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February 3, 2011

Mr. Fred Wong
Office of Regulations and Interpretations
Employee Benefit Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Via email e-ORI@dol.gov

Re: **DOL EBSA Definition of the Term "Fiduciary", RIN 1210-AB32**

Dear Mr. Wong,

This letter provides comments to the Employee Benefits Security Administration ("EBSA") within the Department of Labor ("DOL") on the regulations proposed under 29 CFR § 2510.3-21 in Release No. RIN 1210-AB32 (the "Proposal"). ESBA has proposed regulations to more broadly define the circumstances under which a person is considered a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA").

We request that the DOL coordinate with the Commodities Futures Trading Commission ("CFTC") to ensure that the business conduct standards proposed by the CFTC for swap dealers[1] who serve as counterparties to ERISA plans will not result in those dealers being a fiduciary to the ERISA plans. If swap dealers are deemed a fiduciary under ERISA in that situation, then all swap transactions would be prohibited transactions under 29 USC § 1106.

Avaya Inc. sponsors several retirement plans that are subject to ERISA, including the Avaya Inc. Pension Plan and the Avaya Inc. Pension Plan for Salaried Employees. For the fiscal year ended September 30, 2010, those plans cover in excess of 16,000 participants and have liabilities that exceed $3B. The present value of the liability of the plans can vary significantly depending on changes in the interest rate (the discount rate) that must be used when valuing the liabilities. Our actuaries have indicated that the change in the liabilities of the plans could exceed $200M with a change in the required interest rate of 1% (i.e., 100 bps).

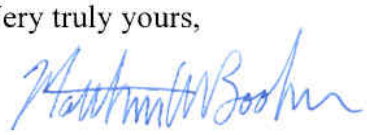
[1] 75 Fed. Reg. 80638 – 80663.

Given the sensitivity of liabilities for such plans to changes in the required interest rate, swaps and other derivatives have become common tools used by such plans in their risk management strategy to minimize the volatility of the liabilities. If the regulations regarding fiduciary status under ERISA are too broad or not coordinated with the business conduct standards proposed by the CFTC, these tools will no longer be available to such plans.

In addition, we are concerned that the portion of the Proposal regarding valuation services will make it difficult and/or more expensive for ERISA plans to engage custodians and/or trustees. As proposed, the rule regarding valuation services is broadly written and could be construed as making the valuation of collective investment trust interests (and other common ERISA plan investments not traded on a recognized market) a fiduciary act. Further, the carve-out for general reports or statements "provided for the purpose of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code . . ." is very narrow. For example, trustees or custodians frequently provide those types of reports and statements periodically (daily, monthly, quarterly) through out the year but such periodic reports are not strictly necessary (or for the purpose of) complying with ERISA's and/or the Internal Revenue Code's reporting a disclosure requirements.

We look forward to your consideration and hope that our comments will be of use. Should you have any questions, regarding this correspondence, please contact Alayne Gatti at 908.953.6388 or at agatti@avaya.com.

Very truly yours,



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Officer and Chairperson, Avaya Inc. Investment Committee

Copy to
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