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October 7, 2014

Office of Exemption Determinations,
Employee Benefits Security Administration,
Room N-5700, U.S. Department of Labor,
200 Constitution Avenue NW.,
Washington DC 20210, Attention:
Application No. D-11819.
moffitt.betty@dol.gov,

Dear officers,

On behalf of more than 350,000 Public Citizen members and supporters, we write to object to the Department of Labor's proposed exemption for convicted criminal firm Credit Suisse from the mandatory penalties provided under the Employee Retirement Income Securities Act rules, and we ask for a public hearing.

Firms that engage in criminal activity should face real consequences. Where those consequences are excused, the firm is invited to become a repeat offender; and the deterrence effect for other firms is nullified. Pension fund beneficiaries are especially vulnerable to Wall Street abuse because their savings may be managed by firms they do not even choose, let alone control. As overseer of the nation's ERISA-governed funds, the Department of Labor bears the heavy responsibility of policing the integrity of the pension fund management industry. The DOL must apply all its tools to achieve this lofty goal. They should be used, not routinely discarded. We understand that the DOL has granted exemptions for all 23 firms that have requested them since 1997, following criminal convictions or other situations. [1]

Congress approved the Employee Retirement Income Security Act (ERISA) against a backdrop of pension fund abuse. [2] The overriding mandate of ERISA is to hold pension fund managers to a

[1] "Credit Suisse awaits DOL asset manager exemption," Pensions & Investments, (June 2014),a available at: http://m.pionline.com/article/20140602/ONLINE/140609982/credit-suisse-awaits-dol-asset-manager-exemption

[2] *See, e.g.,* H.R. Rep. No. 93-553, *as reprinted in* 1974 U.S.C.C.A.N. 4639 (describing the 1963 bankruptcy of the Studebaker Automobile Company, and associated collapse of the Studebaker pension plans, due to inadequate funding requirements under then-current tax law), and ''Teamsters: Trouble, Trouble, Trouble,'' *Pensions &*

high standard. In administering ERISA, the Department of Labor appropriately restricts managers of pension funds from investing in certain complex and higher risk investment strategies that may enable unscrupulous fund managers to engage in the harmful activities. One exception is when the asset manager wins certification as a qualified professional asset manager (QPAM). A QPAM and its affiliated firm must demonstrate financial acumen and integrity. When a QPAM or an affiliate is convicted of a crime, the QPAM automatically loses that blanket authority to invest in these complex and higher risk options. The reasons are self-evident. Convicted criminal operations should not be permitted to engage in risky investments (if they are permitted to manage money at all). A clean criminal record constitutes a bottom line requisite for sound money management. Loss of business protects beneficiaries and serves as an appropriate penalty and necessary deterrent.

The Credit Suisse Case

The Department of Justice found that Credit Suisse engaged in widespread criminal activity. According to the Statement of Facts filed in the criminal case, Credit Suisse admitted to "decades" of "knowingly and willfully" helping US clients escape US taxes.[3]

As a result of this, the QPAM rule is clear: Credit Suisse must forfeit certain QPAM privileges. In the 1982 notice establishing the QPAM regime, the Department of Labor emphasized that firms that manage money with these special privileges "are expected to maintain a high standard of integrity." If a QPAM or "various affiliates have been convicted of various crimes," these privileges terminate.[4] The rule itself expressly names "income tax evasion" as one of the various crimes that demonstrate a loss of integrity. [5] The rule explicitly identifies infractions by both the QPAM and "any affiliate thereof." [6]

As a QPAM, Credit Suisse engages in investment strategies that include complex activities.[7] The cost of liquidating these investments would be about $450,000.

Despite the criminal conviction, despite the bright lines of its own QPAM rule, despite the rather minimal liquidation cost, despite the fact that Wall Street seems rarely to pay any price for crime, the DOL proposes to excuse Credit Suisse from the mandatory penalties provided in its own rule.

Investments, Oct. 19, 1998 (describing the Teamsters Union's Central States pension funds' issuance of low interest loans to Las Vegas casino developers and union officials from the 1950s onward)

[3] See Federal Register notice, (September 2014), available at: https://www.federalregister.gov/articles/2014/09/03/2014-20884/notice-of-proposed-exemption-involving-credit-suisse-ag-hereinafter-either-credit-suisse-ag-or-the#footnote-6

[4] Notices, Department of Labor, 47 FR 56945-01, (December 21, 1982)

[5] Notices, Department of Labor, 47 FR 56945-01, (December 21, 1982)

[6] Notices, Department of Labor, 47 FR 56945-01, (December 21, 1982)

[7] Among these: involve syndicated bank loans, high yield bonds, structured asset backed securities that trade over-the-counter in the primary and secondary markets, futures, structured notes, total return swaps, and other derivatives, hedge fund sectors such as long/short equity, event driven, and managed futures using liquid tradable instruments, forwards, and options.

The DOL recites Credit Suisse's argument that its criminal activity did not involve the plans it manages. This contention blatantly ignores the agency's own rule. The DOL's rule applies to infractions by the QPAM *and* any affiliate. If the Department considered that only infractions by the QPAM constituted grounds for terminating the QPAM status, it would have so limited the scope of its rule.

The Department also recites Credit Suisse's argument that no QPAM employees participated in the criminal activity described by the Department of Justice. The Department of Justice has not described which Credit Suisse employees were responsible for the crime. Consequently, this claim about QPAM employee culpability cannot be immediately verified. The Senate Permanent Subcommittee on Investigations demonstrated that more than 52,000 Americans held Credit Suisse accounts for the purposes of evading US income tax liability. Given that at least some of the US citizens may have engaged in the type of sophisticated investments facilitated by Credit Suisse QPAMs, it is conceivable that Credit Suisse's QPAM employees were, in fact, involved.[8] Even if no QPAM employees were involved in the criminal tax evasion conspiracy, the QPAM rule does not provide an exemption based on employee department. On the contrary, the rule enumerates at some length the affiliate employees who are held to the "high standard of integrity" which includes a record clean of criminal convictions.[9] For example, the Department applies this high standard even to a "relative" of an employee of a firm with QPAMs who is convicted of a crime.[10] It stands to reason that if the Department considered it important to ensure that relatives of bank employees with QPAMs should be held to a high standard, then it should not exempt employees of a QPAM, especially when the Department of Labor cannot definitively dismiss the possibility that they were part of the criminal activity.

The DOL takes comfort that the QPAM will be subject to a special audit. This independent auditor would undertake extensive training and subsequent compliance review. We welcome this safeguard. However, the Department then claims that the exemption will require no additional monitoring because the work would be performed by this independent auditor. We believe the contrary is true, as the Department will need to verify all of the special training and results. The simpler and more effective administrative task, in terms of deterring future criminal activity, would be to remove the QPAM privilege as the rule dictates.

The DOL is bound by the IRS Code 4975 (c) (2) before it can permit an exemption. The code says that the Secretary "may" grant an exemption, but only if the exemption is "administratively feasible," "is in the interests" of the plan, its participants and beneficiaries, and "protective" of their "rights. Further, the Secretary must "afford an opportunity for a hearing."

First, we note that these tests do not oblige the Secretary to grant an exemption, only that he "may" grant it only if the tests are met. That is, even if Credit Suisse meets the tests, the Secretary may still deny the exemption.

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[8] "Offshore Tax Evasion," investigation by the US Senate Permanent Subcomittee on Investigations, (February 26, 2014), available at: http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-tax-evasion-the-effort-to-collect-unpaid-taxes-on-billions-in-hidden-offshore-accounts

[9] Notices, Department of Labor, 47 FR 56945-01, (December 21, 1982)

[10] Notices, Department of Labor, 47 FR 56945-01, (December 21, 1982)

Second, we do not believe that Credit Suisse meets these tests. We do not believe that Credit Suisse has demonstrated that retaining its QPAM status where its parent has been convicted of a massive criminal conspiracy, which is a named cause for QPAM termination, is "in the interests" of pension plan participants and beneficiaries. Those who decide that it is unwise for their savings to be managed by a firm with a criminal record have a more immediate remedy than waiting for a Department of Labor determination—they can dump Credit Suisse. There are others, however, who may not even know that some of their savings are managed by Credit Suisse. For these beneficiaries, the Secretary must act with care. Reliance on the assertions and pledges of a firm convicted of decades of criminal activity would not seem to evince care.

We recognize that determining what is "in the interests" of beneficiaries is a vague and subjective. But we believe a criminal conviction provides as firm a foundation as the DOL would need to allow a rule to be upheld, instead of excused.

For these reasons, we respectfully object to the proposed exemption and request a hearing where this issue can be addressed in open discussion. For questions, contact Bartlett Naylor at bnaylor@citizen.org, or 202.580.5626.

Sincerely,

Bartlett Naylor
Financial Policy Advocate
Public Citizen's Congress Watch