



January 5, 2011

Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Definition of "Fiduciary" Proposed Rule

Dear Ms. Borzi:

On behalf of the nearly 30,000 members of our respective professional associations of real estate appraisers, we welcome the opportunity to comment on the Department of Labor's ("DOL") Proposed Rule on the definition of "fiduciary". The proposed rule offers a wholesale revision to its regulation that defines the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. The proposed rule will affect whether appraisers, consultants, insurance agents, and others who work with pension and 401(k) plans and IRAs will be deemed to be fiduciary investment advisors. The consequences of being a fiduciary include a difference in the duty of care applicable to one's conduct, prohibitions on receipt of additional fees, prohibitions against recommending affiliated products or services, and prohibitions against engaging in principal transactions.

Our organizations are deeply concerned by the proposal's extension of fiduciary status under ERISA to real estate appraisers. We believe the proposed rule will unnecessarily increase liabilities (and hence, costs) for appraisers, needlessly driving competent appraisers from the marketplace, while increasing costs to users of appraisal services. Given conditions facing the real estate market and the economy as a whole, arming investors with competently prepared and unbiased real estate information is of critical importance and central to the economic recovery. We respectfully ask the DOL to suspend the effort to extend fiduciary status to real estate appraisers given that they do not provide "investment advice," and in light of the myriad of enforcement outlets that protect the appraisal profession and users of appraisal services.

Role of Real Estate Appraisers

As you may know, the role of real estate appraisers is to provide objective, impartial, and unbiased opinions about the value of real property to their client. Many appraisers are retained to provide such opinions by pension funds and other institutional investors for a variety of reasons, but including mortgage financing, portfolio monitoring, financial reporting and asset management. The role of the appraisal is primarily risk management relating to real estate.

In the proposed rule, DOL contends that real estate appraisers significantly influence the decisions of plan fiduciaries, and have a considerable impact on plan investments. Further, the DOL claims that these advisers may operate with conflicts of interest that they need not disclose to the plan fiduciaries who expect impartiality and often must rely on their expertise.

These statements are incorrect. Real estate appraisers do not act as advocates, but rather objective third parties who provide opinions of value based on research and analysis. The very definition of an appraiser is "one who is expected to perform valuation services competently and in a manner that is independent, impartial and

objective.¹ *Independence* and *objectivity* are two characteristics that differentiate the services of our members from those conducted by real estate agents, investment advisors, accountants and others providing value opinions in the market. Appraisers do not give *advice*; rather they provide an objective read of the property value given observed market conditions.

We firmly believe that offering investment advice is vastly different than providing objective opinions of value. One who offers investment advice is acting as an advocate for their client. Further, a fiduciary is someone who advocates at all times for their clients². Under the Uniform Standards of Professional Appraisal Practice (USPAP), it is prohibited for appraisers to accept contingent fees. Further, under the Ethics Rule of USPAP an appraiser “must not advocate the cause or interest of any party or issue.” Lastly, USPAP does not permit an appraiser to accept an assignment if the appraiser would be biased. Further, if the appraiser has an interest in the property or parties, the appraiser can accept that assignment only if (1) having the interest does not cause the appraiser to be biased and (2) the interest is disclosed to the client up front and in the report.

For these reasons, we strongly object to including real estate appraisers in the same category as those who give investment advice when real estate appraisers, in the normal course of their practice, do real estate appraisals subject to USPAP and professional standards and rules.

Existing Enforcement Outlets

Our organizations share your concern with incompetently performed - or even fraudulent appraisals - that is why we firmly believe that the best way to gain a clear analysis of current market trends and reduce risk is to have appraisals prepared by competently qualified appraisers with greater than minimum standards and a designation from accepted international valuation organizations.

Existing regulations governing valuations of real property provide ample protection for the general public. Real estate appraisers already face significant federal and state regulation, including minimum state licensing and robust self regulation by those who participate in professional appraisal organizations such as ours. They are subject to a myriad of fraud statutes and they are subject to state appraiser licensing laws, which include USPAP. These standards carry the force of law, and many appraisers lose their licenses every year as the result of USPAP violations or other transgressions. Adding a fiduciary liability will simply increase costs and drive away competent appraisers.

Moreover, regarding an appraiser’s adherence to USPAP, this is no different than any other context, one party or another may have an interest in seeing a transaction done at a certain valuation, but the appraiser has a professional duty to provide his best impartial opinion. Federal banking law has required the participation of appraisers in certain transactions without imposing a fiduciary duty and it is our view, banking law should be the model for ERISA on this point.

Employee Stock Ownership Plan (“ESOP”)

It is our understanding that a great deal of DOL’s concern relates to Employee Stock Ownership Plans (ESOPs). As you may know, the standards of practice and oversight of this segment of appraisal are vastly different than real estate. Where real estate appraisers adhere to a common set of uniform standards and a nationally licensing

¹ From the *Uniform Standards of Professional Appraisal Practice*. Definitions. Available at <http://www.uspap.org/2010USPAP/USPAP/frwr/definitions.htm>

² “In a fiduciary relation one person, in a position of vulnerability, justifiably reposes confidence, good faith, reliance and trust in another whose aid, advice or protection is sought in some matter. In such a relation good conscience requires one to act at all times for the sole benefit and interests of another, with loyalty to those interests.” Available at <http://en.wikipedia.org/wiki/Fiduciary>

regime, ESOP appraisers do not. We urge the DOL to recognize the differences in regulatory structures as it moves to develop a final rule.

Need for Proposed Rule

Our organizations have conferred with errors and omissions insurance providers to the real estate appraisal profession regarding this proposed rule and appraisal work conducted for pension funds. These firms are not aware of any claims being brought by pension funds for the performance by real estate appraisers. This suggests that the perceived problem in real estate appraisal may be little or insignificant.

Still, we understand and share the DOL's concerns about enforcement in the appraisal profession. There are segments of the profession (business and personal property appraisal, for instance) that are not subject to state licensing requirements, like real estate appraisers. Still, the function of the appraiser as an independent professional is the same.

To the extent that we can help the DOL understand the appraisal process and assist with appraisal reviews and enforcement, we would be pleased to do so. Our organizations have an extensive body of knowledge and significant resources that may be helpful in building legitimate fraud cases. For instance, the Appraisal Institute has provided training to the Federal Bureau of Investigation for agents and analysts involved in residential and commercial mortgage fraud issues, and we have provided extensive information to the federal Financial Fraud Enforcement Task Force. Further, the American Society of Farm Managers and Rural Appraisers has extensive coursework and an accreditation program for Rural Property Review Appraisers (RPRA) for appraisal review. This professional avenue is used by many in the appraisal review function within the Federal Government as well as the private sector. We would be pleased to meet and discuss the possible ways that we can help in the area of pension fund investments oversight and enforcement, not only as a matter of public interest, but to avoid increasing costs or driving highly competent professionals from this important segment of the marketplace.

Thank you for the opportunity to comment on the Proposed Rule. Should you have any questions or need additional information, please contact Bill Garber, Director of Government and External Relations, Appraisal Institute, at 202-298-5586 or bgarber@appraisalinstitute.org, or Brian Rodgers, Manager of Federal Affairs, Appraisal Institute, at 202-298-5597 or brodgers@appraisalinstitute.org.

Sincerely,

Appraisal Institute
American Society of Farm Managers and Rural Appraisers