BY: Federal eRulemaking Portal: (*www.regulations.gov*)

DATE: October 10, 2022

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

Telephone: (202)-693-8546

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

Regards. We understand that the Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, is seeking comments on its proposed QPAM Amendment of July 27, 2022 (Docket ID EBSA-2022-0008). We also understand that it has extended the initial comment period to October 11, 2022 (11:59 pm Eastern), and that. you will hold a virtual public hearing on this proposed amendment on November 17, 2022.

The purpose of this letter to submit a joint comment from the signatories of this letter on the Department's proposed amendments to its current "Qualified Pension Asset Manager" ("QPAM") regulations (PTE 84-14) (See https://www.regulations.gov/document/EBSA-2022-0008-0001.)

Several of us will also submit individual comments. As you have requested, we will also submit *separate individual requests to testify* with short synopses of our individual perspectives by October 11, 2022 (11:59 pm Eastern).

BACKGROUND

As you can see from the brief biographical sketches below, the signatories to this letter all share decades of experience in combatting the kind of financial chicanery and outright criminal misbehavior that, regretfully, some leading financial institutions ("FIs") like Credit Suisse ("CS") have engaged all too frequently.

Three of the four the signatories to this letter participated actively in the original CS QPAM waiver hearing that was held by your office on January 15, 2015.

That hearing took place in the wake of Credit Suisse's guilty plea to US felony charges regarding the orchestration of federal tax-dodging for scores of wealthy Americans, in a plea bargain that was proposed by the US Department of Justice ("DOJ") and CS in May 2014 and accepted by Federal District Court Judge Rebecca B. Smith on November 21, 2014.

In commenting on that plea, DOJ noted that CS had "failed to take even the most basic steps to ensure compliance," and had even obstructed the DOJ investigation by destroying evidence.

Yet in the plea deal that DOJ negotiated with CS' lead counsel, Christopher Wray, in 2014, the bank got off with a $2.6 billion fine. The bank was for the most part allowed to continue "business as usual" in the US and elsewhere. No senior executives went to jail. No operating licenses were lost. The fine for tax-dodging even proved to be *tax-deductible* in Switzerland. And of course Mr. Wray also went on to become US *FBI Director* in July 2017.

At the January 15, 2015 hearing, the signatories argued vociferously but unsuccessfully that CS did not deserve a QPAM waiver from the Department of Labor, given the sordid track record that it had already compiled on a world-class scale. We predicted that the bank would continue to misbehave if it continued to receive such light-weight penalties.

Sadly, our warning was not heeded. On October 2, 2015, DOL gave CS another four-year waiver through November 20, 2019, on top of the additional 1-year waiver that had already effectively been granted from the date of sentencing in November 2014. On November 14, 2019 it renewed that waiver for another five years, through November 2024. It was that waiver that was withdrawn earlier this year, as noted below.

REVERSAL

We take no satisfaction whatsoever in noting that we were very quickly proved to be correct, even under DOL's *existing* QPAM standards. In October 2021, the US DOJ announced that Credit Suisse AG and its UK subsidiary CSSEL were guilty of yet another major felony in a US federal court -- this time with respect to over more than $850 million of fraudulent loans that it had made from at least 2013 to March 2017 to a corruption-ridden Mozambique tuna fishing industry project.

As DOJ's settlement announcement acknowledged, this criminal misconduct by Credit Suisse probably harmed unspecified "US and international investors." It almost certainly harmed the ordinary citizens of Mozambique, whose real incomes as of 2021 (PPP-adjusted, World Bank data) averaged just $1342, and have been falling since at least 2016. We also note that much of this misbehavior occurred up to three years after CS's April 2014 plea bargain with the US DOJ, and up to 2 years after DOL's 2015 waiver.

Yet to date this subsequent admitted CS misconduct has merely resulted in a proverbial slap on the wrist. From the DOJ, CS received yet another (3 year) deferred prosecution agreement and just $547 million of fines, penalties and disgorgement. There was still no loss of operating licenses in the US, the UK, or Switzerland. There was still no specific penalties (fines or jail time) for the senior executives involved. The latest fines and other penalties are still tax-deductible (in Switzerland.) And while this time around DOL has moved quickly to suspend CS's QPAM privileges in the US, it has given the bank nearly a year to make the transition.

The new October 2021 US DOJ plea by CS did force DOL to act, however. It automatically disqualified CS as a QPAM unless it received a further exemption, since such convictions otherwise automatically lead to a 10-year ban from QPAM privileges. On January 22, DOL proposed a 12- month exemption for CS from the date of conviction (in Credit Suisse Securities

(Europe) Limited, Case Number 1:21-cr-00520-WFK) and requested comments. It received only two, including one from Senator Warren. On April 19, 2022, DOL granted CS a 12 month exemption from the date of conviction, to allow funds to exit in a timely fashion, acknowledging that "the Convictions and other alleged CS-related criminal misconduct constitute years-long systemic criminal misconduct.." It cautioned Covered Plans not to imply that it would provide any additional extensions.

Indeed, as discussed below and in our other submissions, there is strong evidence that this Mozambique case was just a fraction of *recent* CS misconduct that it has been involved in all over the planet *since* 2014. From this standpoint, it is very hard to make DOL's existing QPAM sanctions regime for serial corporate offenders like CS look like an achievement.

PROPOSED AMENDMENT - OUR SPECIFIC COMMENTS

As noted, evidently the Mozambique conviction convinced the DOL that it could no longer support another waiver for CS even under existing QPAM standards. So in early 2022, DOL began to withdraw CS' *privileges* to manage US public-sector pension funds.

However, the Department also noted that *existing* QPAM standards made it difficult for DOL to ensure that other financial institutions were not engaged in similar criminal behavior, even in the US. Accordingly, it has proposed to amend QPAM regulations, in order to eliminate several glaring loopholes.

That sets the stage for this joint submission, as well as any individual submissions that we may provide, and the upcoming hearings in November, in which we also intend to participate individually.

***Overall,* we strongly support all of these proposed DOL QPAM modifications.**

Here are DOL's key proposed QPAM regime amendments and our comments with respect to each of them.

I. Proposal 1: (Referring to DOL Proposed QPAM Amendment, Subsection I(g)(1)—Reporting to the Department.)

- **All enterprises employing QPAMs must notify DOL that they are relying on QPAM Exemptions, with the names and assets under management ("AUMs") of the business specific units that are claiming the Exemptions.**

Amazingly, as of now, even the DOL has no master list of all such entities. At the 2015 public hearing regarding Credit Suisse's 2014 US criminal conviction, neither the bank nor the DOL was able to provide a complete list of the QPAMs or their total AUMs (assets under management). At least one was under criminal indictment. The Department estimates that there are now at least 616

QPAMs. However, each QPAM may have several affiliated QPAMs, so there could well be hundreds of others.

- **Our Comment on Proposal 1: *This is fundamental.***

Obviously the DOL can't effectively monitor QPAM compliance if it can't even identify them. or estimate the assets associated with them. Indeed, in *opposing* this amendment, one leading corporate law firm recently warned that this could lead to additional monitoring and public knowledge of QPAM status. Apparently it believes that some of its clients prefer to have anonymous privileges without transparency or oversight.

Specifically, we would like to see each QPAM provide **quarterly updates** of its **AUMs.** Presumably they are already disclosed to the market on regular basis. Combined with the master list, this would allow DOL to conduct regular stratified samples of compliance behavior by QPAMs. And that, in turn, would automatically improve compliance by its very existence.

II. Proposal 2: (Referring DOL Proposed QPAM Amendment, Subsection I(g)(3) and Sections VI(r) and VI(s)—Types of Misconduct and Entities That Cause Ineligibility.)

- **Update the list of crimes that disqualify a QPAM to include *foreign crimes* that are "substantially equivalent" to listed US financial crimes.**

- **Our Comment on Proposal 2: *This is also essential.***

As of 1970, most financial crimes went on in a handful of leading financial markets, and most major FIs just specialized in those markets, and there were only about a dozen so-called "havens" -- "financial secrecy jurisdictions" ("FSJs") -- that really mattered. There now are more than 140 FSJs. (See https://fsi.taxjustice.net). The giant leading FIs that engage in financial crimes usually do so across borders. So leading financial crimes like financial fraud, money laundering, and tax dodging have come to be sophisticated, globally-networked crimes. Time after time, FIs have been known to compartmentalize these complex crimes across multiple jurisdictions, arbitraging regulatory loopholes and pressuring weaker jurisdictions to curtail regulation.

Examples of this networked offshore world abound -- from slack regulation of investment funds in the Cayman Islands, to the manipulation of back-to-back loan schemes in Mauritius and Delaware by leading NY investment banks, to the wholesale use of trade mis-invoicing by leading commodity and mining companies by way of Malta, the UAE, the Isle of Jersey and the BVI, to the role of Switzerland in parking profits from commodities like coffee and diamonds, to the growing role of the Singapore in the global art market.

Given the rise of all this offshore networked financial activity, it would be hopelessly "19th century" for DOL to simply ignore it. On the other hand, giving the DOL the authority to take note of, investigate, and exercise judgment with respect to foreign prosecutions and/or convictions doesn't automatically given them "full faith and credit." It simply says that they do not automatically have to be ignored simply because they are "foreign."

III. Proposal 3: (Also Referring DOL Proposed QPAM Amendment, Subsection I(g)(3) and Sections VI(r) and VI(s)—Types of Misconduct and Entities That Cause Ineligibility.)

- **Expand the criteria/ "bad acts" for QPAM disqualification to include:**

    a. "Prohibited misconduct," including any conduct that forms the basis for a non-prosecution or deferred prosecution agreements with respect to equivalent listed US financial crimes;

    b. Engaging in a systematic pattern or practice of violating the conditions of the exemption in connection with otherwise non-exempt prohibited transactions; and/or

    c. Providing materially misleading information to the DOL in connection with the conditions of the exemption.

- **Our Comment on Proposal 3: *This is also essential.***

    We believe that horrendous *serial* corporate financial crimes have escaped DOL detection and corrective action because of its narrow current focus. Procedurally, we would also like to see DOL **become far more proactive,** including the issuance of **"please explain" notices** or **ineligibility notices** in cases where it has determined that there is a substantial likelihood that a QPAM has engaged in prohibited misconduct.

    In this spirit, we note that QPAM status is a privilege, not a right. Rather than have the Department waste scarce taxpayer resources trying to track down QPAM misconduct, we suggest that the Department should consider reversing the burden of proof: All new and existing QPAM privileges should have expiration dates; financial institutions ("FIs") that wish to enjoy these privileges should be required to *demonstrate affirmatively* that they have clean hands before these privileges may be granted or extended.

    In considering whether to extend or grant QPAM privileges, and in reviewing potential misconduct by existing QPAMs, the Department may also want to take into account the identity of parent countries of FI incorporation and/ or senior management location -- establishing, in effect, a list of "high-risk countries" whose QPAMs face a higher burden.

    For example, a October 2018 report by the EU Parliament on "Financial Crimes, Tax Evasion, and Tax Avoidance" highlighted Switzerland's many systemic short-comings as a responsible financial regulator, not only with respect to tolerating the long-time misbehavior of dodgy institutions like CS, but also with respect to failing to enforce basic international AML/CFT

standards even while cracking down hard on whistleblowers and investigative journalists. In assessing the likelihood of QPAM misconduct, such home country-level patterns should count.

Existing and potential QPAMs and their corporate sponsors should have an opportunity to be heard. But this new standard would remind them that QPAM status is a *privilege*, and that the kind of *serial, systemic* corporate misconduct observed in the CS case -- including senior management's negligent tolerance of it -- *must cease*.

IV. Proposal 4: (Referring to DOL Proposed QPAM Amendment, Subsection I(g)(2)—Written Management Agreement.)

- **Include certain mandatory provisions in all written QPAM agreements with plans:**

    a. If a QPAM, its affiliates, and/or the owners of at least 5 percent or more engage in conduct that results in a criminal conviction or receipt of an ineligibility notice, QPAMs must allow a plan to terminate or withdraw from its arrangement without any fees or penalties.

    b. A QPAM must indemnify, hold harmless, and promptly restore actual losses to each plan for any damages directly resulting from a violation of applicable laws, breach of contract, or any claim arising out of the conduct that is the subject of a criminal conviction or written ineligibility notice.

- **Our Comment on Proposal 4: *This is also essential.***

In effect, the current DOL approach to victims of QPAM chicanery basically subsidizes criminal asset managers, fails to compensate victims adequately, and penalizes honest asset managers. Adopting this proposal would help to reverse this situation.

V. Proposal 5 : (Also Referring to DOL Proposed QPAM Amendment, Subsection I(g)(2)—Written Management Agreement.) Subsection I(g)(2)—Written Management Agreement.)

- **QPAMs must agree to not knowingly employ, engage with, or partner with individual(s) who have participated in misconduct that resulted in a criminal conviction or a DOL notice of ineligibility.**

- **Our Comment on Proposal 5: *This should be expected, and would also be very helpful.***

Subject to due process concerns, so long as we focus on those individuals who have been *significantly involved* in proven misconduct, this would increase the penalties for financial crimes and help to restore confidence in honest asset management. Historically, the problem has been that senior managers often get off without any specific penalties, while more junior employees are sacrificed for following (illicit) orders, even where there is *little trusted whistle-blower protection* in the applicable jurisdictions (Cf. Switzerland).

VI. Proposal 6: (Referring to DOL Proposed QPAM Amendment Adding Section VI(t)—Recordkeeping.)

- **Add a six-year record-keeping requirement to ensure that evidence of compliance with QPAM exemptions is preserved.**

- **Our Comment on Proposal 6: *This fills a critical need.***

This record-keeping requirement would protect vital DOL records against the vagaries of changes in administrations, and help to make DOL a more trusted regulator. This could also be combined with a rewards program for frauds exposed by whistle-blowers from anywhere in the world, encouraging them to come forward if they detect QPAM misbehavior. It might also be supported by a policy of providing the public -- including civil society NGOs as well as journalists -- with greater "freedom of information"- type access to such records.

VII. Proposal 7: (Referring the effective Dates in the Preface to DOL's Proposed QPAM Amendments).

- T**he amended QPAM Exemption will be effective 60 days after the date of publication in the Federal Register.** As currently drafted, the proposed amended Exemption does not include any transitional relief.

- **Our Comment on Proposal 7: *For Proposals 1 to 3 above, the sooner the better.***

With respect to proposals 1-3 above, a practical maximum for generally-compliant institutions should be 30-60 days at most. On an exceptions basis, transitional relief might be offered if a QPAM promptly notifies DOL and justifies its need for more time. On the other hand, if serious, deliberate criminal activity turns up during this period, the amended Exemption standards should have immediate effect.

Some of the other DOL proposals admittedly may require significant administrative work for all QPAMs, so a more lenient schedule should be considered.

Comment Re the Costs of DOL's Specific Proposed QPAM Amendments

One of our key concerns with any such new "enforcement" measures, however meritorious, is budgetary. In practice, it is not yet clear what the budgetary impact of all these new enforcement measures will be. DOL's Office of Exemption Administration may well need additional resources to staff, train, and support the expanded enforcement activity implied by these proposals in the often technical area of global FI misconduct. Yet so far, to our knowledge, no proposed budget for such incremental costs has been prepared or submitted to the public for comment. Absent such resources, it is not clear how much difference they will make.

The goal of these efforts is not to make DOL a criminal investigator, but a manager of honest QPAMs that have proper incentives to be regulate themselves appropriately. But this will require an investment.

Can DOL persuade the **ultimate beneficiaries of better QPAM regulation -- pension funds, honest pension fund managers, and taxpayers at larger -- to go to bat for the required resources?** If history is any guide, there will be many financial institutions and their professional minions on the other side. To cover such incremental enforcement costs more automatically, DOL may want to consider adopting the kind of very low **percentage-of-pension fund transactions-based fee** on QPAMS that the SEC levies on stock market trades, to cover such costs.

BEYOND THIS QPAM AMENDMENT

Our final comment is to recall just how important this somewhat technical-sounding "QPAM Amendment" discussion really is.

As DOL learned the hard way in the Credit Suisse case, *"A shoe-maker does not just make one shoe."* This is true in several different senses.

- ***First,*** it is wise to remember that much corporate misconduct is not really a question of individual morality. There really are individual institutions that have, over time, acquired *cultures* of corruption and "higher immorality," where individual staff are subject to enormous pressures to not rock the boat. The *systemic* financial chicanery that was highlighted by the 2014 DOJ plea bargain within CS *did indeed turn out to be just the tip of the iceberg* -- but it was hardly the first warning, as our 2015 testimony made clear.

- This underscores the need for DOL regulators to take corrective action *sooner,* rather than to assume that corporate misbehavior is self-correcting or the result of "a few bad apples." In CS's case, it is clear that if DOJ and DOL had done so, we might have avoided a plethora of *subsequent* costly scandals. For example, the 2021 Archegos Capital collapse included a reported $5.5 billion loss for CS alone; the Mozambique fraud cost that poor country at least

$1 billion; the $10 billion Greensill supply-chains funds debacle in 2020-21, and the 2022 OCCRP "Suisse Secrets" whistleblower case, which one of the signatories helped to investigate, and exposed continuing CS involvement in money laundering in dozens of countries.

This is not to mention the fact that *Credit Suisse itself might well be much better off today. not to have lost the 85% of its equity value* since its May 2014 US DOJ plea bargain. As of fall 2022, it is obviously struggling to survive, with an equity market capitalization of just $11.7 billion market cap.[1] When we started this dialogue with DOL in 2015, it had a $50 billion value; in 2007 it peaked at $87.7 billion. Who says that crime pays? ***Maybe regulation pays.***

- ***Second,*** while CS may indeed have set records with the sheer global scale of its financial chicanery, it is *highly unlikely to be the only QPAM engaged in artful dodging*. This is a key reason why we support DOL's proposed QPAM Amendment -- after all, the CS horse is out of the proverbial barn. And everything we've learned from the 2008 Global Financial Crisis as well as other financial crises tells that FIs -- in particular -- are subject to cycles of highly-competitive, self-destructive "races to the bottom," when FI after FI fall over themselves to imitate each other's *worst* business practices.

  Along these lines, we have already developed a short list of leading global FIs with QPAMS that may be prime candidates for *pro-active* DOL QPAM "ineligibility investigations" -- assuming the necessary political will and resources.

- ***Third,*** US financial regulators -- the Federal Reserve, the US Treasury, CFTC, FINCEN, FINRA, the FATF, the OCC, the SEC, and state regulators -- are often accused of having dropped the ball, and of being a bankster playground of Balkanized, rivalrous regulators. They have had a tough time keeping up with the sheer creative chicanery and political clout of the global financial industry.

  So is this all a fool's errand? Is DOL's quest for stricter QPAM standards likely to be able to withstand the financial services industry's likely response?

  In this regard, it is well to remember that the US still leads the pack when it comes to *actually investigating and prosecuting banksters* for financial crimes like fraud, bribery, tax dodging, and sanctions busting. In other words, while the track record with respect to CS has hardly been perfect, the odds that it or any other major FIs would have faced similar sanctions in any other OECD country are nearly zero.

  Some say the US should relinquish this kind of leadership -- that its relatively pro-regulation stance is Victorian and self-defeating. We say that it is precisely the opposite. The so-called "finance curse" -- the *profound* negative effect of an outsized financial services sector on sustainable, equitable growth -- is a *person-made* disaster, not a natural one. The US and its

[1] CS's stock price peaked at $31.84 in April 2014, just before the DOJ plea deal was announced. As of October 7 2022 it is trading at $4.85, after announcing a $10 billion debt buyback.

key regulators have an essential role to play in showing how to reign in this sector's grotesque excesses.

Respectfully submitted,

(signed)

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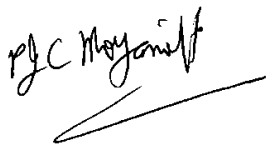

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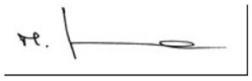

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