

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) Forensic and Valuation Services Executive Committee (FVSEC) 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 FVSEC is authorized to speak on matters affecting forensic and valuation services on behalf of the AICPA, which is the national professional association of over 360,000 Certified Public Accountants.

We applaud the DOL's efforts of protecting the interests of plan participants and of the beneficiaries of employee benefit plans. However we are concerned that certain aspects of the proposed rule would inappropriately include persons providing appraisal and valuation services (such as to an Employee Stock Ownership Plans (ESOP) under the term "fiduciary" by redefining the longstanding definition of "investment advice." Our comments apply specifically to the change which will define the preparer as a fiduciary for ESOP valuations of employer securities for which there is not a generally recognized market.

We believe the effect of the proposed change is:

- incompatible with the Internal Revenue Service's requirements for an independent appraisal of employer securities,
- does not address the underlying issue of proper qualifications and standards for performing valuation services,
- will increase the cost of valuation services for ESOP plans, and
- will restrict the number of valuation specialists willing to do valuations for ESOP plans

Because of these issues, we believe the DOL should not change the definition of fiduciary, rather we believe the DOL should implement rules to ensure only qualified individuals prepare valuations for benefit plans and that individuals follow recognized valuation standards. Our reasons for concern are detailed below.

Independent Appraiser Required by IRS is in Conflict with Appraisers Considered a Fiduciary by DOL

The Internal Revenue Service, in IRC 401(a)(28)(C), requires an ESOP to obtain valuations by an independent appraiser at least on an annual basis. The purpose of the valuation is to determine the share price of shares distributed to plan participants. A plan meets the requirements of IRC 401(a)(28)(C) if all valuations of employer securities which are not readily tradable on an established securities market with respect to activities carried on by the plan are prepared by an independent

appraiser. The term “independent appraiser” means any appraiser meeting requirements similar to the requirements of the regulations prescribed under section IRC 170(a)(1)(see discussion below on qualified appraiser).

A fiduciary has an obligation to obtain “best execution” of a client’s transactions. In meeting this obligation, an adviser must execute securities transactions for clients in such a manner that the clients total cost or proceeds in each transaction is the most favorable under the circumstances (See Exchange Act Release No. 23170). If the appraiser is defined by DOL as a fiduciary, then this would almost certainly impair the appraiser’s independence. This is because the appraiser would be acting on his or her client’s best interest as a fiduciary. If the appraiser, as a fiduciary, would not be considered independent for purposes of performing the ESOP valuations, then this would cause an inherent conflict between the DOL and IRS rules.

Qualifications of CPAs as Professional Appraisers

The Proposed Rule notes that one of the most common violations found during the DOL’s Employee Benefits Security Administration (EBSA) national enforcement project is the incorrect valuation of employer securities. There are many assumptions and judgments made when the appraiser prepares an independent valuation. If a CPA appraiser intentionally misstates a valuation, the AICPA has a strict code of ethics and professional standards in place to address misstatement or fraud (<http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/sec100.aspx>). In addition to the AICPA’s Code of Conduct, state laws are in place to regulate CPAs to ensure that the valuation work is done with integrity, objectivity and independence. We propose that the DOL should work with the IRS to better define who is allowed to prepare employer stock valuations for ESOPs, building on the requirements currently included in Section 170 (a)(1)¹.

In addition to the AICPA’s rules and state laws, the AICPA has issued the Statement on Standards for Valuation Services No.1 (SSVS1), to which all members of the AICPA must abide. This standard requires that CPAs performing valuation services have professional competence, and the standard details minimum requirements for developing the conclusion of value and reporting on the conclusion of value. The standard can be found in its entirety at [Statement on Standards for Valuation Services No1](#)

If DOL requires the preparer to hold a CPA or other professional credential with similar high professional standards and enforcement procedures in place, and if the DOL requires valuations to be performed in accordance with comprehensive valuation standards, the risk of employer stock valuation misstatement would be mitigated.

Other Points to Consider

By changing the definition to include a valuation preparer within the scope of fiduciary responsibilities there would be an associated increase in employer stock valuation costs. Such valuation cost increases would negatively impact the investment to the plan participant. Increased appraiser costs from higher insurance rates and risk premiums would surely be passed on to plan participants, either by the plan

paying appraisal expenses directly or by decreased employer earnings affecting the value of the plan owned securities. The benefit of implementing these rules would in no way outweigh the cost to plan participants.

Finally, because of additional risks associated with fiduciary status for valuation preparers, a significant number of experienced valuation professionals would discontinue offering valuation services for benefit plans. The decrease in the number of available, quality professionals to prepare employer stock valuations would adversely affect plans by further driving up appraisal costs. The AICPA has received numerous comments from our membership, specifically those members who perform valuation services for an ESOP. These comments indicate that if these proposed rules are implemented, these CPAs will no longer prepare valuations for benefit plans.

Considering the aforementioned issues, the FVSEC strongly believes that including preparers of employer stock valuations and fairness opinions under the definition of fiduciary would adversely affect ESOP and benefit plan participants. That is, the FVSEC believes the employer stock appraisals should not be included in the proposed definition of a fiduciary. It is our opinion that the public would be best served if the DOL worked with the IRS to better define who should be allowed to prepare an employer stock valuation. We also believe that valuation preparers should be required to follow accepted valuation standards like the AICPA's SSVS1. If the person is independent and objective, and has the professional competence to perform the valuation (as required of CPAs in the AICPA's Code of Professional Conduct) then the risk of misstatement would greatly mitigated.

Regards

A handwritten signature in black ink that reads "Thomas Burrage". The signature is stylized and includes a large, sweeping flourish at the end.

Thomas Burrage, CPA/ABV,/CFF, CVA
Chair, AICPA Forensic and Valuation Services Executive Committee

¹ (E) **Qualified appraisal and appraiser**

For purposes of this paragraph—

- (i) **Qualified appraisal** The term “qualified appraisal” means, with respect to any property, an appraisal of such property which—
 - (I) is treated for purposes of this paragraph as a qualified appraisal under regulations or other guidance prescribed by the Secretary, and
 - (II) is conducted by a qualified appraiser in accordance with generally accepted appraisal standards and any regulations or other guidance prescribed under subclause (I).
- (ii) **Qualified appraiser** Except as provided in clause (iii), the term “qualified appraiser” means an individual who—
 - (I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary,

(II) regularly performs appraisals for which the individual receives compensation, and
(III) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance.

(iii) Specific appraisals An individual shall not be treated as a qualified appraiser with respect to any specific appraisal unless—

(I) the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal, and

(II) the individual has not been prohibited from practicing before the Internal Revenue Service by the Secretary under section [330 \(c\)](#) of title [31](#), United States Code, at any time during the 3-year period ending on the date of the appraisal.