AICPA Forensic and Valuation Services Section

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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: Comment on Public Hearing

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 (CPAs).

We strongly believe this is not the correct solution to the perceived problem with valuations prepared for employee benefit plans for the following reasons:

- Valuations prepared for annual reporting purposes are frequently used for purposes other than issuing the annual report to the DOL and/or IRS;
- The valuation analyst provides information to a designated plan trustee, who must then evaluate that information in order to make any plan investment or other decision; and
- Any inclusion of valuation analysts within the definition of "fiduciary" does not address the underlying cause of incorrect valuations.

Per the fact sheet on the DOL website dated March 30, 2011: *"Limitations recognizing that certain activities should not result in fiduciary status: . . . Appraisers who provide investment values to plans to use only for reporting their assets to the DOL and IRS*." This clarification seems to be trying to make a distinction between a report prepared for transactional purposes and a report prepared to meet annual reporting requirements. The proposal is problematic as the analyst's report can, and frequently is, used for purposes other than the annual report **without the analyst's knowledge**, thus creating a fiduciary relationship of which the analyst is unaware. In addition to reporting the value of plan assets to the DOL and IRS, the analyst's valuation report is often used:

- To allocate the shares in the trust to individual participant accounts;
- To repurchase shares from retiring employees; or
- When the trustee relies on the year-end report to evaluate tender or other purchase offers

Any of the above events would qualify as a transaction even if the plan trustee or administrator did not consult with or inform the valuation analyst of the use of the report for such purposes.

Each plan is assigned a designated trustee whose role is to provide guidance to plan participants. The trustee receives information from disparate individuals, evaluates the information and recommends actions based on the evaluation. The valuation analyst provides information to the trustee in the form of the fair market value of the employer stock. The analyst does not provide investment advice to the plan on transactions, even in the event of a fairness opinion. For this reason, we believe the rule, as proposed, assumes a level of involvement by the valuation analyst which does not exist.

Finally, we believe the DOL is not addressing the underlying issue: sponsor company valuations can currently be performed by any individual, regardless of qualifications. Trustees, in an effort to keep plan expenses to a minimum, often have the valuations performed by the lowest cost provider instead of the person most qualified to perform the valuation. We believe the DOL should address this issue by requiring valuation preparers to:

- Meet minimum specialized training requirements;
- Hold relevant credentials; and
- Comply with applicable professional standards

These requirements are already codified in IRC 170(a)(1) and the Small Business Administration's SOP 50-10(A) Sub Part B. Examples of credentials which recognize specialized training would be the CPA and the AICPA's Accredited in Business Valuation (ABV) credential, the National Association of Certified Valuation Analyst's Certified Valuation Analyst (CVA) credential, the American Society of Appraiser's Accredited Senior Appraiser (ASA) and Associate Member (AM) credentials, or the Institute of Business Appraiser's Certified Business Appraiser (CBA) credential. While these credentials are issued by different organizations, they all require specialized training and have professional standards in place to ensure members prepare high quality valuations. Members of the AICPA must adhere to Statement on Standards for Valuation Services No. 1, the AICPA Code of Professional Conduct and the AICPA Code of Ethics.

In summary, we do not believe valuation analysts should be included within the definition of the term fiduciary. Instead the DOL should require valuation analysts to meet minimum qualification requirements and follow professional standards to ensure the quality of the employer stock valuation.

Regards

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