

PANEL 3: NEGOTIATING THE AGENCY PEACE TREATY: REORGANIZATION PLAN NO. 4

MODERATORS:

Phyllis Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration

Mark Iwry, Deputy Assistant Secretary of Treasury for Retirement and Health Policy

Alan Lebowitz, Deputy Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor

PANELISTS:

Ian Lanoff, past Administrator, Pension and Welfare Benefit Programs, U.S. Department of Labor

Dianne Bennett, Legislation Attorney, U.S. Congress Joint Committee on Taxation, Attorney-Advisor, the Office of Tax Legislative Counsel, U.S. Department of Treasury

Norman Stein: This is the third panel and the only panel that deliberately takes us beyond 1974. In 1978, the jurisdictional problems that we heard about in the earlier panels were addressed by the agencies in Reorganization Plan No. 4,¹ and we have with us today two of the principal people who drafted Reorganization Plan No. 4: Ian Lanoff, who was then Administrator of what today we call the Employee Benefit Security Administration, and Dianne Bennett, who was then an attorney at the Tax Legislative Counsel in the Department of Treasury. We also have with us Alan Lebowitz, who was then working in the Department of Treasury on fiduciary matters and, as a result of the Reorganization Act, was transferred to the Department of Labor, where he brought his expertise on the prohibited transaction rules to that agency.

To my left we have the two people who are today living with Ian and Dianne's handiwork: Mark Iwry, who is Deputy Assistant Secretary at the Department of Treasury for Retirement and Health Policy, and Phyllis Borzi, who's Assistant Secretary at the Department of Labor for the Employee Benefits Security Administration.

1. Reorganization Plan No. 4 of 1978, 5 U.S.C. app. (2006) [hereinafter Reorg Plan 4].

The first question I have is this: Before the reorganization plan, how were regulations and guidance initiated by the agencies? Was there consultation before a project began? And, more broadly, how well did the agencies cooperate or consult?

Dianne Bennett: Actually, I'm going to turn that over to Alan since you were in both agencies.

Alan Lebowitz: Well, I don't think the problems that the reorganization plan sought to fix were the result of a lack of communication. There was a lot of inter-agency communication. There was a lot of conversation. There was a lot of sharing of ideas and information. I think some of it was, frankly, that the concepts were very new and somewhat vague, and everybody had his or her own idea about what they meant.

It's hard enough within a single agency to sort through all the different points of view and different ideas that people have. When you have to do that twice and go through the organization up through the chain of command to get sign-off twice, it's going to take four times as long, which is what happened. We heard a lot in some of the other panels about the jurisdictional fights on the Hill. All that was concluded by Congress, at least from my perspective at the staff level, was that both agencies will do everything and then threw Title III into the statute,² which says to the agencies, "Get along with each other and make sure everything works okay."

But it was very difficult. The thing that was really the lightning rod, I think, for much of the controversy was the exemption process.³ I was at the IRS at the time, where no one really knew what an exemption was. The IRS never did anything like an exemption before, at least not with respect to individual tax matters. An exemption was a proceeding that required notice in the *Federal Register*, public comment, as well as public hearings. IRS proceedings are never public and the idea of publishing notice and having public hearings on an individual tax matter was simply foreign to them.

2. See 29 U.S.C. §§ 1201-04 (2012) (setting forth rules for jurisdiction, administration, and enforcement of ERISA, which include an emphasis on coordination between the Department of Treasury and the Department of Labor).

3. Sections 406(a) and (b) of ERISA prohibit a fiduciary from engaging in a variety of transactions in which a conflict of interest may pose a threat to a benefit plan. Section 408(a) of ERISA authorizes the Secretary of Labor "after consultation and coordination with the Secretary of the Treasury" to grant exemptions to the restrictions imposed by Sections 406(a) and (b). Employee Retirement Income Security Act of 1974, §§ 406(a)-(b), 408(a), 29 U.S.C. §§ 1106(a)-(b), 1108(a) (2012).

And then the standards for granting exemptions—very lofty but vague concepts, in the “interest of participants,” “protective of participants,” and “administratively feasible”—were in the eye of the beholder.

So all of that sort of combined to create gridlock, which the reorganization plan sought to fix. But getting back to the original question, it wasn't for lack of trying. There was plenty of cooperation, plenty of good faith on the part of the staffs to try to work it out. But this was just an impossible task given the time and how little guidance there was in the statute about what all that meant.

Dianne Bennett: Ian, do you want to respond from the perspective of the Department of Labor?

Ian Lanoff: Yeah. It was funny, when we were preparing for this panel, we were on the phone and Dianne was saying that everything that happened was based on personal relationships. I think this is definitely a situation where that's true. She and I worked together on the Hill for a year before we joined the Carter Administration. I was the pension person on the Senate Labor Committee and she worked on the Joint Tax Committee, and so we became very aware of the problems in implementation of ERISA in almost every regard.

It stemmed from what you heard about earlier, the Congressional committees preserving their jurisdiction and not being willing to give it up, so they paraded this unwieldy and poorly theorized administrative procedure and just dumped it on two agencies that were totally unprepared in any way—I'll speak for the Labor Department when I went there—in any way to address the complex legal issues. For example, as Alan mentioned, the legal issues surrounding prohibited transaction exemptions.

By the time we joined the Carter administration, we knew what had to be done and we sort of hit the ground running, and this idea of reorganizing the agencies and their jurisdictions was in the forefront of our thinking. It was our first priority and thank goodness, since I had no connections really at Treasury or the IRS, Dianne did and she used, again, her personal relationships and we were able to work it out. I'll let her describe—because I think it's fun how it actually came about.

Dianne Bennett: I am taking to heart what Frank Cummings said earlier,⁴ that maybe this is all sort of what I wanted to have happened, but it all seemed pretty simple to me. We have two people in the audience who probably know it better than I do: Al Lurie, who was at the IRS at the time, and Dan Halperin, at Treasury. I was a baby lawyer. In fact, Dan used to—I told him yesterday—used to roam the halls saying, “Where’s a real lawyer?” He wasn’t looking at me. So it all didn’t seem that complicated to me, and in fact yesterday Ian said to me, and he said it again to me today, “Now which one of us came up with this idea?”

It’s interesting that I think it was so obvious to us, it was so clear. We weren’t really concerned about jurisdictional turf, we just wanted to make the thing happen, and although I was a baby lawyer I had very good contacts in my office because I came from Buffalo, the law firm of Don Lubick, who was the Assistant Secretary of the Treasury for Tax Policy. I said to Don, “Here’s this idea,” and he said, “Well, set up lunch with Ian.” And Don being kosher said, “And make it a Chinese Lunch.” So Ian and I always say Reorg 4 is really just the Chinese Lunch Deal.

The three of us went to lunch, as I recall downstairs at a Chinese restaurant near Treasury. And you recall mapping something on a napkin, right? Unfortunately, you don’t still have the napkin.

Ian Lanoff: No, I should have saved it and framed it.

Dianne Bennett: But that was kind of the deal, and I don’t remember it being difficult to go forward and that Reorg 4, which is in your materials, is relatively short. I think it was the shortest thing we ever drafted at Treasury. [Laughter] I seem to recall—and Al, tell me if I’m wrong—I seem to recall a meeting in your office because you were not part of this plan at that point, and obviously you were going to be critical to the whole thing—and you raising some objections to it, and Don saying, “This is the way it is,” and you were fantastic in implementing it. I mean, I thought you’d never speak to me again, and you do. [Laughter—amidst laughter Al Lurie says “I love you”]

I love you too, but it really seemed to me to roll out very easily and I think the most interesting thing about how it happened is having Alan [Lebowitz] here, because he, as Norm said, is the one who

4. See Remarks of Frank Cummings, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 267–68 (2014).

actually – well, you said, Alan, you actually didn't have to, but your whole staff switched sides and Al Lurie – that you kind of said, "Okay, if this is the way it is, this is the way it is." I mean, jurisdictionally to sort of cede jurisdiction, to say, "My employees are now going over to Labor." It all happened with such good grace. I'm not sure that could happen today – well, maybe it could with you two guys. That's my story.

Ian Lanoff: It wouldn't have happened if I wasn't able to persuade Alan to come over and bring his people over, because I knew, again, from overseeing the Labor Department during that year on the Hill that the Labor Department did not have any talent. They may have been talented in other ways, but they were not talented with respect to figuring out the complex transactions that were being proposed where people were seeking complex exemptions.

That was before the Solicitor's Office started recruiting people from the SEC, who were also a big help to us, and those people working with Alan and his staff, which came over from IRS, were able to really get the exemption process, both individual and class exemption programs, working at a high speed almost immediately. We were granting class exemptions it seemed like every day because there was such a bottleneck before Reorganization Plan No. 4. But the interesting thing is I didn't remember that there were obstacles raised because we had to get this approved by Congress.

Dianne Bennett: Minor detail.

Ian Lanoff: For some reason I guess time just smoothes things out. My memory was that it just sailed right through. But some of the documents that people found that we looked at in preparation for today reminded me that we actually did have some difficulties, we did have to go up and meet with some of the Congressmen. Dan [Halperin] remembers a story of heading over to the AFL-CIO, which he says rejected one of the ideas the Treasury had for what they wanted to hold onto.

I didn't think – I don't know about Dianne – I didn't think that much about theory in terms of what should be at the Labor Department and what should be at Treasury. My interests, I was young – today I don't know if I would be as bold – but I was interested in fiduciary standards and prohibited transactions, so I wanted it in Labor and I wasn't interested in what I gave to Treasury. [Laughter] In defense of what I just said, it wasn't only that. I felt that the Labor Department was better equipped to enforce fiduciary standards

against multi-employer plans because some of the corruption in the Teamsters' plans and elsewhere is what gave some impetus to the passage of ERISA. It just seemed to me that we could do it better because we understood. I formerly had been General Counsel of the United Mine Workers Health and Retirement Funds so I understood multi-employer plans and how they worked and how they invested, so I thought that belonged with us.

With respect to some of the provisions that we sent over to Treasury, Karen Ferguson was very critical, gave me a hard time I remember, saying that the Labor Department should enforce participation and vesting rules. And I said, "Quite frankly, based on my experience with the labor movement, certain parts of it, the building trades in particular, that was one thing I didn't think I could really enforce without undue interference and I thought the IRS would do a better job of enforcing those rules and making companies in other plans comply with those rules." There was that aspect to it also, who could enforce these provisions best and what I just said was what I concluded.

Al Lurie⁵ [from the gallery]: You made a point, while you were still involved at Labor figuring out what to do. Within hours of the time I got my job, Steve Sacher, from Labor, was coming over to my office. We were faced with "What are we going to do with the Teamsters?" Immediately, we had no idea how we were going to integrate at that point. We were marching up to the Hill, without knowing the ground rules and not recognizing all the problems. I remember my reaction, "Labor is in bed with the IRS? That's what I call an obscene act." [Laughter] We weren't even thinking about that. We had a remarkable working relationship. We had to. Right from the start we had the same Congressman pointing to us, "Why did you do that?" "No, we did that, Congressman." [Congressman John] Erlenborn⁶ once corrected [Congressman John] Dent⁷ with just that remark: "We did that, Mr. Chairman."

Alan Lebowitz: Al, you might also remember that one of the first things that we all had to face right after ERISA passed was the secu-

5. Alvin D. Lurie was the first Assistant Commissioner of Internal Review for Employee Plans and Exempt Organizations, a position created by ERISA. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 1051(a) (amending 26 U.S.C. § 7802).

6. See Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 286 n.32 (2014).

7. See Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 295 n.10 (2014).

rities industry coming to both agencies and saying, “Unless you do something, the stock market won’t open tomorrow.”

Al Lurie [from the gallery]: And by midnight.⁸

Alan Lebowitz: And that was something that we all worked on together and it ultimately resulted in the first class exemption 75-1, which saved the economy, by the way.⁹ [Laughter]

Donald Myers [from the gallery]: I second Alan’s comments. I was at Department of Labor at the end of ‘75 and I was one of the Department of Labor’s representatives on this joint board with Alan, trying to figure how to administer the exemptions. I had the great title of the Special Assistant to the Associate Solicitor. We’d meet regularly to try to work this through. One of our major accomplishments was to develop joint letterhead. [Laughter]

And in fact, the Department of Labor was on one side of a table and the IRS was on the other side, and then we had to start responding to the exemption requests and we didn’t have time to develop a unique letter for each exemption request, so we had to use a form letter, personalizing it for each request, but we had to come up with language that everyone could use for everything. Everyone would get the letter and say, “Oh, this was written for me.” So we came up with some language that said, “We’ve reviewed your application and we’ve determined that you have not adequately demonstrated that those transactions meet the various statutory requirements for an exemption.” I think they’re still using some language similar to that today, but I think we did work well together but the problem was we all recognized that trying to administer this process with two separate agencies with two separate perspectives with two separate mandates was very difficult, and so I think we all believed in the reorganization but, like Alan said, it didn’t reflect the fact that we weren’t really [indecipherable]. It was just an impossible task.

8. Al Lurie adds: “And by midnight” is a response to Alan Lebowitz’s observation about Class Exemption 75-1. We were asked to deliver a prohibited transaction exemption to a key securities industry group prior to midnight on New Year’s Eve in 1974, on very short lead time, which greatly disrupted the holiday plans of those of us at IRS and our colleagues at DOL who were working on the matter. Not without difficulty, we satisfied the request.

9. See Prohibited Transaction Exemption 75-1, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers, and Banks, 40 Fed. Reg. 50845 (Oct. 31, 1975).

Dianne Bennett: It actually surprises me today to look back at that period and see how smoothly Reorg Plan 4 went, given it was undoing basically a lot of the dual jurisdiction that seemed necessary—when you think of the previous panel,¹⁰ it seemed necessary in creating ERISA—and maybe it was because it was proving so difficult that it came out the way it did. I think there are two relevant documents that Ian circulated. One is a transcript of a hearing in the Senate on the plan.¹¹ And Dan [Halperin], you were at the hearing and Ian was at the hearing in September of 1978 and to me it's kind of remarkable how willing everybody was to go along with the plan at that point, given how they were carving out their areas so fiercely before that. I actually didn't remember the hearing and then I realized I had already left Treasury by that time, so I wasn't at the hearing. But it seemed to me it actually went remarkably smoothly given the complexities of ERISA jurisdiction before that.

Norman Stein: Yes, Russ?

Russell Mueller [from the gallery]: Let me add a footnote. Prior to and leading up to all of this, there were hearings with regard to the problems that existed and Congressmen John Dent and John Erlenborn actually introduced a single agency bill which would have placed the IRS employee-plan people for qualification purposes, into the single agency, as well as all the fiduciary reporting, disclosure—there'd be one report—not one report to PBGC, and one to this agency and one to that agency—they'd all be within a single agency. And I think that the hearings that were held kind of gave impetus to this movement and Jim Hutchinson, the original administrator at DOL, Steven Schanes, Executive Director of the PBGC, Bill Chadwick, who was then consultant to the Department of Labor. I have a hearing record here, and they testified in favor of the single agency, so there was still, even post-ERISA, interest in legislation to create a single agency—and Javits had his own bill in the Senate in support of the effort—but Senator [Lloyd] Bentsen¹² had a slightly different approach to the whole thing so the same jurisdictional issues

10. See Remarks of Jack Sheehan, in Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 302–03 (2014); Remarks of Russell Mueller, in *id.*, at 305.

11. *A Reorganization Plan to Improve the Administration of the Employee Retirement Income Security Act of 1974, Pursuant to 5 U.S.C. 903 (91 Stat. 30): Hearing Before the S. Comm. On Governmental Affairs, 95th Cong.* (1978).

12. See Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 281 n.28 (2014).

were tantamount at the time and led to the multi-agency duplication, which was unfortunate —

Alan Lebowitz: I remember the then IRS commissioner, Don Alexander, at the time — he had very strong views about a single agency.

Dianne Bennett: And I wonder which one it was.

Alan Lebowitz: He was absolutely determined that everything would end up at the IRS.

Norman Stein: I have three additional questions I wanted to ask, or topics I wanted to suggest for discussion, before turning to Mark and Phyllis about how things are working with the Reorg Plan today. One of them — in the hearing that was just discussed that Dan Halperin testified at and that Ian Lanoff testified at, a lot of that hearing was devoted to the long time it was taking to get approval of prohibited transaction exemptions, and I wondered whether that was some of the pressure which led to the Reorganization Plan, or whether the impetus was largely internal, generated by the agencies themselves wanting a smoother, more efficient process, with people on the Hill basically interested bystanders?

Ian Lanoff: I don't remember specifically, but I'm sure that that was part of the push for doing something. I had worked for a Democrat on the Senate Labor Committee, Pete Williams of New Jersey, but I'd also worked closely with Javits and his people — one was from New York, one was from New Jersey. I don't remember specific meetings or anything, but I'm sure that was part of the pressure that was being brought to bear on them to do something about this mess, but I don't remember anybody suggesting what we came up with. But it's just funny, as Dianne said, it just seemed so obvious.

Dianne Bennett: To us anyway. Dan?

Daniel Halperin [from the gallery]: I don't know if I was actually a bottleneck [in the prohibited transaction process], but I was required to sign these things before they went out of Treasury, and I can remember that pile in my office. And they were all big and every time I looked at them I said, "I haven't got a clue what I'm doing."

Dianne Bennett: You're talking about the proposed regulations, right?

Daniel Halperin [from the gallery]: No, I'm talking about the—

Dianne Bennett: Oh, prohibited transaction exemptions—

Daniel Halperin [from the gallery]: And I just felt like every time I signed, "I'm going to jail in ten minutes." So, getting them over to Labor was really a plus, but I think—

Phyllis Borzi: Welcome to my world, Dan. [Laughter]

Norman Stein: One interesting thing that Dan wrote to us after we had our meeting preparing for this conference was that at some point Treasury apparently was having second thoughts and wanted to take back a little bit of the fiduciary jurisdiction.

Daniel Halperin [from the gallery]: I don't know what the issue was, do you remember?

Dianne Bennett: No, I don't remember that. I was going to say that I thought one of the documents—I think again, Ian circulated to us on a panel—was the required report two years after the Reorg Plan. It's a Joint OMB [Office of Management and Budget] Executive Office Study where a single agency is again brought up, but basically it shows the thing was working. I mean, that was kind of what was amazing to me, and it wasn't just the prohibited transactions—that was what you mainly talked about in the hearing—but the regulatory backlog was something else too, because both agencies had to sign off on all the regulations, so guidance just wasn't getting out there to people until the Reorg Plan. Yes, it was both ways, not just regulations.

Daniel Halperin [from the gallery]: We wanted some authority for prohibited transactions but I have no idea what it was. [Laughter] As I told you, we went to talk to the unions because we were told—Jim mentioned this last night that he thought that that was really important—we were told this plan was not going to go through Congress unless the unions signed off. Jack Brooks, who was the Chair of the House Government Operations Committee, said "without union agreement, no," so Larry [Woodworth] and I went to see the AFL-CIO. Larry was involved in the whole thing and he thought he was a good negotiator so he said he'd go, but we got nowhere.

Dianne Bennett: It's interesting because Ian and I were talking about the timing of all this. I didn't get to Treasury until, I think, the summer of '77 and Larry died early December '77, so sometime in that period we'd already had the Chinese lunch. We'd probably already had the Memo of Understanding, which document I don't have, but it would be interesting to see that document, between Treasury and Labor. We'd already been to Al [Lurie's] office, so a lot happened in about three months, I think.

Alan Lebowitz: There's one part of the Reorg Plan that's not often thought about, but aside from exemptions and regulations, there's a provision actually in Section 103 that requires the IRS to give the Labor Department notice before it proposes to disqualify a plan based on a violation of the Exclusive Benefit Rule.¹³ Essentially applying fiduciary standards to the tax qualification rules, and that was a direct outgrowth of the Teamsters. The Central States disqualification that some of you might remember was an enormous event.

Al Lurie [from the gallery]: About 11,000 plans of trucking companies whose pension plans were provided, pursuant to collective bargaining agreements, under the multiemployer plan of the Central States Teamsters Union, were disqualified.¹⁴

13. See Reorg Plan 4, § 103.

14. Al Lurie adds: Almost immediately after the enactment of ERISA on Labor Day in 1974, a joint investigation of the alleged improper actions of the trustees of the Teamsters Plan was launched by the IRS, headed by its Assistant Commissioner Lurie, and DOL, whose actions regarding the Teamsters union were under the leadership of Steve Sacher, Solicitor of the DOL Employee Benefits Security Division. That investigation, constantly monitored by the Tax and Labor Committees of the Congress, was not just "an important event," as Alan Lebowitz characterized it in this Symposium, but, judging by the attention devoted to it by the Congress, one would suppose that the Teamsters plan was viewed as the single most important such plan in the country and absolutely essential to the retirement security of the nation's workers. It provided the first test of the ability of IRS and DOL, two administrative agencies of the U.S. government having no prior experience of working together, to demonstrate whether they could effectively discharge the joint responsibilities thrust upon them by ERISA's commands. Their actions, performed in the glaring spotlight of the ongoing Congressional oversight and continuous coverage in the press, led to their jointly devising a remedy whose chief sanction was the removal of the entire slate of the Plan's trustees and their replacement by independent trustees, designated by the agencies, possessing the requisite expertise to deal with the Plan's extensive real estate and securities portfolios and the authority to rid the Plan of the unsavory lending policies favoring Las Vegas casino owners at the expense of the Plan's participants. The government's leverage for enforcing this broad stroke rested on the authority of the IRS to disqualify the Central States' pension plan, which the District Director of the IRS field division in Chicago (locus of the Central States headquarters) exercised promptly upon the development of the foregoing plan of action. While the sanction was effective, it fell not only on the wrongdoers, but also immediately disqualified every one of the approximately 11,000 pension plans of the truck-company sponsors of the Teamsters'

Alan Lebowitz: So that was another factor I think in the Reorganization Plan—to kind of make sure that that couldn't happen again based on the action of one district director somewhere at the IRS.

Dianne Bennett: What did you say, Dan?

Daniel Halperin [from the gallery]: We wanted to be able to act without [the Department of] Labor's acquiescence. That's what we were worried about.

Norman Stein: Okay, so something new has come out of this discussion. I wanted to turn to Phyllis [Borzi] and Mark [Iwry] and ask them two questions, and one is: How is the reorganization plan working today? And the other is less a question than an invitation. I wanted to invite them to ask Dianne [Bennett] and Ian [Lanoff] and Alan [Lebowitz]—

Dianne Bennett: — what were you thinking? [Laughter]

Norman Stein: Anything they'd like to know now.

Phyllis Borzi: Okay, well, having had the benefit of thirty-five years of Reorg 4, I have to say that I began my congressional career—I was a baby lawyer when ERISA passed and the first thing I did when I came to the Hill was Russ [Mueller] and I monitored, if you will, the Reorg 4 process. As a new lawyer I had basically the same reaction that several of you probably have had and certainly

multiemployer pension plans. Within days of the Plan's disqualification, the Employee Plans division of the IRS National Office and the Office of the IRS Chief Counsel devised and announced relief for the participating plan sponsors under Section 7805(b) of the Internal Revenue Code, which enables the Secretary of the Treasury (and hence the IRS, as his agency within the Treasury charged with qualification of retirement plans) to "prescribe the extent . . . to which any ruling . . . shall be applied without retroactive effect." As a participant in the discussion leading to that determination, along with the then IRS Chief Counsel, Meade Whitaker, Lurie has informed the editors that the Service personnel in those discussions readily agreed that the obvious fairness of sparing plan sponsoring employers and their participating employees from the harsh effects of a remedy that would punish them for actions for which they clearly bore no culpability fell well within the broad discretion given to the Service to temporarily suspend the Plan's qualification for dereliction of duty by its fiduciaries, conditioned on the immediate resignation of the then existing board of trustees, to be followed by reinstatement of the Plan's qualification upon satisfaction of the conditions. With the passage of forty years, the number of practitioners, teachers and students currently or formerly engaged in the pension field having anything more than a dim awareness, if that, of this important part of the ERISA story almost at the very moment of its creation has dwindled down to scarcely a handful. As comments by several of the participants in the development of Reorganization Plan No. 4 clearly intimate, the Central States disqualification was very much in their minds. The organizers of this Symposium hope, by this footnote, to rescue this story from obscurity.

Karen [Ferguson's] reaction, which is it really made no sense to me that participant protections went to Treasury and the financial pieces of the law went to the Labor Department.

I'm not sure that I, even now, thirty-five years later, figured out whether that was the best or not, but I think that we had the benefit of the work that you all did, and I actually think, and Mark will have his opportunity to say as well, that the Reorg Plan has worked very well. We coordinate, we talk to each other. We sometimes have disagreements and so we have to work out our differences, but it doesn't seem to me that except for a couple of areas that I'm going to hold for the second part of your question, what in the world were you thinking? I think it has worked very well and I think the evidence that the Reorg Plan worked very well is the way these issues have developed, the coordinated way that these issues have developed on the health side, because ERISA was really mostly about pensions.

There are a lot of people—it makes me crazy when I go to conferences and people purport to be experts and say, "It was merely drafting error on the part of Congress that welfare plans were included." I don't want to get into that debate now, but if you look at what we did, what Congress did, because by that time I was, as I said, on the Hill and so I got to work on some of the first pieces of fleshing out the health care jurisdiction, I think Congress learned some lessons and continues to learn some lessons—well, it may be a bit dysfunctional now, but at least for a while it learned its lesson.

In the health care arena, the first substantive expansion of ERISA's health care provisions, which were largely a shell, except for preemption, were the health and drugs continuation provisions in COBRA.¹⁵ And there, Congress, following a tradition that Russ and I started with frustration about getting the agencies to coordinate, Russ reminded me last night that we started to put provisions in bills that required the Secretaries to talk to each other.

But the way when the COBRA provisions, the health insurance continuation provisions, were developed they were a single set of provisions and the agencies had to, in essence, recapture the spirit of Reorg 4 in deciding how to parcel them out. And that didn't really work very well, and by 1996 when Congress passed the HIPAA provisions,¹⁶ the Health Insurance Portability and Accountability

15. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986).

16. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 101-191, 100 Stat. 2548.

Act, and I might say back on the COBRA provisions—for the first time we had a new actor into this docudrama, which was HHS [Department of Health and Human Services]. So we had our usual coordination issues—Treasury, the [Internal Revenue] Service, Labor, but now we had a whole new agency that was completely unaccustomed to dealing with anything in the employer world, and that has been an interesting learning experience.

In 1996, what Congress did was rather than leaving it to the agencies to carve up jurisdiction, what they did was they put parallel provisions in all three statutes, in part to make sure that they covered the waterfront in terms of covered entities, but then they said the three agencies have to work together and issue tri-agency regulations. And then if you fast-forward to the process that we have under the Affordable Care Act,¹⁷ a couple of the issues that you all talked about that Congress wanted to deal with have in fact been dealt with, or at least we get our regulations out faster, because we've been forced to work together. Is it a time-consuming process? Yes. When you think about the policy issues and the things that may potentially divide the Treasury and Labor points of view, think about the provider point of view, which is largely what HHS has brought to the table in the past.

So I think that the seeds that were sown in Reorg 4 really served us well going forward, and I think on balance it has worked well. There's always going to be problems and kinks, and as I said, I'll come back to that in answering your second question.

Mark Iwry: First of all, Norman [Stein], Jim [Wooten], congratulations on holding this conference. I think this is an amazing gathering, and you've organized it terrifically, the idea of an oral history of ERISA. Capturing these really incredible stories and real history is invaluable and you can see from the amazing turnout of experts and leading figures in the history of this whole field—including least of all, those of us who are currently under the gun with the urgent driving out the important—Phyllis and I are juggling our Blackberries and so forth, you know, but we wouldn't miss this for the world. There are all kinds of balls that are crashing back in Washington right now that (happily) our staffs are dealing with one way or another, but we really deeply appreciate your doing this and so I am here mostly to listen and learn from the wiser heads who are here. But what an opportunity for us to get all these gaps filled in

17. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

and to hear about it from the people who were actually putting it together.

A word about building on what Phyllis mentioned, reflecting on the point you just made, Phyllis, that in a sense we had the opposite of Reorg Plan 4 in the healthcare area when—especially in '96 when Congress enacted these three identical statutes, all driven, of course, by similar immutable facts of life, congressionally—

Phyllis Borzi: Because then we had five committees because we also had [the] Commerce [Committee].

Mark Iwry: Exactly, so congressional turf jealousy and power struggles, frankly, that drove all of ERISA and the way it was organized and HIPAA and other laws since then. The idea that instead of divvying up the subject matter, different agencies would have to simultaneously agree on every jot and tittle of the interpretation, have literally identical multi-hundred page regulations, not only agree on the policy, but agree on the law, agree on the tactics, and even if we could agree on what needed to be said and done, we then had to agree on how to say it and do it.

And that worked also, and I think really the Affordable Care Act process of rulemaking and regulation, which is not what is at issue this month, where the operational aspect of the exchanges are the focus, but the three and a half years of rulemaking that have preceded this on the various key provisions, are something that, as Phyllis says, have really worked very smoothly. The disagreements are inevitable, over policy or particular issues, but to me it is striking how both the Reorg Plan approach of divvying up the jurisdiction and then having to coordinate over the edges and make it all relatively seamless, how that has generally worked and how even the more challenging, “Everybody does it all simultaneously and together” has worked.

Frankly, although this is a somewhat ahistorical or idiosyncratically historical view, the people matter a lot. I mean, I've never heard that story, Dianne, that you and Ian were telling about the Chinese Lunch, but knowing Don Lubick, knowing Al Lurie, knowing Dianne, knowing Ian [Lanoff] and Alan [Lebowitz] and Dan [Halperin], working with Don, it is not at all surprising. For those of you who do not know them, it would not be at all surprising if those half-dozen people could create peace in the Middle East in a few months.

What would be surprising is if—most folks, if you took sort of most bureaucrats or congressional staffers and put them in that po-

sition, I do not think you would have come up with a Chinese Lunch. I think you would have come up with a food fight. Frankly, I think that has more to do with it than anything, and the fact that it's worked now I think also has a lot do with who is involved. Frankly, my colleague Phyllis here, I can't think of anyone I would rather have over at Labor to coordinate with and that is a factor that this kind of conference can actually focus on because we have time for this and we can look not only at the sort of cold organizational history and history of constituencies and interest groups, but also at the details and who was involved.

Dianne Bennett: It is interesting because before you started on that last bit, I wrote one word down here and circled it, which was "people." It's the people. What's your title now?

Mark Iwry: It would take the rest of the conference to actually give you it.

Dianne Bennett: But there was no pension title within Treasury in 1977. You were the first one to hold the deputy position.

Mark Iwry: Well, there was—I mean, Dan [Halperin], sort of, for example, de facto did this work when he was there.

Dianne Bennett: I know people did it de facto, but I'm saying there was no position at the time.

Mark Iwry: And to your point, Dianne, yes, it was done in two phases. There was a Benefits Tax Counsel established at Treasury in '91, and Tom Terry was the first one, Evelyn Petschek and Randy Hardock and various ones of us and myself and George Bostick does that now. And the reason is actually relevant to all of this for establishing that position in that office, and then we further elevated it by creating—I had the fortunate bargaining power when the Obama administration came in of being able—you know, the Secretary sort of said, "Come in and do whatever you want and make up your title or titles and we'll do it."

So I said, "Let's have a Senior Advisor to the Secretary for Retirement and Health Policy," to try to elevate this, and the Deputy Assistant Secretary for Tax Policy, in order to make sure that it was still rooted in the tax system so the person would have a staff. The idea there was to, in part, globalize and socialize the IRS culture, so that we could take all the advantages of the tax culture and the strengths

of the IRS, apart from being perceived as fearsome, which was not an inconsiderable strength in trying to enforce things—but the strengths of the IRS—and also expand things so that we wouldn't have that "Where you stand depends on where you sit" mentality causing problems with policy.

We tried to transcend the limits of bureaucratic and institutional perspectives and interests by beefing up the Treasury piece. When you have someone like Al [Lurie] at the IRS, you sort of have a person who can transcend it, but you cannot rely on that over the long term. And so Treasury is not just looking at IRS institutional considerations, and by having a Senior Advisor to the Secretary for this, even apart from tax policy, you can get beyond tax generally and say, you know, it might be better to recognize what the Labor Department is saying, and never mind even Treasury's interests, frankly, but in particular, never mind the IRS's and take it into account, but resolve it in favor of what Labor wants because there's something more important than institutional or turf issues, you know, the sort of good policy. I think you get that now from—on both sides. Phyllis lots of times and others will say things like, "You may think that I would come out this way on it, but I think Treasury is right or HHS is right and we ought to move in that direction."

Finally, the other thing that goes to your point, I think, Dianne, is that what really makes it cumbersome to have two departments or three departments is the classic model of having to resolve differences by going up to the Secretaries. And then having the Secretaries have to agree, duke it out, and if they can't, it goes to the President or the Chief of Staff of the White House. We have sort of solved that or avoided that. We almost never do that. We hardly ever have meetings at the Secretarial level that are necessary to iron out issues, very rare. Mostly, we work them out. That's partly because, frankly, the Assistant Secretary—at least when Phyllis is there, and I know this was true when Ann Combs was there and others—is so influential in the Labor Department and generally has the trust of both the Secretary of Labor and the White House and the respect of the Treasury to the extent that things can be worked out at that level. And similarly at Treasury we have tried to install—to your point about the title—people who would have enough influence that they could act for the Secretary, make most of the decisions and concessions and compromises.

Phyllis Borzi: I have a point about institutional as well. I think Mark's point is good, because of course what happened at the Labor Department when Ian was there, the top official was an administra-

tor of a program, and then, Alan, what year did it turn into an Assistant Secretary? I don't remember.

Alan Lebowitz: It was 1985. But it separated out in '84, when Bob Monks was the head of whatever we were called at the time, and then in '85 Dennis Kass was the first.

Phyllis Borzi: Yes, but I do think that Mark's point and Dianne's point about raising the level of these substantive issues institutionally also helps in terms of the coordination.

Ian Lanoff: Yes, although it might have been a bit easier when I was there though because everybody above me was so afraid of ERISA.

Dianne Bennett: But see, I had the opposite and that was —

Ian Lanoff: Secretary of Labor for ERISA —

Dianne Bennett: I was really fortunate because Dan [Halperin], as he explained before, knew pensions. In fact, what did you say? You knew more about ERISA than anybody else when you got to Treasury, and I will not say the other part of your comment. And Don Lubick knew pensions, he had done pensions at Hodgson, Russ; so, to have people in the hierarchy who get pensions at a time before there was a Special Counsel or anything made a huge difference I think in what we could accomplish.

Al Lurie [from the gallery]: You act as if the IRS were an integral unit within itself and therefore you can talk about the IRS position and the DOL position and the HHS position — but it's not necessarily so. Congress, in enacting ERISA, put in a provision that said there shall be an Assistant Commissioner of Internal Revenue for Employee Plans and Exempt Organizations and friends of mine, when I would disagree with Don Alexander, who had a, well, strong personality — [Laughter] — said, "You can tell them to . . ." well — we don't work that way. But Congress did not trust the IRS to deal with pensions and they gave me eighteen supergrades and a budget by statute. Another way of dealing with a problem that is internal.

Norman Stein: We are running short on time, but we can take a few comments. Russ?

Russell Mueller [from the gallery]: Congress often does not learn from past experience. Part of that is there is such turnover in Congress and among staff, although Phyllis mentioned the 1996 HIPAA law, which had a provision that led to the opposite of the ERISA development. The first bill was drafted in the House and we put in this provision so when it went to the Senate, that structure instructed all three agencies to work together. It worked and it had to work, I mean otherwise how could it have been accomplished successfully. Otherwise you'd have the kind of ERISA stagnation we sometimes see in Congress: "Are we going to do it, aren't we going to do it," all the jurisdictional fights. So hopefully that provision can serve as a model.

Frank Cummings: I suddenly remember where they all came from — Iz Goodman,¹⁸ who was running the IRS branch out of his hat without benefit of regulations. CCH [Commerce Clearing House] was publishing his speeches and when you went into his office and argued with him he would pull one of his speeches off the shelf and say, "Here is the law" and in fact it was.

And the motive for that particular section creating the Assistant Commissioner, as I recall now, at least my motive, was as a matter of statute I wanted to put in charge someone other than Iz Goodman, and this was effectively an abolishment. That's what I had in mind. I had nothing against Izzy, he was a lovely fellow, but this was no way to run a circus. [Laughter]

Al Lurie [from the gallery]: There was a real Isidore Goodman — I have a photo here, Isidore Goodman is in the photo. When I came, he became my advisor.

Norman Stein: And he lived to be a hundred, right?

Al Lurie [from the gallery]: Not quite. He was always Mr. Goodman. He was a very formal man.

Mark Iwry: You've put a new twist on the idea that people matter.

Norman Stein: We'll close by letting Phyllis and Mark ask any questions.

18. See Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 271 n.8 (2014).

Phyllis Borzi: I had a couple, but I'm just going to ask one. Given what our current regulatory priorities are now at the Department of Labor—and I am not going to bore you with them because there's a whole panel on the fiduciary section later on—one of the questions that I had and one of the things that we're wrestling with now, and so my question is: Was there any thought given to the—let's see, can I be colloquial and say screwy—way that IRA [Individual Retirement Account] jurisdiction has played out?

Where the Labor Department having the authority under Reorg 4 to deal with the substantive aspects of PTs [Prohibited Transactions], but the enforcement being the excise tax at the IRS and what we have seen over the years is there is virtually no interest in the IRS in ever enforcing the prohibited transaction excise taxes regardless of what substantive violations of the conflict rules exist in IRAs. So, the market has developed acting like there are no current conflict of interest rules. Was there any thought or discussion about IRAs then or were they just too new?

Alan Lebowitz: There was, because it ended up rather confusing in a sense because IRAs are not Title I plans, but the Labor Department was given responsibility for interpreting the tax code provisions—the prohibited transaction provisions at least—that relate to IRAs and to grant exemptions for IRAs. But remember that the Reorg Plan was sort of an administrative thing, it didn't change underlying authority, so that whatever enforcement authority existed remained after the Reorg Plan, so it could not have transferred anything from the IRS to the Labor Department with respect to enforcement, because there was nothing to transfer.

Phyllis Borzi: Yes, maybe I should have asked the prior panel that question.

Alan Lebowitz: The Labor Department was never going to be administering an excise tax provision. And I think sort of at the policy level that the idea was that IRAs may be individual savings accounts, tax-favored savings accounts, but they are still retirement accounts, and that the rules—the PT rules and to a degree the fiduciary rules—should apply in the same way that they apply to any other kind of tax-favored retirement program. So that was really why it happened, it creates some oddities sometimes in the way the process plays itself out because in those circumstances, when we are dealing with an exemption that relates to an IRA, we do ask the IRS

if they see any tax abuse issues and so there is a bit of continued overlap there.

Norman Stein: I want to close this, but as I said when I did the introductions, I was a little concerned about time, and I'm still a little concerned about time, but I've decided to take a couple of moments to mention two omissions when I introduced Ian [Lanoff] and Alan [Lebowitz]. One is not really very important, but Ian was my first boss after I entered law school when I went to work for the United Mine Workers Health and Retirement Funds and he was a great boss, but he did tell me that I was an ERISA fiduciary when I reviewed applications for benefits. I think he was wrong about that now, but I worried a lot about it that summer because he said we could be sued if we made errors.

Alan has been the Deputy Assistant Secretary at the Department of Labor for almost thirty years. And he is retiring the last day of October, on Halloween, which seems oddly appropriate for this statute, full of treats and tricks. He is truly one of the most compassionate and capable public servants I've ever known.