



July 17, 2015

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

To Whom It May Concern:

On behalf of the largest professional association of real estate appraisers in the world, thank you for the opportunity to comment on the U.S. Department of Labor (DOL) Employee Benefits Security Administration Proposed Rule on the *Definition of the Term Fiduciary; Conflict of Interest Rule-Retirement Investment Advice*. Designated members of the Appraisal Institute commonly provide appraisal services to pension funds and institutional investors that invest in real estate. Additionally, many Designated members provide a variety of professional valuation services, including appraisals and reviews, for these pension funds and institutional investors.

Generally, while we are pleased the DOL has listened to the concerns of real property appraisers and others relative to the treatment of appraisals used to satisfy required reporting and disclosure rules, however, we remain deeply concerned by the proposal's continued extension of fiduciary status under ERISA to real estate appraisers in important situations.

Specifically, section (a)(1)(iii) states:

*An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a **specific transaction or transactions** involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;*

This firmly captures a common situation where appraisals are prepared for pension funds considering acquiring or disposing of certain properties. Such services are performed to help investment managers or fund sponsors make sound investment decisions.

Lack of Definitions

Our concerns stem primarily from the lack of distinction between "appraisals" prepared for investment managers and "fairness opinions." The proposed rule confuses the role of appraisals in buy and selling decisions, as the role of fiduciary is maintained by the investment manager, not the appraiser. The investment manager considers the appraisal, and compares that with other information (e.g., offers made on property), to make determination in the best interest of the fund. The appraiser does not carry that responsibility or decision making authority, and contrary to the proposed rule, performs such work in accordance with generally accepted appraisal standards without advocacy to the client. Once the appraiser has completed the valuation assignment, the fairness opinions are decided by the investment manager or third party, who then holds the fiduciary decision responsibilities regarding the transaction. Once the appraisal opinion is provided, the work of the appraiser is completed and that work can be used

by others to help make fiduciary decisions. These buy and sell decisions will be based on a variety of considerations with the appraised value being only one.

Fairness opinions differ vastly from appraisals, as they essentially represent the work an investment manager might perform, by a third party. Fairness opinions answer a different question than appraisals. While appraisals may provide information to an investment manager or answer whether the value of the property is within a stipulated range of a price, it does not answer the question as to whether the price of the terms are "fair." Such opinions can be offered by appraisal professionals, but such a service would not be considered an "appraisal." This is an important distinction that is currently not found in the proposed rule, but is essential for any final rule.

Cost Increases

We have consulted with insurance providers to the appraisal profession, and such a change will likely result in a dramatic increase in insurance costs for valuation firms providing such a service. This will likely cause some to reconsider providing such important services, altogether. This is needless and unnecessary, as the DOL still has not provided clear evidence for why appraisers should be covered under the fiduciary definition. To our knowledge, the DOL has not attempted and had difficulty bringing enforcement actions against appraisers, or has not explained how that process is impeded by the lack of fiduciary coverage.

Recommendations

We urge the DOL to resolve these concerns by undertaking specific actions in any final rulemaking: 1) provide clear definitions for *appraisals* and *fairness opinions*, and 2) provide an exemption for appraisals prepared for specific transactions involving the acquisition, disposition or exchange of real estate. This would distinguish fairness opinions, whether provided by appraisers or others, as carrying a fiduciary responsibility – a position that is reasonable given the purpose of the fairness opinion.

Instances of Appraisals Contained Within a Fairness Opinion

Insofar as appraisals may be included as a part of a fairness opinion, as long as the work of the appraiser is limited to valuation questions (as opposed to questions of fairness), we believe that work should be exempt from fiduciary status. That responsibility rests on the shoulders of the individual(s) providing the fairness opinion. If the appraiser provides the appraisals and the fairness opinion, we believe that should be classified as a fiduciary.

Thank you again for the opportunity to comment on the proposed rule. We look forward to working with the DOL to answer any remaining questions and resolve these concerns. Please contact Bill Garber, Director of Government and External Relations at 202-298-5586, bgarber@appraisalinstitute.org or Brian Rodgers, Manager of Federal Affairs, at 202-298-5597, brodgers@appraisalinstitute.org.

Sincerely,

Appraisal Institute