

February 25, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

Attn: Definition of Fiduciary Proposed Rule

The American Institute of Certified Public Accountants (AICPA) Employee Benefit Plan Audit Quality Center (EBPAQC) Executive Committee is pleased to comment on the U.S. Department of Labor's (DOL) proposed rule on Definition of the Term "Fiduciary" (RIN 1210-AB32) which was published in the October 22, 2010 *Federal Register*. The proposal aims to more broadly define the circumstances under which a person is considered to be a fiduciary by reason of giving investment advice to an employee benefit plan or a plan's participants.

Under paragraph (c)(1)(i)(A) of the proposal, the types of advice and recommendations that may result in fiduciary status under ERISA section 3(21)(A)(ii) are:

- advice, appraisals or fairness opinions concerning the value of securities or other property;
- recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property; or
- advice or recommendations as to the management of securities or other property.

The proposed rule encompasses the same types of investment-related advice and recommendations as covered by paragraph (c)(1)(i) of the current regulation, except for the certain modifications, including , among other things, specific reference to advice and recommendations as to the management of securities or other property.

While we do not believe the intent of the proposed changes are to include communications by independent qualified public accountants (IQPAs) as defined in ERISA § 103(a)(3)(A), we are concerned that the proposed rule could be construed to include communications by IQPAs. ERISA § 103(a)(3)(A) requires a plan administrator to engage, on behalf of all plan participants, an independent qualified public accountant ("IQPA") to conduct an examination of the plan's financial statements in accordance with generally accepted auditing standards (GAAS). Further, IQPAs must adhere to independence standards in DOL Interpretive Bulletin 75-9 (29 CFR 2509.75-9) and the AICPA's Code of Professional Conduct Rule 101, *Independence*.

GAAS requires IQPAs to communicate to management and those charged with governance in the plan organization significant deficiencies and material weaknesses in internal controls noted in the audit. These communications may relate to plan investments, their management and valuation including, for

example, the concentration of risk in certain asset types, liquidity concerns for funding distributions, internal control weaknesses at asset managers, and the absence of timely updates of values. In addition IQPA engagement letters may specifically refer to the requirement to inform plan management about potential ERISA issues to the extent that come to the IQPA's attention.

Recommendation

We request that the final rule explicitly state that communications by IQPAs pursuant to GAAS and to satisfy the financial statement audit requirements of ERISA § 103(a)(3)(A) are not considered advice or recommendations that result in fiduciary status under ERISA section 3(21)(A)(ii) and paragraph (c)(1)(i)(A).

Thank you for the opportunity to comment. We would be happy to discuss our comments with DOL representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Lavenberg". The signature is fluid and cursive, with a large loop at the end.

Robert A. Lavenberg, CPA
Chair
Executive Committee
AICPA Employee Benefit Plan Audit Quality Center

Cc: Michael Davis, Deputy Assistant Secretary, EBSA
Ian Dingwall, Chief Accountant, EBSA