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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

SENT VIA E-MAIL

Attn: Independence of Accountant RFI (RIN 1210-AB09)

Dear Sir/Madam:

We appreciate the opportunity to respond to the U.S. Department of Labor's (DOL) Request for Information (RFI) regarding the DOL guidelines on independence of accountants retained to audit employee benefit plans. In general, we believe that the DOL, in modernizing its independence guidelines, should attempt to harmonize its rules with those of other standard setters. The Securities and Exchange Commission (SEC), the Government Accountability Office (GAO), and the American Institute of CPAs (AICPA) all have differing independence rules. Such differing requirements can lead to auditor confusion and inadvertent errors in applying the rules. Because many auditors of employee benefit plans do not audit entities that are subject to the special requirements of either the SEC (relating to publicly-held companies) or the GAO (relating to governmental and other applicable entities), we suggest that the DOL harmonize its independence guidelines with those of the AICPA in its Code of Professional Conduct ("AICPA rules") which are well established and understood across the accounting profession in the US.

The questions included in the RFI and our responses are as follows:

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?

For many years, the AICPA has developed and maintained a comprehensive set of independence rules, interpretations, and rulings that have formed the foundation for auditor independence standards in the US. The AICPA rules have been fully responsive to the changing requirements of the profession, as reflected in the recent addition of a comprehensive independence framework. Therefore, KPMG believes that the DOL should harmonize its independence guidelines with those of the AICPA. However, with respect to certain matters, we believe there should be differences between DOL and AICPA guidance. Such differences are indicated in our responses below.

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?

We believe the DOL should modify the guidance in Interpretative Bulletin 75-9, principally with respect to the current application to the financial interests of all members of the accounting firm. We believe that the prohibitions on direct and material indirect financial interests should be directed at the accounting firm and those individuals in the firm that pose a threat to auditor independence, i.e. the members of the engagement team and those able to influence their decisions. Furthermore, we believe the rules should extend to the immediate family members of such individuals and, in certain circumstances, should also include the close family members of those individuals, such as where an interest in a plan or plan sponsor is both material and known to the individual. These modifications would result in consistency with current AICPA (and SEC) independence rules.

Application of the "covered member" concept of the AICPA rules will address the threats to independence posed by financial interests held by the audit firm and appropriate firm personnel. Under AICPA rules, a covered member includes the following:

- *An individual on the audit engagement team;*
- *An individual in a position to influence the audit engagement;*

- *A partner or manager who provides ten (10) or more hours of nonaudit services to the audit client;*
- *A partner in the office in which the lead audit engagement partner primarily practices in connection with the audit engagement;*
- *The firm, including the firm's employee benefit plans;*
- *An entity whose operating, financial, or accounting policies can be controlled...by any of the individuals or entities described above or by two or more of such individuals or entities if they act together.*

We also believe that it is in the public interest that the DOL guidelines include a provision that a firm's independence would not be impaired solely because of a minor, inadvertent violation of the financial interest rules by a covered member that is promptly corrected upon detection.

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?

We believe the DOL guidelines should include guidance on the circumstances when employment of an accountant's family member by a plan or plan sponsor would impair independence. We believe that the threats to independence related to the employment of an accountant's family member are adequately addressed by the AICPA rules, which are comparable to the rules of the SEC. The AICPA rules address threats posed by employment of a close family member (an individual's spouse, spousal equivalent, parent, dependent, non-dependent child, or sibling) in a "key position" at the audit client. Such key positions incorporate both accounting roles and financial reporting oversight roles, and include those roles in which an individual is in a position to, or does, exercise more than minimal influence over the contents of the financial statements.

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?

We believe the DOL should provide guidance on what activities would constitute "maintaining" financial records. Particularly with respect to benefit plan audits, we believe that a threat to independence would arise when the auditor prepares or maintains the employee data and other information underlying the plan financial statements. As discussed in 7 below, we believe the DOL should adopt the AICPA rules on nonaudit services (effectively

Interpretation 101-3) and modify those rules to prohibit those services that constitute preparing or maintaining employee data.

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?

We believe that these are generally accepted terms that do not require definition. However, other terms that the DOL should consider adding to its list of disqualifying status positions include: "investment manager," "record keeper," "plan administrator," "custodian," and "fiduciary." We believe these terms are also generally accepted and do not require definition.

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?

As discussed in 2 above, we believe that the definition of "member of the firm" should be revised in a manner consistent with the AICPA rules.

7. What kinds of nonaudit 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 nonaudit 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 nonaudit 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?

We believe that the DOL should provide guidance on the specific circumstances under which the auditor of a plan is prohibited from providing nonaudit services to the plan or plan sponsor. Generally, we believe that compliance with the AICPA rules should be sufficient since the AICPA rules, and specifically Interpretation 101-3, have been modernized in recent years to address threats to independence and include appropriate safeguards related thereto. Such safeguards include requirements that the audit client: (a) make all management

decisions; (b) designate a competent individual, preferably within senior management, to oversee the nonaudit services; and (c) accept responsibility for the results of the services.

However, if the DOL adopts the AICPA rules we believe those rules should be modified to prohibit those services that pose an unacceptable threat to independence as discussed in 4 and 5 above.

In addition, we believe that appraisal, valuation, or actuarial services should not be provided to an employee benefit plan audit client. Currently, the AICPA rules permit these services as long as the results of the service would be immaterial to the financial statements and the appraisal, valuation, or actuarial service does not involve a significant degree of subjectivity. We believe that the self-review threat from these types of services, in the context of an employee benefit plan audit, cannot be overcome through safeguards.

The DOL should include a discussion in its guidance on the nature of the nonaudit services that may be performed for the plan sponsor without impacting the auditor's independence from the plan. We believe that similar to the SEC's independence rule, if it is reasonable to conclude that the results of the nonaudit service will not be subject to audit procedures in the audit of the plan, a nonaudit service provided to the plan sponsor should not impair independence. However, serving a plan sponsor as a promoter or performing a management function for the sponsor would constitute a threat to independence with respect to the plan and therefore should be prohibited.

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?

With respect to new audit clients, we believe that the DOL should revise its requirement for the auditor to be independent during the period covered by the financial statements for matters such as financial interests and business relationships. In the case of a new audit client, a financial interest that existed before the auditor is appointed (or begins auditing services) does not pose a threat to independence. Therefore, the disposal of an auditor's financial interest in a plan or sponsor prior to such time is an effective safeguard. This revision would bring the DOL requirements in line with the rules of the AICPA (and SEC).

However, we believe independence would be impaired if a covered member held a direct or material indirect financial interest in the plan or the plan sponsor after the period of professional engagement has commenced.

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?

We believe there are no special provisions necessary for those plans that have an audit committee. Many plan sponsors (or their parent companies) already pre-approve services provided to the plan pursuant to SEC requirements. We believe that audit committees for non-public companies or their benefit plans should determine the appropriate communications with its auditor and the practices regarding approval of services to be followed.

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 nonaudit 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?

We believe the AICPA rules provide appropriate guidance regarding contingent fees. However, for new audit clients, we believe that the DOL should provide guidance indicating that an auditor's independence would not be impaired if a pre-existing contingent fee arrangement with either the plan or plan sponsor were settled or fixed prior to the earlier of the signing of an audit engagement letter or commencement of auditing services.

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?

We believe the AICPA rules provide appropriate guidance.

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?

We believe that an "appearance of independence" requirement should be included in the DOL's guidance. We observe that the AICPA rules include such a requirement and suggest that the AICPA's requirements would be sufficient if applied to audits of plans and plan sponsors. The AICPA conceptual framework defines independence in ET §100.06 as independence of mind and independence of appearance and ET §55, *Article IV-Objectivity and Independence*, states, "A member in public practice should be independent in fact and appearance when providing auditing and other attestation services."

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?

We believe that monitoring of the accounting firm's independence should be left to the discretion of the benefit plan's audit committee or those charged with governance of the plan. We also note that the AICPA's proposed Statement on Quality Control Standards, once it is adopted, will provide guidance on policies and procedures for accounting firms, including independence policies.

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?

We believe that the DOL should refer an accountant to the state licensing board when the DOL concludes that an accountant has conducted an audit without being independent. However, we believe the DOL should apply judgment in its referrals, weighing all relevant facts and circumstances, as some violations of the independence rules are extremely minor.

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?

Consistent with our recommendation that DOL guidelines be harmonized with the AICPA rules, we do not recommend that the DOL adopt an independence disclosure requirement. We observe that the SAS 61 requirement to communicate with audit committees does not contain such specific independence disclosure requirements and that SAS 58 requires that the auditor's report include a title containing the word "independent." Therefore, we believe disclosures regarding independence should be determined by the plan's audit committee or others charged with governance of the plan.

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If you have questions about our response, please contact David A. Winetroub, Partner-in-Charge - Independence at 212-909-5552 or dawinetroub@kpmg.com.

Very truly yours,

KPMG LLP