 154:8,15 155:8,11
 156:14 161:9,11
 168:17 169:1 174:14
 175:7 178:11 186:10
 186:20 187:5
quick 118:8 123:4
 125:11 128:2,2
 162:22
quickly 114:8 131:14
quite 9:2 68:6 72:1
 74:20 75:6 76:22 90:9
 94:16 95:15 98:3
 109:13 110:20 112:6
 112:15 113:1,13
 114:4,6 115:19 116:6
quote 29:1 74:15
 120:21 146:7,7
quoted 95:5

R

raise 126:6 156:14
 186:13
raised 75:22 154:18
 181:3
raises 55:16 144:15
 156:10 185:4
raising 159:10
range 32:22 55:21
 78:12 89:11,22 90:12
ranging 88:22
rare 143:3
rationale 52:2 146:6
rationales 54:7
rationality 113:2
rationally 85:4
re- 71:4
reach 95:7 153:4
reaching 164:8
react 47:16
reacting 134:13
reaction 167:7
read 10:11 25:22 55:10
 98:3 106:6,8 113:13
 133:7 142:22
readily 81:1 115:10
reading 46:20 89:18,19
 106:9 107:11 189:8
ready 77:9,14 164:17
real 69:10 83:5 100:15
 128:2,2 148:15
 155:22 165:21
reality 149:20
reason 9:17 36:13
 38:11 47:5 51:1 65:17
 106:16 128:10,18
 183:8

reasonable 70:3 156:9
reasonably 149:18
 150:19
reasons 31:14 40:20
 42:7 51:9 78:22 86:11
 88:15 119:8 125:13
 178:6 183:15
Reath 2:10 3:18
receive 82:21 110:13
received 5:11 42:19
 43:4 50:15 69:20 83:1
receives 25:4 71:20
receiving 26:21
recognize 59:5 70:12
 140:8
recognized 80:11 140:3
 140:7 143:8
recognizes 68:4
Recognizing 161:10
reconcile 179:9
reconsider 17:12 23:16
 65:18 129:8
record 10:15 12:16 22:5
 35:1 40:9 43:14 44:8
 44:17 45:17 46:5,10
 48:9,17 49:6 50:4,19
 50:19 58:3,20 59:1,5
 63:2 70:20 93:13,18
 114:15 115:7 117:16
 129:16 155:9 162:6,8
 162:18 164:6 166:17
 167:19 168:12 169:16
 189:11
recourse 38:9
recovery 85:20
redacted 168:11
redefine 78:16 79:14
redefinition 82:18
redirect 181:21
reduce 24:20 28:19
 55:18 86:4 94:22
reduction 145:1
reductions 86:7
references 76:15
 118:11
referring 97:18 111:2,3
 114:9,11 115:15
reflected 25:22 107:9
reflecting 79:10 80:17
 106:9
reflective 93:17
refuse 133:18
regard 21:14 24:17 95:9
 98:17
regarding 46:20 64:16
 146:8 160:20
regardless 48:1 95:8
 126:21

regards 60:19
regimes 146:19
Register 6:1 187:8
regular 145:16 146:16
regularly 78:9
regulated 23:11 82:17
 83:12 88:18 139:5
 140:10
regulating 92:1
regulation 78:21
 151:21 152:2,3 156:3
 159:6 180:11
regulations 80:19 81:5
 86:13
regulative 73:20
regulators 163:21
 169:18
regulatory 14:2 99:17
 140:17 146:19 173:7
reimbursement 57:2
reimbursing 102:16
reinforces 127:2
reinsurance 70:3
reiterate 187:15
reject 36:11 37:4 92:6
rejoin 15:6
relate 21:15
related 37:7 69:15
 77:22 78:1 81:6
 104:17 128:11 171:6
relates 87:8 96:6
relationship 99:2 177:2
relationships 33:13
 73:21 96:12
relative 83:1
relatively 74:9 118:1
 156:13
released 168:15
relevance 158:14
relevant 53:5 68:19
 90:3 111:9,11 122:19
 148:20 153:5 156:6
 156:11 157:7,17
 159:7,13 163:2 165:8
 166:14 167:18 169:2
 169:5,6,12 174:3
 175:2,3 178:7 185:19
 186:7
reliable 31:6
reliance 20:17 35:17
relied 164:8
relief 69:5 124:5,10
 126:9 127:3 137:6,9
 137:14,18,20 138:9
 139:20
relies 87:1
relieve 68:16
reluctance 57:19

rely 28:3 32:17 35:13
 40:3 44:6 47:2 85:18
 137:9,11 149:14
relying 8:10 149:10
remain 5:16 42:4 46:12
 85:9,22
remainder 161:6
remarkably 37:2
remarks 3:3 77:9 172:4
remember 6:17
reminded 121:7
remove 147:8
removed 25:20 168:12
rendering 100:11
reopened 187:7
reopening 5:15
repeal 180:17,22
repeatedly 23:7
repercussions 150:2
rephrase 160:6
replace 91:10
report 78:17 79:14,15
 79:22 82:3 96:19
 97:22 99:4,4
reporter 12:19 13:2,11
reporting 155:17
reports 85:19 96:14
 108:21
represent 32:10 83:17
 84:11 134:21 153:1
representations 30:21
 35:12,13 50:12
 182:19
representatives 33:10
representing 42:22
 47:19
represents 92:14 123:5
reps 183:5
reputation 72:1
reputations 37:17
request 35:3 118:8
 126:8 139:17 142:6
 156:5 163:9 181:16
 181:20,22 182:9
requesters 35:5
requesting 61:1 147:21
requests 55:3 126:12
 129:18 181:7 182:11
require 19:21 65:2
 76:12 79:15 80:7
 100:10
required 6:15 18:18
 39:6 52:19 59:22
 98:11 135:10
requirement 19:21
 28:12 30:17 31:4
 80:14 84:7 116:16
 161:1

requirements 18:2,19
 19:6,14,16 20:20 21:6
 37:12,22 39:13 55:6
 67:13 79:21 80:13
 100:9 107:6 118:22
 128:15 133:16 139:2
requires 75:15 81:17
 100:15
requiring 81:21 174:5
research 14:4 72:15
reservation 151:13
 154:1
reserve 161:6
reserved 153:17
resigned 72:6
resolve 87:20 95:17
resort 141:7,7 172:10
 173:2,10,16
resources 45:11 85:5
 105:9,11 142:4,5
respect 23:16 24:13
 25:1 26:7 39:4,5 55:4
 61:7 64:19 72:15 73:4
 74:3,9 75:2 76:1,8
 86:19 88:14 90:2 94:7
 95:17 99:14 103:11
 107:9 108:6,8,10,15
 109:4,12,17 110:6
 112:15,20 116:2,10
 116:19 120:14 154:19
respectfully 139:17
respects 43:18
respond 61:8 178:14
response 50:6 60:21
 120:4
responses 62:3 76:19
responsibilities 39:3
 56:21 65:11 68:12
responsible 99:16
 102:9
rest 15:1
restrict 143:12
restriction 39:8 83:2
 100:21
restrictions 24:7 29:19
 34:17 36:5 37:7 39:13
 133:16 145:6,9 147:8
restructuring 126:3
rests 87:9
result 11:9 21:2 33:13
 72:20 95:10 136:19
 149:9 187:12 188:17
resulted 46:14 126:16
resulting 90:20 124:2
results 23:4 95:8
retain 42:8
retained 26:3
retention 37:8

rethink 71:5 139:19
retired 32:16
retirees 123:18
retirement 27:10,11,15
 27:16,20 28:1,4,6,16
 28:19 29:17 31:10
 123:17 138:16
returns 69:12
reveal 87:6
revealed 164:19
revenue 4:11 71:20
 72:19 82:14,21 83:18
 84:5,7,10,12 90:21
 104:21 120:12 124:13
 168:10
revenues 71:13 83:1
 84:2 89:13,15 92:15
 105:19
reversal 153:21
reverse 144:4
review 31:1 43:16
 111:10 148:6 155:2
 163:5 175:4 185:10
 185:21
reviewed 163:16
reviewers 109:22
reviewing 43:12
reviews 146:18
revisions 87:18
revocation 39:21 40:1
 43:8
revocations 39:19
reward 85:3
reworked 102:8
RFP 110:13,17
RFPs 76:20
rhetorically 186:16
richer 138:18
rider 38:10
ridiculous 169:10
rights 18:17 30:4 57:4
 69:17 136:7
rigorous 68:13
risk 28:14,15 85:3,6
 86:6 164:3 176:19
riskier 85:18
risks 85:11
road 5:2
roads 176:13
robust 42:8 142:21
role 8:15 16:12 32:21
 42:21 68:4 93:9 98:6
 106:11,20,21 107:4
 108:10 109:19 145:3
 150:8
rooted 152:7
rose 155:5
roughly 147:6

routine 36:17 155:2
routinely 38:17
rubbed 113:12
rubber 110:3
rule 25:2 30:9 74:12
 78:15,22 79:3,20
 80:12 82:3,11 83:5,16
 83:19,21 84:13,14
 85:16 86:16,17,21
 87:7,8,19,22 88:2,4,9
 88:21 91:21 92:5
 95:20 96:3 97:19
 105:4 114:1 124:6
 127:2,9,13 166:18
 167:5 171:22
rule's 88:16 96:5
rulemaking 87:4,13
 152:5
rules 4:10 5:2 23:4 26:4
 52:4 62:12 80:1 82:14
 82:18 87:1 88:7,12
 93:4 123:2 124:12,15
 125:9 126:4 128:11
 129:5,8 134:11,14,15
 135:4 139:3 140:4
 142:19 144:17 174:19
ruling 165:15
run 61:12
running 72:22 74:21
 173:22
Ryan 2:3 64:6,10,11
 77:6 89:9,19,20 92:5
 108:5 111:3 112:2
 113:18 114:3,11
 115:4,17 117:21
 118:4 120:7,9 121:14
 121:19

S

s 46:3
sad 133:3
safeguard 41:10 106:21
safeguards 21:5 28:13
 41:16 53:15 66:19
 76:20
Saindon 1:21 32:8
sake 155:10
satisfy 75:14 80:3 84:6
 117:11 160:16
save 172:2
saving 35:7 38:21
savings 27:10,13 28:19
 31:11
saw 76:21
saying 10:20 47:18
 48:15 53:20 60:20
 114:9,14 151:1
 162:10 166:16 168:5

174:16 177:3 184:5
says 111:21 130:19
 151:18 152:14 166:11
 173:3 186:2
scale 17:1 30:12 59:3
 98:4
scales 25:2 109:11
scenario 155:13
scenes 113:11
scope 30:11 41:18
 156:18
score 98:19
screen 13:17 64:4
 146:7
scrutiny 148:8
SCS 13:19
se 29:18
search 88:3
SEC 155:17
second 21:7,20 23:1
 52:15 63:7 68:3 82:14
 110:5 131:6,9 143:9
 172:6 175:15,16
 178:4
secondly 101:12
 149:16
seconds 120:7
secret 170:2
Secretary 1:12,14 3:3
 4:3,18 13:15 14:22
 15:10,16 26:15 30:1
 32:1 42:16 44:18 49:7
 63:4 89:6 90:16 91:8
 91:15 92:2,20 93:6,22
 122:4 127:21 128:3
 130:6,12,17,21 142:8
 142:14 154:4,10
 157:10 160:3 161:5
 186:19
secrets 48:13 164:21
section 29:6,7,8,12
 41:7 101:10
securities 69:10 81:1,2
 108:19
security 1:14 4:5 27:12
 27:21 28:4,16 29:17
 31:10
seeing 144:22
seek 20:7 35:13 54:16
 105:10 123:12
seeking 18:21 20:15
 21:1 22:9,21 36:22
 40:11,12 54:22 67:5
 85:15 124:4 159:8
 175:9
seen 11:16 56:3 75:6
 97:14,16 102:19,22
 103:5,8 112:3,4 113:7

113:12 133:5
select 37:20 86:10
selected 38:16
selectively 180:13
self-dealing 29:13
self-insurance 86:3
sell 94:22 112:21
sellers 81:16
semblance 46:10
send 18:12
sending 48:16 54:20
Senior 13:21
sense 47:6 49:1 149:12
 150:6 158:20 164:7
 164:20 166:22
sensible 54:7
sensitive 129:9
sent 9:12
sentence 107:11
separate 33:16 39:18
 76:16 171:13
SEPTEMBER 1:8
series 21:9
serious 78:20 83:3
seriously 6:10,14,21
 65:12 68:12 110:4
 118:21,22 164:4
seriousness 188:10
serve 18:9 24:22 26:18
 38:13 72:21 98:18
 104:8
served 37:13 95:3
serves 15:22
service 73:16 131:19
 154:3 157:13
services 39:9 70:6
 72:12,18 82:16 83:15
 85:6 86:8,17 88:18
 110:7,21
serving 73:18
session 118:10
set 78:19 80:5 107:6
 136:14 149:6 150:21
 171:13
sets 37:15 80:10 179:6
shape 104:13
share 123:16
shared 121:17
shareholder 69:17
shares 79:8
shift 85:4
shifting 86:5
Shiker 1:17 13:21 77:4
 127:19
short 139:7
show 143:10
showed 137:2
showing 20:2

shows 108:1
sick 169:11
side 94:22,22 110:16
 120:10 187:1
sign 12:7,9,10 49:8
signal 18:12 89:16
signed 30:18
significant 8:22 10:1,2
 17:13 52:6 78:15
 80:13 145:5 158:5
significantly 46:18 69:5
 83:11 86:2
signing 31:5
signs 13:10 14:7
silence 152:15
similar 19:4,4,5 60:16
 152:10 181:9 185:5
similarly 59:13 150:20
Simmons 2:17 122:1,7
 122:10,11 127:17
 128:1,5 130:10,15
 162:21
simple 139:16
simpler 141:17
simply 51:12 81:20
 110:9 125:22 186:8
 188:2
Simultaneous 15:9
 113:20
simultaneously 83:7
sincerely 123:11
single 33:18 72:10
situated 150:20
situation 55:22 93:3
 178:4 179:6
situations 8:14,17 17:8
 45:14 108:11 109:10
 120:14 126:5 140:5,5
 150:3 157:15 158:17
 176:5
six 144:8
size 7:17 103:17 105:18
 116:20
skill 37:14
skills 105:9
skin 53:19 101:21
skirt 134:14
skirting 174:13
slowly 141:22
small 6:11 87:22 88:10
 90:3 105:1,6,7 119:5
 140:18,20
smaller 25:13 83:8 85:8
 85:10 86:10 104:15
Social 27:12,21
Society 2:5 3:12 63:8
 78:5
sole 96:6 136:12 181:9

solely 79:15 95:21
 104:22 136:9
solicitation 60:4
Solicitor's 14:2
solid 15:4
solution 88:3 141:13
 149:18
solutions 132:18
solve 132:6 149:5
somebody 53:18
 102:16 118:15
soon 63:22
sorry 15:13 26:12 111:1
 177:6
sort 7:14 36:1,13 58:6
 61:1,11 69:18 96:9
 98:1 100:3 110:18
 118:11,16 133:5,7
 134:13 139:18 146:19
 149:4 159:21 161:20
 184:10
sorts 140:4 156:12
sound 169:9
sounds 151:12 179:7
source 71:21
sources 83:2 97:1
space 33:19,22 118:20
 183:9
speak 11:22 13:5,12
 64:18 101:6 132:3
 150:12,13
speakers 140:16
speaking 15:9 91:14
 113:20 120:9 147:6
 163:6
special 68:18
Specialist 13:22
specialized 148:5
specific 22:12 24:10,10
 29:7 48:5 92:21
 127:11 136:22 138:22
 176:4
specifically 42:2 60:18
 66:15
speech 164:5
speed 142:1
spend 4:19 6:5 131:1
sponsor 53:10 125:14
sponsored 28:1 32:15
sponsoring 33:20
sponsors 131:19
 138:17 141:11
square 170:5
squarely 30:6
staff 12:6 14:6 87:2
stage 45:1
stages 7:12 152:13
 165:7

stakeholders 33:17
 40:11,17 129:14
 140:11 167:2
stamp 110:3
stand 77:9
standard 60:2 75:13,14
 81:16 82:4,12 84:17
 89:10 101:12,12,14
 101:16,17 119:1,9
 136:12 184:1
standards 28:6 29:4
 30:9 40:1 54:2 68:13
 74:20 80:2,5,11,20
 81:12 82:7 95:4 99:14
 99:15 155:15,19
standing 23:10 41:7
 56:19
standpoint 175:19
start 5:22 13:7 14:15
 15:11,14,19 42:17
 48:4 55:22 56:10
 181:17 187:6
started 46:19 144:4
starting 16:3 94:4
startup 90:19 91:16,19
state 18:22 54:3 92:11
 93:16,19 100:15,16
 101:1 118:12 121:6,9
 146:3,4 156:20 157:2
 157:18,21 159:18,18
statement 30:21 137:8
 160:6 182:3 184:9
 185:14 186:5
statements 19:7 31:7
 95:16
states 1:1 21:17 97:19
 100:9,10 145:22
 146:5
static 125:3
status 69:7
statute 6:20 18:18
 52:20
statutory 8:18 21:5
 28:12 29:11 55:6
 66:14 120:17 124:19
 135:8 140:4 171:4
 188:5
stay 4:14 50:19
step 63:12 132:11
stick 159:2
sticking 185:13
stipulation 167:17
stock 78:1,1 88:8 99:14
 100:11 108:18 117:2
stop 12:10 49:8 147:22
 177:7
strategies 178:3
streamline 34:15

streams 168:10
stress 8:20
stretch 91:22
strict 125:8
strikes 156:8
strokes 45:8
strong 90:14 184:9
strongly 104:1 129:12
 141:2
struck 109:18
structure 126:2
structured 182:5
 188:16
studies 104:1
stuff 5:3 167:12 170:2,2
 170:9 189:2
stuff's 169:12
style 103:17
subject 21:4 36:21
 76:16 101:18 129:9
 167:14 181:12 185:21
subjective 153:18
submission 149:6
 164:18 167:11
submissions 50:3
submit 5:20 159:15
 166:19
submits 182:9
submitted 16:10 64:21
 128:7 130:5 132:8
 168:13
submitting 7:12 132:11
subsequent 69:9
subset 119:6,7 168:20
substantial 76:13
substantially 17:1
 152:10 181:9
successor 72:8
sufficient 62:3
suggest 98:9
suggested 170:7
suggesting 184:20
suggestion 167:5
summarize 130:2
summarized 17:17
summary 182:18 183:5
supervising 108:12
supplement 27:20 58:3
 115:7 117:16
supplemental 60:4,17
 118:9
supplemented 29:6
support 39:17 48:11
 129:11
supported 75:9
supporting 30:21
supports 30:12,16
 31:14

suppose 49:16
supposed 75:19 98:14
 170:10
surprised 70:17 97:11
surprising 47:1
Susan 1:18 14:5
system 8:16 27:16
 125:3 145:14

T

Taft 33:7
tailed 149:18
tainted 70:15
taken 9:1 171:18
takes 100:3 140:13
 183:12
talk 21:16 90:7 108:14
 109:8 127:11 136:22
 163:21
talked 76:4 115:3
 158:13 174:8 183:11
talking 4:16,20 6:6 57:1
 73:20 140:19 155:6
 163:20 176:2
Tarbell 2:5 77:14,16,18
 77:19 89:3 90:17 91:2
 91:13,18 92:8 93:1,20
 94:5 95:19 97:7,11
 99:18 100:13 101:5
 102:4,12,18 103:9,19
 103:22 121:4,15,20
target 72:19
targeted 147:2
task 14:12 107:18
taste 110:11
team 6:11 7:1 13:21
tech 130:15
technical 23:3 26:11
 54:19 127:11 130:18
technicalities 52:5
technically 16:17
techniques 147:2
technology 15:2 130:8
 154:12
telegraphing 72:5
tell 53:3 59:11 60:10
 71:17 101:6 104:2
 106:7 117:21 127:18
 128:4 141:10 158:8
 160:6 172:14,17
telling 170:11
tells 98:4
temperature 47:7
tempted 101:6
ten 11:19 12:2 13:9
 15:17 62:5 131:15
tend 10:22
tens 84:22

tension 170:21 172:13
 178:16 179:9 181:2
 182:5 185:3
tentative 152:13
term 148:19 177:14
terminologies 155:3
terms 19:11 35:5 56:20
 67:3 69:3 71:6 75:3
 78:18 88:9 99:3 110:1
 116:14 121:9 135:11
terrifying 12:10
test 120:12
testify 11:17,20 17:12
 27:1 64:14 89:4
 132:12 154:9
testifying 13:1,4 14:20
 15:21 78:3
testimony 12:13 42:14
 54:9 63:6 65:15 89:8
 90:17 92:3 99:12
 106:6 114:18 122:21
 130:11 154:17 187:3
text 24:9 91:10 94:17
 128:2
thank 16:3 26:11 27:2
 31:22 42:10,16 58:1
 63:3,4,22 64:8,10,17
 77:7,12,15 100:18
 105:13 121:14,15,16
 121:19,20 131:10
 137:1 142:6,7 154:7
 178:9 186:20,21
 189:6,8
thanks 14:18 26:15
 64:9 89:7 113:14
 118:6 142:13 154:10
 160:3
that'd 115:13 161:13
theft 158:2
theme 7:9
themes 44:20
things 5:12 9:21 11:6
 11:12 23:7 54:20 56:8
 57:9 60:12 67:14 73:9
 79:14 81:4 89:13 99:8
 105:11 107:20 108:20
 111:22 116:8,13
 120:15 121:3 125:3
 133:5 143:5 145:21
 150:14 153:20 157:7
 164:1 168:5 169:3
 170:15 172:11 176:11
 181:5 185:22 187:11
thinks 47:8
third 31:2 71:3 86:15
 121:13
thought 10:1 24:19
 51:11,19 62:13

109:20 112:13 113:1
 135:18 162:22 164:19
 165:6 168:3 173:8
 176:11,12
thoughts 64:18 174:6
 175:6 177:19 182:17
 183:6 185:16 187:11
 188:19
thousand 101:9
thousands 33:5
threat 28:14
three 3:15 11:13,14
 12:4 17:17 42:17
 51:15 63:5 77:20
 104:17 136:3,4 147:4
 147:5 157:14 158:18
three-year 173:5
threshold 24:18 25:11
 26:8 92:7 155:6 156:1
throw 141:14
throwing 35:19
thumb 59:3 109:11
THURSDAY 1:7
Tim 1:16 13:14 108:6
 110:10 112:14 113:6
 121:5 165:10 168:5
 169:8 171:3
time's 89:2
timer 77:11
times 7:19 47:4 93:9
 147:4 158:13 168:21
 188:12
timing 60:21 61:20
 109:8
tiny 119:6
tires 45:10 49:19,22
 108:15 167:9
today 4:16 5:8 9:11
 10:9,12 11:13 13:13
 14:15,20 16:22 17:9
 17:12 21:8 23:20 27:1
 43:6 63:15 78:3 91:4
 91:10 121:18 122:19
 123:19 127:6 132:2
 145:13 181:3 186:22
 187:11 188:7
today's 4:22 5:17 14:10
 16:4
told 26:12 113:8 166:16
 180:7
total 34:6 112:1 144:10
totally 76:6 112:2,16
 113:11 115:18 133:11
touch 23:19 131:3
touched 71:3 154:16
touchable 81:2
trade 48:13
traffic 37:4

trained 71:2
training 105:9 107:13
 121:3
transaction 1:3 4:10
 7:8,22 8:8 20:3 22:13
 22:15,21 23:4 25:6,10
 25:16 29:18 31:16
 41:2 45:8 51:4 52:1,4
 52:12,21 53:18 55:13
 56:14 58:12 62:10,12
 62:17 65:21 68:16
 69:17 71:14 75:20
 81:6,7 82:9,22 87:18
 91:6 96:16 111:5,13
 111:16 112:10,17,22
 113:4 116:19,21
 123:2,21 124:12
 125:19 126:4,6,9,11
 126:15 128:21 141:4
 142:19 144:17 146:9
 156:11 158:15 167:22
 174:19 188:4
transactions 16:15,18
 17:7 24:2,3 25:1 27:5
 29:9 30:6 34:11,19
 36:9 41:8,15 48:5
 56:19 66:8 69:2,4,13
 70:10 73:9 74:15,20
 75:6 78:11 105:19
 107:1 110:8 111:6
 112:10 113:7 117:1
 122:18 125:7,9
 131:20 133:3 134:18
 134:20 135:7 137:9
 138:14 139:13 157:8
transcribing 12:20
transcript 5:11,17
 12:18,21
transcript's 6:2
transferred 125:18
transitions 72:7
transparency 8:6 46:10
 139:2
transparent 129:11
treat 185:5
treated 25:10 45:16
 99:2 150:22 183:20
tried 141:13
trigger 187:11
triggers 155:17
trillions 28:13
trip 166:15
Trojan 88:5
trouble 172:3
troubling 153:10 180:3
true 30:22 60:14 108:3
 149:11 184:18,18
truly 37:10 39:9 173:16

Trump 144:6
trust 2:4 34:3 71:18
 80:21 89:21 114:12
 125:18
Trust's 114:16
trustee 37:3
trustees 33:9,11 78:10
 83:4
trusts 33:7 64:13
truth 98:18
truthfully 110:10
try 13:11 54:11 116:12
 121:1 132:6 154:5
trying 13:8 24:12 47:5
 54:13 55:1 93:18
 111:15 112:21 114:1
 117:18 148:11 149:8
 159:15 160:4 166:15
 177:13 184:3
turn 15:7 63:7 69:12
 72:2 127:10 131:8
 134:8 136:21 139:14
 161:7 169:5
turned 113:7 167:12
turning 53:17
two 3:10 5:19 11:13
 21:15 22:10 24:17
 26:7 33:3 46:8 71:15
 71:16 73:1 82:20 84:1
 84:6 89:11 90:13,14
 91:3,10 92:5 98:10
 101:10 103:11 104:8
 120:13 143:18,19
 144:7,14 147:4
 150:19 152:21 153:19
 175:7 185:5
type 35:17 46:17 74:16
 115:11 140:13 150:3
 165:15,20 178:4
types 17:4 23:17 24:2
 24:11 47:12 56:8
 171:5
typical 103:14,17,18
 115:11
typically 33:7 38:10
 52:6 71:11 108:14

U

ultimately 5:12 50:10
 125:21 160:22 189:5
unable 38:13 83:15
unaffiliated 37:10
uncertainty 148:3
unclear 39:12
undercapitalized 85:8
underestimates 68:9
undergoing 70:7
underlying 178:8

undermines 79:19
 175:22
undermining 107:22
underneath 176:7
underpinnings 11:4
understand 7:7 8:8
 10:19 11:3 19:8 35:10
 39:1 45:18 51:8,14
 52:11 58:16 60:13,17
 65:22 67:20 71:18
 76:6 92:3 93:2 98:2
 106:12 108:21 112:2
 112:16 114:3 119:16
 119:17,18 161:16
 170:20 177:8 184:3
 186:12
understanding 11:10
 62:21 117:12 118:18
 119:15 158:5 163:15
 180:21
understood 41:6 54:9
 90:1 102:6 105:13
 135:3
undertake 135:6
undisclosed 87:9,12
undivided 28:10
undue 79:11 80:17
unexpected 41:22
unfettered 73:4 74:9
unfortunate 22:10 23:5
Unfortunately 127:1
unhelpfully 71:8
unilateral 102:13
union 33:10 145:16
unions 32:14 33:5
unique 37:18 42:21
UNITED 1:1
universally 92:18
unjustified 35:17
unlawful 41:9
unlevel 184:2
unmute 5:2 89:17
unmuted 127:22
unnecessarily 23:22
 34:20 129:18
unnecessary 36:7 42:9
 83:2 124:8 139:1
unquestionably 128:20
unquote 120:22
unrelated 37:1 95:12
 107:15 174:7
unsupported 87:1
unusual 42:5 132:11
 143:3
unverifiable 87:2
unwilling 126:19
update 9:4
updated 27:3 31:15

upfront 8:4 61:2
upper 104:20
urge 129:7
urges 79:1
urging 127:7
use 137:20 180:12
useful 35:4
uses 180:13
USPAP 80:10,16 81:12
utilize 141:9

V

V 75:9
vague 71:8 74:21
 153:18
valid 102:22
valuable 34:19 74:4
 150:7
valuation 78:6,8 79:10
 80:2,4,13 83:15 84:17
 86:1 87:3 88:7 94:19
 109:6
valuations 78:11
 104:17 109:3,12
 121:8
value 68:9 71:22 78:10
 78:13 79:7 81:17,20
 82:4,12 98:14 132:17
 158:5
valued 153:22
valuing 77:21
variable 98:12
variables 98:10
variety 104:11
various 29:12 36:17
 37:21 106:5 156:12
 187:16,16
vary 116:20,21
vast 110:16
vastly 73:12
VEBAs 69:8
verify 71:19
version 42:14
Versus 159:12
Video-Teleconference
 1:11
view 9:22 35:17 52:3
 65:20 67:5,9 70:14
 113:17 117:7 124:2,6
 126:7,17 127:2 139:7
 145:3 162:4 174:15
 181:8 188:14
viewing 141:6
views 26:1 73:8 87:2
 175:19 181:12,13
violate 82:5 83:18
 84:13
violates 171:21

violation 146:15 156:7
 156:22 157:9
violations 137:16 146:4
 147:3,3,7
virtual 130:10
virtually 4:6 29:8
 133:19 162:15
vital 32:21 142:20 143:4
voice 127:6

W

wage 34:6
wait 170:19
waiting 61:14
waive 53:22 57:5 59:17
waiver 38:9 59:20
 100:22 102:9
waivers 57:4 100:19
 101:2
waiving 57:4
walk 148:10
wanted 4:19 12:17
 49:13 127:12 134:9
 150:13 161:13 171:19
 183:10
wants 114:17 160:12
 162:20 169:3
warnings 36:1
warranted 67:21
wasn't 115:15,17 178:5
waste 142:4
water 35:20
waving 130:13
way 8:19 9:20 22:14
 43:3 48:20 51:2 52:11
 54:19 58:11 59:10
 62:18 67:3 90:15 98:3
 108:20 113:13 116:5
 135:2 140:14,22
 150:16 163:4,18
 166:21 167:6 168:13
 173:17 177:20 184:5
 185:2,6,11 186:17
 188:15
ways 11:5 16:6 20:6
 45:9 46:2,6 51:21
 55:21 113:9 140:8
 165:15 172:19 176:20
website 5:9,13 11:16
weeks 5:7,19 187:7
Welch 1:21 32:8
welcome 4:3 89:4
 170:19 171:12
welcomed 126:11
welcoming 4:19
welfare 70:2 138:18
well- 71:1
well-intentioned
 133:12
went 9:7 176:5 187:1
 189:11
whatever's 163:14
whatsoever 90:11
 100:21
wholly 37:1
wide 55:21 66:8 88:22
Wilker 1:18 14:5
willfully 151:9
WILLIAM 2:3
willing 38:13 59:12
 179:12
willingly 148:9
willingness 23:10
 123:12 187:5
win 24:21
winning 141:22
wise 126:7
wish 178:15
wishes 95:9,13
withdraw 79:1 139:18
withdrawing 40:20
withdrawn 40:6
witness 11:19 14:17
 131:6
witnesses 10:5,22
 11:17 12:4,8,12,15
 15:1 42:17 43:5,7
 63:5 68:2 89:7 145:13
 154:11 186:21 188:7
women 33:1
wonderful 142:17
wondering 183:13,18
worded 160:22
wording 73:3 94:10
 96:20
words 34:7 102:12
 147:5 161:2,4
work 6:12 10:4,5,6
 47:17 54:3 56:20
 61:21 89:17 92:13,17
 95:21 102:10 103:6
 108:16 110:19 125:6
 130:8 131:18 141:19
 161:3 172:21 177:5
 178:3 187:1
worked 27:14 44:12
 65:6 110:15 122:16
 123:8 132:5
workers 31:9 32:17
 34:4,8 123:18 145:16
working 20:15 32:22
 67:10 96:7 125:22
 130:16 141:8 142:11
workman 54:1 59:17
workman-like 54:2
works 180:22 184:10

184:12
world 41:21 157:8
worries 150:15
worse 153:14
worst 166:11
worth 117:5 146:22
 147:19 152:1,20
 161:20 164:1
wouldn't 44:13 99:9
 113:12 169:14 173:18
 183:19
woven 166:19
wrap 77:4 154:5
write 140:3
writing 55:18 61:8
 101:8 119:4 166:13
 168:6
written 22:2 42:13
 95:10 152:17 154:17
 168:3 170:19 179:19
 184:6 185:2,12,14
wrong 106:7 113:13
wrongdoing 40:22
wrote 167:5

X

Y

year 5:5 16:10 17:15
 42:13 67:17 84:5,9
 88:1 100:2 103:15,21
 104:8,18 105:18
 138:7,7 143:22 144:1
 144:3,12
years 16:14 36:19,19
 65:6 69:6 122:17
 123:9 126:10,15
 132:4 136:17 143:11
 143:16,18 144:3,5,6,7
 144:8,14 149:2
 152:11,22 180:4
yields 149:9

Z

zero 141:22

0

1

1,000 182:14
1,500 183:7
100 83:17 90:20
100,000 84:11
114 123:5
12:10 189:11
120 144:1
121 3:15
122 3:16

131 3:17
14 3:4,5
142 3:18
15 1:8
154 3:19
18 144:1
18-month 173:4
185 143:21
189 3:20
1978 66:16
1982 153:5 184:18

2

2 25:5
2.5 84:6,12
20 32:16 67:17 87:22
200 104:5
2002 65:2
2005 143:16
2012 143:16
2017 144:5
2020 144:13
2022 1:8 153:6 184:18
23 143:22
26 3:6
29 144:9

3

3 121:22
30 12:3 120:7
300 104:5
32 3:8
33 156:3
38 26:19

4

4 3:3 84:11
40 136:17
401k 123:8
404 29:6 68:12 137:15
406 29:7 41:7
406(a) 29:8
406(b) 29:12
408 174:4
408(a) 67:13 136:2
 146:11
41 144:2
410 38:5
42 3:9

5

5 89:15 90:2,3
50 83:22 84:5 132:4
50,000 84:4
500 182:12,14
500-page 183:4

6

63 3:10
64 3:11

7

77 3:12

8

80 64:22
89 3:13

9

9:00 1:11
9:06 4:2
90 144:22 145:1
96-62 151:22

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In the matter of: Public Hearing

Before: US DOL

Date: 09-15-22

Place: teleconference

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Court Reporter

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