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Employee Benefits Security Administration  
Office of Regulations and Interpretations  
Attn: Public Hearing on Definition of Fiduciary, Room N-5655  
U.S. Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

The American Society of Appraisers (ASA) appreciates the opportunity to follow-up its testimony at EBSA's recent hearing on the proposed fiduciary rule with additional comments in response to the views expressed by DOL panel members and by other stakeholders. These additional comments continue to focus on the provisions of the rule which propose to include appraisers within the definition of "fiduciary" under ERISA.

ASA's February 1<sup>st</sup> comment letter and March 2<sup>nd</sup> hearing testimony specified the reasons for our strong opposition to the "appraiser-as-fiduciary" proposal and set forth our recommendations for strengthening the quality and independence of ESOP appraisals in a way which avoids the seriously negative consequences that the proposed rule would produce. We have urged - and continue to urge - EBSA to adopt the appraisal competency and accountability model utilized by IRS and all other federal agencies with responsibility for ensuring the integrity of valuations: Reliance on professional appraisers who have earned their valuation credentials by demonstrating competency, by meeting their continuing education obligations and by being accountable for the integrity of their work.

This communication elaborates on those views and responds to a number of the specific observations of EBSA panelists and other stakeholders, as follows:

- **The professional appraisal community involved in ESOP valuations universally opposes the proposed rule:** To the best of our knowledge and belief, all hearing witnesses and other commenters who represent organizations which credential professional appraisers or whose firms provide ESOP valuation services, strongly oppose the proposed regulation on a variety of grounds. The grounds most frequently cited against the rule involve the conviction (1) that it represents an untried and untested method for strengthening ESOP valuations; (2) that it is out-of-sync with the appraisal reform models utilized by all other federal agencies, most importantly the Internal Revenue Service which shares responsibility with DOL for enforcing the provisions of ERISA; (3) that it fails to even address the competency of those providing ESOP valuation services; (4) that it will result in significantly higher costs for ESOP appraisal services without any off-setting benefits to plan beneficiaries; and, (5) that it conflicts

with the Ethics obligation of all professional appraisers under generally accepted valuation standards (most prominently the Uniform Standards of Professional Appraisal Practice (USPAP)) to be fully independent of all parties and interests involved in an ESOP transaction. In our judgment, any of these factors, individually, would be a sufficient basis for the Department to abandon its appraiser-as-fiduciary proposal; collectively, they represent an insurmountable case for its rejection;

- **The community of professional ESOP appraisers recognizes, and is deeply troubled by, the inevitable conflict between an appraiser’s ethical independence obligations and their duty as a fiduciary under the proposed rule:** Every professional valuation practitioner who testified at the hearing raised the same unmistakable and strong objection to the proposed rule’s imposition of fiduciary status on appraisers: That appraisers, when performing an ESOP valuation, cannot be fiduciaries and simultaneously uphold their ethical duty to be independent of all parties to and interests in, the transaction underlying the appraisal. Despite the skepticism of EBSA panelists on this point, there is not a scintilla of doubt among professional ESOP appraisers that there is an inherent conflict between appraiser independence, on the one hand, and the duty an appraiser would necessarily have as a fiduciary to one or more parties to the underlying transaction, on the other. Given the unanimous conclusion of valuation practitioners that this conflict is unavoidable and would actually undermine confidence in the reliability of ESOP appraisals, we urge EBSA officials, as they review the proposed rule, to accord great weight to this conclusion;
- **Adoption of the proposed rule will cause many of the most experienced ESOP appraisers to leave this practice area:** We urge EBSA’s decision-makers to take seriously the testimony of ASA and the firms which offer ESOP valuation services that adoption of the “appraiser-as-fiduciary” rule would drive many of the most experienced ESOP appraisers out of this practice area because of the increased liability. We do not doubt that there are occasions when some stakeholders, in their zeal to defeat a public policy proposal with which they strongly disagree, will overstate the negative consequences of that policy if it is adopted. However, this is not one of those occasions. The vehemence and universality of the opposition to the proposed rule by the community of professional appraisers (together with the fact that the major firms providing ESOP valuations derive a relatively small percentage of their income from this book of business) should convince the Department that adoption of the rule as proposed will, in fact, drive many of the most experienced ESOP appraisers out of this practice area;
- **The appraiser independence vs. appraiser-as-fiduciary conflict cannot be eliminated or even mitigated by modifying the language of the proposed rule:** We totally reject the thesis, expressed by some DOL panelists, that the conflict between an appraiser as fiduciary and his or her obligation to be independent of all parties and interests can be

eliminated or mitigated by amending the proposed rule to clarify that an appraiser's independence obligations are equal to (or even that they take precedence over) the obligations of a fiduciary. We firmly believe that the benefits of such a construct are illusory, at best. Even with the addition of such "clarifying" language, appraisers would continue to be exposed to two distinct and often conflicting standards of care. These inevitable conflicts would be a source of ongoing concern and uncertainty by appraisers and would have to be sorted out through costly litigation or DOL administrative proceedings over many years on a case-by-case basis. The representational and internal costs to valuation firms to sort out whether the appraiser has properly balanced his or her independence responsibility with his or her fiduciary duty in a given valuation assignment will put all firms providing ESOP valuation services at financial risk (even if it is eventually determined that the appraisal was reliable); and further discourage them from continuing these services;

- **While ASA agrees that an appraiser's opinion of value can be central to some ESOP trustee decisions, this fact is not relevant to determining how best to strengthen the ESOP valuation function:** During the hearing, several DOL panelists went to great lengths to argue that ESOP appraisals are often a significant factor in or central to certain types of decisions by trustees. We are puzzled by the panelists' persistence on this point. ASA (and we're reasonably confident the other valuation stakeholders) readily accepts this thesis. However, the fact that an appraiser's opinion of value is sometimes central to a trustee's decision is, we believe, fundamentally irrelevant to the issue of whether making an appraiser a fiduciary is a prudent response, let alone the best one, to the Department's interest in improving the reliability of ESOP valuations;
- **Making appraisers fiduciaries could create unintended and unwelcome consequences for trustees who are also fiduciaries:** In situations where a valuation is a central or significant factor in an ESOP trustee's decision, the trustee nevertheless has a responsibility to consider other facts and circumstances that are relevant to that decision. The proposed rule would not diminish this responsibility; but, it could cause the trustees to rely disproportionately on the appraiser's valuation – rather than on the other relevant facts and circumstances – simply because it comes from a co-fiduciary;
- **All professionally designated appraisers, not just real property appraisers, are accountable for their work:** All individuals with valuation credentials, whether awarded by state agencies or by recognized professional appraisal organizations, are accountable for the quality and integrity of their work. Business appraisers, for example, are fully accountable to the discipline committees and sanctions processes of their credentialing organizations. When ASA's Ethics Committee receives complaints against its credentialed appraisers, it investigates and, when justified, takes disciplinary action. Between January 1, 2007 and February 28, 2011, ASA's Ethics Committee examined 101

complaints against ASA-credentialed members with the following results: 10 Letters of Caution; 1 Censure; 1 Expulsion; 1 complaint withdrawn; 17 No Violation Found; 11 Not A Valid Complaint; and, 54 corrections required for a member's misuse of ASA's website/membership status/ASA logo.

Importantly, ESOP appraisers are accountable to the federal government. EBSA's Enforcement Manual provides a number of examples of "ERISA Civil Violations" including "Failing to properly value plan assets at their current fair market value...". Even if DOL doubts the efficacy of its existing civil enforcement powers to sanction appraisers for abusive ESOP valuations, such individuals are accountable to IRS – which shares responsibility with EBSA to enforce ERISA - under its comprehensive valuation misstatement penalty regime and its Office of Professional Responsibility (OPR) requirements. If DOL is convinced that it lacks appropriate civil enforcement authority to sanction unprofessional conduct by appraisers (absent their being defined as fiduciaries), it should seek such additional authority from Congress. ASA would support such a DOL request so long as it included proper due process safeguards. ASA would also welcome an opportunity to explore with EBSA an arrangement under which the agency could refer to ASA concerns about misconduct or negligence by one of our credentialed appraiser in connection with an ESOP valuation, for consideration by ASA's Ethics Committee. We believe it likely that other professional organizations which credential appraisers would also agree to enter into such an arrangement with EBSA.

- **In connection with its effort to enhance oversight of ESOP valuations, DOL should consider hiring a team of professional review appraisers:** While we do not doubt that EBSA has a knowledge base which allows it to review some ESOP appraisals, we do not believe it has sufficient numbers of professionally credentialed appraisers on its staff (if any) necessary to review questionable appraisals at an efficient and effective level. DOL's efforts to improve its ability to oversee the reliability and integrity of ESOP appraisals would be enhanced by the establishment of a valuation specialist program along the lines of the one which exists at IRS. Hiring professionally credentialed appraisers to review the quality of ESOP appraisals is, in our view, an indispensable first step in improving DOL's oversight of the program;
- **As part of its establishment of an appraisal reform model similar to the one which exists at IRS and other federal agencies, EBSA may want to consider adding a feature to its version of the IRS model which prohibits parties with financial interests in an ESOP transaction, from improperly pressuring appraiser:** In connection with DOL's efforts to ensure the independence of ESOP appraisals and otherwise improve its ability to oversee and, when justified, sanction individuals for abusive practices, the Department should adopt the appraisal reform model used by the IRS and may want to consider additional provisions which amend its ERISA rules to

specifically prohibit improper or inappropriate efforts to influence the judgment of the appraiser. The new Dodd-Frank law includes language which strengthens the independence of appraisers by proscribing acts and practices whose purpose is to improperly influence the appraiser's opinion of value; and, by establishing civil money penalties for breaches of the anti-pressure provisions;

- **Two recent developments – one at DOL another at IRS – provide additional rationale for EBSA's adoption of the appraisal reform model used by IRS (and throughout the federal government) – reliance on professionally credentialed appraisers to ensure a high level of competency and independence:** ASA believes that DOL could make a smooth transition to the adoption of a rule that would be equivalent to the successful appraisal reform model used by IRS. We are referring to the August 30, 2010, EBSA proposed rulemaking (RIN 1210-AA98) relating to Prohibited Transaction Exemption Procedures, whose "independent appraisal" provisions are roughly equivalent to the IRS model we advocate. These independence provisions could be perfected and incorporated into a final rule governing appraisal practice in connection with all ESOP valuations. We also urge EBSA to consider recent guidance issued by IRS relating to the definition of the phrase "readily tradable on an established securities market" or "readily tradable on an established market." This guidance, which applies to employee stock ownership plans, reaffirms the Service's commitment to its requirement that when closely-held securities are valued for tax-related purposes, those appraisals must be performed by individuals who meet the Agency's definitions of a "Qualified Appraiser" and in a way which meets its definition of a "Qualified Appraisal". EBSA "adequate consideration" rule, proposed in the 1980s but not finalized, could easily be made to conform to this regimen.

Thank you for considering these additional comments along with our hearing testimony and comment letter on the proposed appraiser-as-fiduciary rule. The American Society of Appraisers would be pleased to work closely with EBSA to establish policies that address its ESOP valuation concerns.

Sincerely,  
American Society of Appraisers