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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

Re: Definition of ERISA Fiduciaries Under the Proposed Rule (29 CFR Part 2510)

Ladies and Gentlemen:

The Department of Labor (the "**DOL**") has requested comments on the proposed rule which defines the circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act ("**ERISA**"), by reason of providing "investment advice" to an employee benefit plan or a plan's participants (the "**Proposed Rule**"). We thank you for the opportunity to comment.

Introduction

As described in greater detail below, Standard & Poor's Securities Evaluations, Inc. ("**SPSE**") is in the business of providing to our customers independent, objectively determined and standardized daily pricing evaluations on over three million different securities and financial instruments, derived predominantly by reference to market prices and market analyses.

Under the regulations and authorities that have been in place since the enactment of ERISA 35 years ago, our services are not deemed to involve the provision of "investment advice" for purposes of ERISA. We believe that the DOL intended that the same result would be achieved under the Proposed Rule with respect to our core evaluated pricing service. However, as discussed in greater detail below, in light of the ambiguity of the Proposed Rule in this regard, if the DOL decides to adopt the Proposed Rule, we would request that the DOL include in the Proposed Rule provisions which make clear that the services provided by SPSE will not be considered "investment advice" under ERISA.

Operative Provisions of ERISA and the Existing and Proposed Regulations

Under ERISA, a party will be a fiduciary of a benefit plan if the party administers the plan, exercises discretion with respect to the plan's assets or provides "investment advice" to the plan in exchange for compensation. If a party is deemed to be a fiduciary of a plan, the party will be subject to various fiduciary duties and transaction prohibitions under ERISA.

Under the Proposed Rule, a party would be deemed to provide "investment advice" if the party provides advice, or an appraisal or fairness opinion, concerning the value of securities or other

property and is an investment adviser within the meaning of the Investment Advisers Act of 1940 (the "**Advisers Act**") or otherwise provides this advice pursuant to an understanding that the advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary or a participant or beneficiary.

The DOL has made clear that at least certain asset appraisals are intended to be treated as "investment advice" under the Proposed Rule. The DOL's primary concern appears to be potential abuses with respect to valuation appraisal reports provided in connection with Employee Stock Ownership Plan ("**ESOP**") transactions, but it is unclear from the Proposed Rule what, if any, other pricing, quotation and valuation sources will be affected.

There is a wide and ever-evolving variety of sources offering pricing, quotation and valuation information to the markets and we would urge the DOL to study the potential impacts to this aspect of the financial markets before it moves forward with the Proposed Rule. We assume that the core services offered by SPSE and the majority of other broader market sources are not intended to be considered "investment advice" under the Proposed Rule, but the ambiguity of the Proposed Rule in this regard raises significant uncertainty and concern for both service providers and plan representatives.

SPSE Services

Our Evaluated Price Service provides clients with independent, objectively determined and standardized daily pricing on over three million securities and other financial instruments. SPSE is registered under the Advisers Act and has approximately 55 employees who function as pricing analysts in its evaluated pricing business.

Our customer base encompasses a wide variety of institutional investors, including banks, insurance companies and managers of mutual funds and other pooled investment vehicles. For example, managers of mutual funds require daily independent values for the portfolio securities held by those mutual funds for purposes of reflecting net asset values to the market, executing purchases and redemptions of fund shares and calculating fund fees. These customers enter into contracts with SPSE pursuant to which SPSE provides them with access to SPSE's valuations. Some customers receive a valuation feed of all or virtually all the securities and financial instruments that SPSE values, while others elect to receive valuation feeds relating to a designated subset of securities and instruments.

Our valuation feeds may also include values on equity securities and exchange-traded funds, which are derived from third-party, market-based sources. Our feeds also cover fixed-income securities, including notes, commercial paper, bonds, certificates of deposit, forward contracts, convertible securities, asset-backed securities (including mortgage-backed securities), swaps and other derivatives issued by government, municipal, corporate, agency and other entities. Our market approach pricing uses data from a hierarchy of market sources regarding the instrument being priced or, for less frequently traded securities, an instrument with similar characteristics. These sources include reports related to securities trading levels provided under various market transparency efforts (e.g., the FINRA Trade Reporting and Compliance Engine and the Municipal Securities Rulemaking Board), information received from clients, information received from market participants and, in the case of some non-rated bonds and other fixed-income instruments that have seen a pronounced drop in credit quality, research conducted by SPSE.

We do not tailor our valuations to any customer, customer type or group of customers. Moreover, our valuations do not take into account a particular customer's investment objectives, financial situation or needs and they are not intended as a recommendation of a particular security, financial instrument or strategy.

Although benefit plans do not constitute a significant part of our customer base, our valuation feeds are applied in scenarios that might directly or indirectly impact plan investments. For example, if a plan holds shares of a mutual fund, those shares might be valued by the manager of the mutual fund based, in part, on values we provided to the manager relating to the portfolio securities of the mutual fund. We understand that under other relevant DOL rules the portfolio securities of the mutual fund in this scenario would not be plan assets of the investing plan, although the shares of the mutual fund that are held by the plan would be plan assets.

The same values that we provide to mutual fund managers are also provided to other customers. These customers include, for example, insurance companies, which may use these values for purposes of their general and separate accounts, and banks, which may use the values for purposes of their plan and non-plan trusts and custodial accounts. Due to the diverse set of customers to whom our valuation feeds are provided and the range of end uses to which such values are put, the valuation feeds that we provide are not provided pursuant to an understanding that these valuations will be used as the basis for any particular investment or management decisions.

SPSE typically does not provide purpose-specific valuation services. Instead, we provide values which our customers may use for a broad variety of purposes, such as striking a net asset value for executing purchases and redemptions for pooled investment vehicles, computing asset management fees, managing and rebalancing portfolios and preparing reports and accounting statements. SPSE does not consult with its customers regarding the appropriateness of their use of SPSE's valuations for any particular purpose. SPSE also does not have the ability to discern whether the valuations that it provides for any of its three million covered instruments are the appropriate values for any particular use by customers or whether different value assumptions should be made by customers. For example, while SPSE may indicate a market-derived value for a particular security or class of securities, depending on liquidity, a customer may or may not be able to buy or sell those securities for that value. Therefore, SPSE cannot determine whether the customer's reliance on the values reflected by SPSE is appropriate for any particular usage by the customer. Our customers are typically sophisticated investment managers and financial institutions and we assume they use our valuation feeds appropriately. However, because we cannot know or control our customers' use of our valuation feeds, we cannot be presumed to be able to play a fiduciary role with respect to our customers or the plans with which they may, in turn, have relationships.

Investment advice under the Proposed Rule requires an undertaking to provide individualized advice. We do not provide individualized valuations to our customers. Two different customers receiving a value on the same security will receive the same value. Thus, by definition our valuations are not individualized. As noted, some customers receive valuation feeds which include a designated subset of the three million-plus instruments. However, we assume that the manner in which they are delivered would not be sufficient to render our standardized valuations individualized advice.

We understand the DOL's concern regarding valuations of a single, privately held stock in the context of an ESOP transaction. We note that the DOL's Proposed Rule has stirred significant debate as to whether the provision of ESOP valuations should be regarded as "investment advice" and we assume that the DOL intends to study this issue further. However, the valuation services that we

provide are in no way similar to ESOP valuations. We are not retained by parties to transactions to provide values for the transactions. Our valuations are not provided in the context of any particular transaction and are not requested for this purpose. Again, we provide daily values on millions of instruments and we assume that these values are not necessarily used to guide purchase or sale decisions because, as noted, purchase and sale decisions will presumably be guided by the price available in an actual transaction between the buyer and seller, which may vary from the value we provide. We provide our valuation feed to a broad array of customers and we are not beholden to any particular customer. Unlike the concerns identified by the DOL in the context of ESOPs, there is no potential that our relationships with customers receiving our valuation feeds would influence the information we provide.

Notwithstanding the foregoing, it is at least ambiguous whether the valuation feeds offered pursuant to our Evaluated Price Service would be deemed to be "investment advice" under the wording of the Proposed Rule as a result of either the reference in the Proposed Rule to the Advisers Act or the general ambiguity of the Proposed Rule.

We believe that any rule that would treat our services as investment advice for purposes of ERISA would be inconsistent with the intent of ERISA and its 35-year history and would be harmful to plans, valuation providers and the broader market.

ERISA fiduciary status is inconsistent with the independence required of valuation providers such as SPSE. It is expected that these valuation providers be independent of the customers receiving their valuation feeds. The provision of independent, objective and impartial valuations is fundamental to our customers' use of such valuations for a variety of purposes, including executing withdrawals and investments in pooled investment vehicles, assessing fees, portfolio monitoring and financial reporting. The imposition of fiduciary liability on valuation providers such as SPSE would be functionally inconsistent with the independence that we are required to maintain. For example, if we were regarded as a fiduciary of a plan customer, we would be required to act solely in the best interests of that plan and owe the highest duty of loyalty to the plan, which would undermine the credibility of our valuations provided to all our customers.

If valuation providers such as SPSE and the various other pricing and valuation aggregators are deemed to be fiduciaries, this would extend ERISA's fiduciary responsibilities and prohibited transaction rules throughout a complex and obscure chain of service providers. Many pricing and valuation platforms receive components of their inputs from third parties, who in turn may get this information from other reporting services. For example, as described earlier, SPSE receives daily prices on equity securities from other sources and makes those prices available on SPSE's daily feed to SPSE customers. A customer may use these prices to value interests in a pooled investment vehicle, shares of which are held by another pooled vehicle in which pension plans invest.

We would argue that these values should not attract fiduciary status. However, if the DOL intends that in this type of scenario the valuation providers should be regarded as fiduciaries of the plan, we assume that the DOL would not distinguish between whether the scenario involves so-called plan asset vehicles or non-plan asset vehicles. If the values provided will eventually be used to value a plan's total assets or a plan's allocation to a particular asset class, it should not matter if or at what point in the chain the valuation of an underlying instrument is passed from a non-plan asset user to a plan asset user. Nor should fiduciary status depend on a valuation provider's level of remoteness from the ultimate customer or the plan which eventually receives a value. Any such distinctions

would incentivize pricing and valuation providers to create shielding structures to avoid fiduciary duties.

In any case, if some or all of the parties in the typical valuation chain for financial instruments are deemed to be ERISA fiduciaries, we understand that this would raise ERISA appointment, delegation and monitoring issues. We are advised that many plans do not permit parties other than the plan investment committee to delegate fiduciary responsibilities to third parties and that many plan committees require that any party serving in a fiduciary capacity for the plan must meet specified minimum net worth and insurance tests. Accordingly, given the attenuated network of parties that may be involved in a valuation chain, imposing fiduciary status on valuation providers would create a confusing and unworkable complex of delegations, duties and prohibited transaction issues.

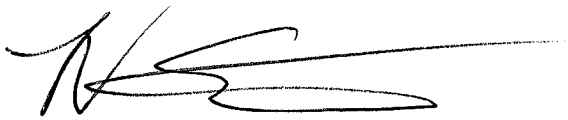
We are also advised that ERISA litigation has increased exponentially over the last decade and a fiduciary's exercise of the utmost care and expertise often does not insulate the fiduciary against costly claims from an increasingly aggressive ERISA litigation industry. We have no doubt that if the Proposed Rule exposes valuation firms like SPSE to fiduciary liability, the cost of doing business will increase significantly for the valuation firms and their customers.

Because benefit plans represent a small fraction of the direct customer base for firms such as SPSE, it is likely that valuation providers would cease to offer their services to plans. So-called plan asset vehicles also represent only a fraction of the customer base for many valuation firms and it is possible that valuation providers would curtail business with these customers as well.

Based on the foregoing, if the DOL intends to move forward with the Proposed Rule, we would request that it modify the rule to make clear that valuation services such as those provided by SPSE will not constitute "investment advice" under ERISA. This can be accomplished, for example, by adding a provision to the Proposed Rule clarifying that a party engaged in the business of publishing or providing valuations with respect to financial instruments shall not be deemed to be providing "investment advice" when it publishes or provides the same valuations to multiple independent and bona fide users of those valuations, provided that such valuations are not provided or published for the purpose of influencing the pricing or other terms of any particular transaction or series of transactions.

We would be happy to provide any additional information or to discuss these issues further with you. Thank you for the opportunity to comment on the Proposed Rule.

Sincerely,



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