

December 11, 2006

Mr. Michael G. Leventhal
Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attn: Independence of Accountant RFI (RIN 1210-ABO9)

Re: Independence of Employee Benefit Plan Accountants – Request for Information

Dear Mr. Leventhal:

We fully support the initiative undertaken by the Department of Labor ("Department") to evaluate the adequacy of the guidelines in Interpretive Bulletin 75-9 to promote the independence of accountants who audit employee benefit plans. Likewise, we appreciate the opportunity to provide input to the Department by responding to its request for information ("RFI"). The comments set forth in this letter reflect our views on the fifteen specific questions posed in the Department's RFI. We have not repeated those questions within the body of this response, but have instead, for reference purposes, included them as an attachment to this letter.

General comments

It is our view that the Department should formally adopt the independence standards promulgated by the American Institute of Certified Public Accountants ("AICPA") as set forth under Rule 101 – *Independence*, and its interpretations and rulings as contained in the AICPA *Code of Professional Conduct*. At a minimum, these standards are required to be followed in the performance of all attest engagements conducted in accordance with professional standards established by the AICPA (e.g., audits conducted in accordance with generally accepted auditing standards, as required for employee benefit plans under ERISA). In addition, many state boards of accountancy have adopted the AICPA's independence standards or have based their rules in large part on these standards. As such, the AICPA's standards are well understood by practitioners, are broadly known, are widely accepted by relevant parties in both the public and private sectors, and we believe are sufficiently robust to serve as a foundation for independence rules applicable to audits of employee benefit plans.¹ As a general principle, we

¹ Note that the AICPA independence standards currently address certain facts and circumstances unique to employee benefit plan audits, such as those discussed in Interpretation 101-3, *Performance of Nonattest Services*,

believe that independence guidelines should be uniform wherever possible, thereby facilitating common understanding and encouraging compliance. Therefore, formally adopting the AICPA's independence standards, as opposed to the development of a new framework, will contribute to the harmonization of standards that apply to audits of benefit plans and concurrently satisfy the Department's regulatory mandate by simplifying and promoting compliance. Further, we believe that the AICPA independence standards would be more appropriate than those of regulators cited by the Department (e.g., the Securities and Exchange Commission ("SEC"), and Government Accountability Office ("GAO")) because of other factors, such as -

- the active role taken by the AICPA in the independence standard-setting arena that includes a full-time dedicated staff and a standing committee, the Professional Ethics Executive Committee, comprised of knowledgeable professionals, including three members of the public, which assures the continued applicability and relevance of these standards and enables the AICPA to adapt its rules on a timely basis to regulatory and marketplace needs, including the needs of the Department, as they arise over time, and
- the robust exposure draft and comment process followed by the AICPA that offers due consideration to the positions taken by a broad range of interested stakeholders.

We believe these attributes are vital to producing relevant and timely independence guidance for practitioners and their benefit plan audit clients and are important components to ensuring that the rules continue to serve the public interest, including the interests of plan participants and their beneficiaries.

If the Department formally adopts the AICPA independence standards, certain adjustments to those standards may be needed to address the unique attributes of employee benefit plans, their activities, and their relationships with sponsors, participants, trustees, and third-party providers, among others. Such adjustments, in our view, might involve consideration or reaffirmation of certain elements of Interpretative Bulletin 75-9, such as whether certain requirements to maintain independence with respect to both the plan and the plan sponsor should continue, or the prohibition against maintaining financial records for the employee benefit plan (although we comment later on the term "financial records"). However, we believe that determining the exact nature and extent of such adjustments will necessitate a detailed and thoughtful analysis reflecting the insights and expertise of a number of stakeholders and constituents. We would, of course, welcome the opportunity to participate in such an endeavor in any capacity deemed appropriate by the Department.

The independence issues raised by the Department in a number of questions posed in the RFI (specifically, questions no. 1 – 3, 6 – 8, 10, & 12), would, we believe, be adequately addressed by the formal adoption of AICPA independence standards. These issues include the following:

Ethics Ruling No. 60, *Employee Benefit Plans – Member's Relationships with Participating Employers*, and Ethics Ruling No. 111, *Employee Benefit Plan Sponsored by Client*.

- Definitions of direct and material indirect financial interests, and the circumstances under which such interests would bear upon an accountant's independence (e.g., applicability to certain members of the accounting firm, relevant time period of prohibitions, and attribution of familial financial interests, among others), are addressed in AICPA Interpretation 101-15 – *Financial Relationships*, ET section 92 – *Definitions*, and other relevant guidance under Rule 101, its interpretations and rulings.
- Employment issues relating to the accountant's family members (immediate and close family members) are addressed in AICPA Interpretation 101-1, *Interpretation of Rule 101*.
- The scope of those individuals within an accounting firm to whom independence standards would apply is addressed by the "covered member" approach to determining who should be independent, as defined in AICPA Professional Standards - ET section 92, and incorporated in relevant interpretations and rulings.
- Both the provision of non-audit services to an attest client, and the consideration of how those services impact auditor independence, are set forth in AICPA Interpretation 101-3, *Performance of Nonattest Services*.
- The time periods during which independence must be maintained (i.e., the period of the professional engagement; the period covered by the financial statements) and their applicability to the various categories of independence requirements, are set forth in AICPA Interpretation 101-1 and are otherwise specifically referenced throughout the AICPA independence standards. In particular, the proposal put forth in question no. 8 of the RFI is addressed by the AICPA's financial interest prohibition, which is limited to the "period of the professional engagement," and does not extend to the "period covered by the financial statements." This is appropriate because the threat to the auditor's independence is eliminated once the financial interest is disposed of (i.e., the fact that the auditor once held an interest in the sponsor would not affect his or her objectivity during the audit since the auditor would be conducting the audit devoid of that interest). This also would relieve the undue hardship to the plan or plan sponsor that may result from circumstances where the plan seeks to engage a new auditor for the current year but that auditor is disqualified under the current rules because he or she held an interest in the plan sponsor during part of the year.
- Fee arrangements that would be considered impermissible with respect to an entity for which certain attest services are provided, are set forth under AICPA Rule 302 – *Contingent Fees* and Rule 503 – *Commissions and Referral Fees*, as well as their related ethics rulings.
- The *appearance of independence* as a fundamental precept is defined in ET Section 100.01 – *Conceptual Framework for AICPA Independence Standards*, and serves as an underlying principle that is reflected throughout AICPA independence and auditing standards.

As noted above, some adjustments to the AICPA independence standards may be required to ensure that all independence issues relevant to the audit of employee benefit plans are adequately addressed. In those circumstances, the AICPA independence standards noted above will nevertheless provide a useful frame of reference in considering whether, and to what extent, such adjustments may be necessary.

Specific comments

With respect to RFI questions no. 4 and 5, if the Department does not adopt the AICPA's independence standards, we believe that it would be appropriate for the Department to define the term "financial records" and to provide guidance on those activities that would constitute "maintaining" financial records, as these matters are of particular relevance to employee benefit plans and their auditors. We do not, however, believe that it is necessary for the Department to define the terms "promoter," "underwriter," "investment advisor," "voting trustee," "director," or "officer," as these terms are generally understood in the business, professional, and regulatory arenas.

With respect to RFI question no. 9, we do not believe that special provisions in the Department's independence guidelines for plans that have audit committees that hire and monitor an auditor's independence are necessary, as the creation of separate standards for entities that don't have audit committees and those that do, could prove complicated and perhaps counterproductive, possibly creating a disincentive to the establishment of an audit committee.

With respect to RFI question no. 11, we believe that a definition of the term "firm," although not critical, might prove to be helpful. Such a definition already exists in the guidance issued by the AICPA and we recommend that it serve as a basis for the Department's consideration of this matter, should it determine that a separate definition is necessary.

With respect to RFI questions no. 13 and 15, it should be noted that regulatory and professional guidelines currently require the auditor to establish written policies and procedures on independence, and therefore, an additional requirement enacted by the Department would seem redundant. Further, we are concerned that any benefit of a requirement for auditors to disclose to plan clients matters involving their independence may not exceed the cost that would be imposed on plan audit clients and their sponsors (e.g., to learn about various independence rules and understand how the auditor's policies and procedures promote compliance with those rules). Currently, no such requirement exists under any regulatory mandate or professional standard. As to the issue of independence disclosures to plan clients, it should be noted that the AICPA does not presently have such a requirement. We recommend that this be left to the discretion of the individual plans/plan sponsors and their auditors to determine whether under their unique facts and circumstances such a disclosure is appropriate.



Finally, with respect to RFI question no. 14, we believe that it is appropriate for the Department to adopt a formal disciplinary mechanism with regard to auditor independence. Referrals to another regulatory or professional body would be an effective means of accomplishing this end.

Once again, we thank you for the opportunity to participate in the Department's RFI process. Please feel free to contact us should you have any questions or concerns.

Yours sincerely,

A handwritten signature in cursive script that reads "PricewaterhouseCoopers LLP".

PricewaterhouseCoopers LLP

Attachment

Department of Labor Request for Information – Specific Questions Posed

1. Should the Department adopt, in whole or in part, current rules or guidelines on accountant independence of the SEC, AICPA, GAO or other governmental or nongovernmental entity? If the Department were to adopt a specific organization's rules or guidelines, what adjustments would be needed to reflect the audit requirements for or circumstances of employee benefit plans under ERISA?
2. Should the Department modify, or otherwise provide guidance on, the prohibition in Interpretive Bulletin 75-9 on an independent accountant, his or her firm, or a member of the firm having a "direct financial interest" or a "material indirect financial interest" in a plan or plan sponsor? For example, should the Department issue guidance that clarifies whether, and under what circumstances, financial interests held by an accountant's family members are deemed to be held by the accountant or his or her accounting firm for independence purposes? If so, what familial relationships should trigger the imposition of ownership attribution rules? Should the ownership attribution rules apply to all members of the accounting firm retained to perform the audit of the plan or should it be restricted to individuals who work directly on the audit or may be able to influence the audit?
3. Should the Department issue guidance on whether, and under what circumstances, employment of an accountant's family members by a plan or plan sponsor that is a client of the accountant or his or her accounting firm impairs the independence of the accountant or accounting firm?
4. Interpretive Bulletin 75-9 states that an accountant will not be considered independent with respect to a plan if the accountant or member of his or her accounting firm maintains financial records for the employee benefit plan. Should the Department define the term "financial records" and provide guidance on what activities would constitute "maintaining" financial records. If so, what definitions should apply?
5. Should the Department define the terms "promoter," "underwriter," "investment advisor," "voting trustee," "director," "officer," and "employee of the plan or plan sponsor," as used in Interpretive Bulletin 75-9? Should the Department include and define additional disqualifying status positions in its independence guidelines? If so, what positions and how should they be defined?
6. Interpretive Bulletin 75-9 defines the term "member of an accounting firm" as all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit. Should the Department revise and update the definition of "member?" If so, how should the definition be revised and updated?

7. What kinds of non-audit services are accountants and accounting firms engaged to provide to the plans they audit or to the sponsor of plans they audit? Are there benefits for the plan or plan sponsor from entering into agreements to have the accountant or accounting firm provide non-audit services and also perform the employee benefit plan audit? If so, what are the benefits? Should the Department issue guidance on the circumstances under which the performance of non-audit services by accountants and accounting firms for the plan or plan sponsor would be treated as impairing an accountant's independence for purposes of auditing and rendering an opinion on the financial information required to be included in the plan's annual report? If so, what should the guidance provide?
8. Interpretive Bulletin 75-9 requires an auditor to be independent during the period of professional engagement to examine the financial statements being reported, at the date of the opinion, and during the period covered by the financial statements. Should the Department change the Interpretive Bulletin to remove or otherwise provide exceptions for "the period covered by the financial statements" requirement? For example, should the requirement be changed so that an accountant's independence would be impaired by a material direct financial interest in the plan or plan sponsor during the period covered by the financial statements rather than any direct financial interest?
9. Should there be special provisions in the Department's independence guidelines for plans that have audit committees that hire and monitor an auditor's independence, such as the audit committees described in the Sarbanes-Oxley Act applicable to public companies?
10. What types and level of fees, payments, and compensation are accountants and accounting firms receiving from plans they audit and sponsors of plans they audit for audit and non-audit services provided to the plan? Should the Department issue guidance regarding whether receipt of particular types of fees, such as contingent fees and other fees and compensation received from parties other than the plan or plan sponsor, would be treated as impairing an accountant's independence for purposes of auditing and rendering an opinion on the financial information required to be included in the plan's annual report?
11. Should the Department define the term "firm" in Interpretive Bulletin 75-9 or otherwise issue guidance on the treatment of subsidiaries and affiliates of an accounting firm in evaluating the independence of an accounting firm and members of the firm? If so, what should the guidance provide regarding subsidiaries and affiliates in the evaluation of the independence of an accountant or accounting firm?
12. Should the Department's independence guidance include an "appearance of independence" requirement in addition to the requirement that applies by reason of the ERISA requirement that the accountant perform the plan's audit in accordance with GAAS?

13. Should the Department require accountants and accounting firms to have written policies and procedures on independence which apply when performing audits of employee benefit plans? If so, should the Department require those policies and procedures be disclosed to plan clients as part of the audit engagement?
14. Should the Department adopt formal procedures under which the Department will refer accountants to state licensing boards for discipline when the Department concludes an accountant has conducted an employee benefit plan audit without being independent?
15. Should accountants and accounting firms be required to make any standard disclosures to plan clients about the accountant's and firm's independence as part of the audit engagement? If so, what standard disclosures should be required?