



July 17, 2015

Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Attn: Conflict of Interest Rule (RIN 1210-AB32)

Dear Sir or Madam:

The undersigned professional appraisal organizations, representing thousands of professionally credentialed appraisers in the U.S. – many of whom provide valuation services to ESOPs and other employee benefit plans – appreciate the opportunity to comment on the above-referenced proposed rule.¹ Although our comments most often reference ESOP-related valuations, they should be understood to apply, as well, to appraisals and fairness opinions provided to other employee benefit plans under ERISA, such as IRA and 401(k) plans. Our views, which address only the valuation provisions of the proposal, are set forth below.

EXECUTIVE SUMMARY

- **EBSA deserves credit for its decision in the current proposal to carve out from the definition of fiduciary individuals who appraise the market value of employer securities held by ESOPs – constituting the largest number of ESOP-related valuation engagements. This constructive change from the 2010 proposal makes it more acceptable to our organizations (and likely to the entire community of ESOP appraisers) than the previous version of EBSA’s fiduciary rule.**
- **Nevertheless, we are disappointed and frankly confused by the fact that the current proposal continues to designate appraisers as fiduciaries for a smaller, but still important, subset of ESOP valuations. In our view, this bifurcated approach to the ESOP valuation issue cannot be justified or rationalized on any public policy basis. Indeed, it will confuse ESOP appraisers and ESOP sponsoring companies; and, it resurrects all the reasons our organizations strongly opposed the 2010 version. For that reason, we respectfully urge the Department, in a final rule, to carve out from the fiduciary requirements not only ESOP appraisals of employer securities but also valuations of other property² purchased, sold or exchanged by ESOPs in individual transactions. The Department should have a single policy on ESOP valuations, not two.**

¹ Each of our organizations teaches, tests and credentials its members for professional appraisal practice and appraisal review in the area of commercial and residential real property valuation. Additionally, the American Society of Appraisers (ASA) is a multi-disciplinary appraisal organization that teaches, tests and credentials its members for professional appraisal practice in business valuation and in personal property valuation (including fine arts, machinery and technical specialties and other categories of tangible and intangible property).

² Such as real estate, intellectual property and machinery and equipment.

- **The commentary accompanying the valuation provisions of the conflict of interest proposal states that, notwithstanding EBSA’s decision to exclude valuations of employer securities from the proposal’s fiduciary requirements, the Department continues to have concerns about such valuations that it may want to address “in a separate regulatory initiative.”³ Our organizations believe there are many persuasive reasons for EBSA to exclude from a final rule, a fiduciary requirement for even a small subset of ESOP appraisals. One of those reasons is that it would be extremely burdensome for EBSA to embark on a new regulatory initiative for ESOP appraisers, should it decide to require some of them to adhere to the rule’s complex and controversial fiduciary requirements. Unfortunately, the unfairness inherent in such a development would exist even if the subsequent regulatory initiative proposed by EBSA was one which our organizations supported. Accordingly, we urge the Department to carve out all ESOP appraisals from the proposal’s fiduciary requirements so that a subsequent regulatory initiative governing ESOP appraisers would not be burdened by having to undo requirements that were recently imposed.**

DISCUSSION

Our more detailed views on the rule are discussed below:

I. The ESOP Valuation Provisions of the Conflict of Interest Rule Are A Vast Improvement Over Those In the 2010 Fiduciary Proposal. EBSA Deserves Credit For Making These Constructive Changes

EBSA deserves credit for its decision to eliminate from its re-proposed rule provisions in the 2010 Proposal which designated appraisers providing ESOP-related valuations and fairness opinions as “fiduciaries”. Our organizations, virtually the entire community of professional appraisers, and all other ESOP stakeholders found the “appraiser-as-fiduciary” concept to be inappropriate, unworkable and an ineffective way to ensure the integrity, competency and independence of valuations performed for ESOPs.

We appreciate EBSA’s thoughtful attention to the many reasons we cited in our comment letters, hearing testimony and other communications with the Department for our opposition to the fiduciary concept.⁴ We applaud the agency’s conclusion that the fiduciary requirements should be eliminated for valuations of employer securities involving both reporting and disclosure purposes and in connection with individual transactions. Appraisals of employer securities constitute the largest category of ESOP valuation engagements.⁵

II. Notwithstanding Our Support For EBSA’s Decision To Eliminate the Fiduciary Requirements For the Majority of ESOP Valuation Engagements, We Object To – And Frankly Are Puzzled By – Its Decision To Continue The Fiduciary Requirement For A

³ DOL’s Fact Sheet on its proposed rule states that it “may put forth a separate regulatory proposal to clarify the applicable law for ESOP appraisals.”

⁴ In this regard, the commentary accompanying the valuation provisions of the conflict of interest proposal states: “In response to commenters, the Department has also determined not to include, as fiduciary in nature, appraisals or valuations of employer securities provided to ESOPs or to certain collective investment funds holding assets of plan investors” (*Federal Register* of April 20, 2015, at page 21932).

⁵ Appraisers could still be considered fiduciaries if they specifically represent that they are acting as a fiduciary under ERISA or they provide the appraisal pursuant to an agreement or understanding “that it is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan assets.” (*Ibid* at page 21936).

Smaller, But Important, Subset of ESOP-Related Appraisals. The Department Should Have a Single Policy Governing ESOP Appraisals Not Two Distinct Policies.

Although our organizations applaud EBSA's sensible decision not to impose fiduciary status on appraisers for ERISA reporting and administrative purposes (which constitute the vast majority of ESOP appraisal engagements), we fail to understand the public policy basis or other rationale for proposing to impose fiduciary status on appraisers who provide valuation services to ESOPs in connection with individual transactions involving their purchase, sale or exchange of property that is not the employer's securities.

While there is little hard data on the nature and extent of such individual transactions and on the property categories they involve,⁶ we recognize that the dollar value of an individual transaction can be substantial and that a competent and independent appraisal of the value of the property involved is no less important to plan beneficiaries than appraisals of employer securities. Nevertheless, there is no public policy basis that we can discern (or any other logical reason) for treating this smaller cohort of ESOP valuation engagements completely differently from the larger cohort of employer securities valuations. Doing so will only create confusion and introduce needless complexity into the ESOP valuation process. Accordingly, we strongly oppose this fiduciary requirement and respectfully urge the Department to eliminate it from its final rule.

Our opposition to this fiduciary requirement is largely based on the same reasons we opposed the fiduciary designation for appraisers in the 2010 Proposal – reasons with which, we thought, the Department basically agreed. But, an additional and important reason for our objection is that appraisers and the thousands of ESOPs they service will inevitably be confused by the fact of a dual regulatory approach to ESOP valuations: that is, for some ESOP-appraisals, an appraiser is not a fiduciary but for others the appraiser is a fiduciary. We fail to understand why appraisers should be subject to different standards of care based on the ESOP held asset they are valuing.

Our objections to the 2010 fiduciary proposal were based on a litany of substantive concerns that, regrettably, continue to be relevant under the current proposal to a smaller but still important category of ESOP appraisal engagements. Several of these concerns are reiterated below:

- a. An Unavoidable Conflict Exists – or At a Minimum Will Be Seen by Many To Exist - Between the Ethical and Legal Obligations of Appraisers to be Independent of All Parties to a Financial Transaction and the Ethical and Legal Obligations of Fiduciaries to Act Solely in the Interests of Plan Beneficiaries. Notwithstanding the Department's Dismissal of This Concern, We Believe That the Conflict Issue Will Be Raised Repeatedly In the Courts and in Administrative Proceedings By ESOP Parties Who Disagree With an Appraiser's Opinion of Value and Believe that One or the Other of the Appraiser's Legal Duties Has Been Violated**

Principal among our previous and now current concerns involves the inherent conflict we believe exists between the ethical and legal obligations of a professional appraiser to be independent of all parties when rendering an opinion of value versus the duty of loyalty owed by fiduciaries to a plan's beneficiaries. This concern is not only shared by our organizations, but by the community of professional appraisers, including The Appraisal Foundation; and, we believe, by companies with ESOPs, as well.

⁶ Based on the experience of our members who provide ESOP valuation services, we believe that the property which is most frequently involved in such transactions is real property or interests in real property.

We acknowledge – but are unpersuaded by – EBSA’s sincere disagreement with this concern. The commentary accompanying EBSA’s conflict of interest proposal, states in pertinent part that:

“The Department disagrees. A biased or inaccurate appraisal does not help a plan...make prudent investment decisions. Like other forms of investment advice, an appraisal is a tool for plan fiduciaries, participants, beneficiaries, and IRA owners to use in deciding what price to pay for assets and whether to accept or decline proposed transactions. An appraiser complies with his or her obligations as an appraiser – and as a loyal fiduciary – by giving plan fiduciaries or participants an impartial and accurate assessment of the value of an asset in accordance with the appraisers’ professional standard of care. Nothing in ERISA or this regulation should be read as compelling an appraiser to slant valuation opinions to reflect what the plan wishes the asset were worth rather than what it is really worth...the Department would expect a fiduciary appraiser’s determination of value to be made in good faith based on a prudent investigation under the prevailing circumstances then known to the appraiser. In the Department’s view, these fiduciary standards are fully consistent with professional standards, such as the Uniform Standards of Professional Appraisal Practice (USPAP).”⁷

Our organizations are decidedly unpersuaded that the Department’s position on this critical issue is or will be seen as dispositive; or, that it will forestall controversies surrounding it. To the contrary, we believe that if the final rule includes appraisers within the definition of fiduciary for any ESOP-related valuations, it is inevitable that this issue will become a major source of confusion among ESOP appraisers trying to balance or weigh their dual obligations; and by plan trustees who want to ensure loyalty to plan beneficiaries.

We also believe that the real or perceived conflict between the appraiser’s duty of independence as an appraiser and his/her duty of loyalty to plan beneficiaries as a fiduciary will trigger multiple lawsuits alleging that an ESOP appraiser has failed to honor one or the other of those ethical obligations. Equally conceivable is that state appraiser licensing agencies, which enforce USPAP’s appraiser independence requirements, will be drawn into this controversy in situations where a state licensed real estate appraiser values real property purchased, sold or exchanges by an ESOP; and the valuation is challenged by a party to that transaction.

We acknowledge that reasonable people can disagree on the inevitability of such confusion among ESOP appraisers (as well as between appraisers and plan trustee-fiduciaries) as to whether they properly and simultaneously met both their appraiser independence responsibilities as well as their duty of loyalty, as a fiduciary, to plan beneficiaries. Reasonable people are also likely to disagree on the inevitability of these issues having to be litigated in administrative proceedings and/or in courts of law.

If a consensus existed that a reasonable person could never find a conflict between an appraiser’s duty of independence and a fiduciary’s duty of loyalty to plan beneficiaries, then a major reason for our objection to the “appraiser as fiduciary” concept would be withdrawn. But, no such consensus or anything close to one exists (indeed, there is a consensus but it is in the opposite direction). Moreover, the fact that reasonable people are likely to disagree on these issues is precisely what drives our deep concern that appraisers will get whip-sawed between two obligations that we believe are in direct conflict; or, at best, will be thought by some to be in conflict. The undeniable fact of such disagreement by reasonable people is a serious danger sign that cannot be ignored

⁷ *Ibid*, page 21940.

and should cause DOL to abandon, once and for all, the idea that designating appraisers as fiduciaries represents good public policy. It is of little comfort to our organizations that under the currently proposed rule, these ethical and legal conflict issues will only play out for valuations of property that do not involve employer securities and only occur in connection with individual transactions. While such individual transactions represent a minority of ESOP valuation engagements, we believe they are of sufficient number and importance to cause ESOP appraisers a great deal of harm.⁸

b. Our Organizations Continue to Believe that Including Appraisers in ERISA’s Definition of “Fiduciary” Would Impose Costly and Unnecessary Burdens Both on Appraisers and on the Thousands of Companies with ESOP Plans; Is a Wholly Unproven Way To Ensure the Integrity of ESOP Appraisals; And, is Inconsistent with the Appraisal Regulatory Policies of All Other federal agencies.

We have discussed, in section (a) above, some of the legal and administrative controversies that appraisers and ESOP stakeholders would face if a final conflict of interest rule regards appraisers as fiduciaries for certain ESOP-related transactions. An additional reason for excluding the “appraiser as fiduciary” provision from a final rule is that it amounts to an experiment. Given the fact that no federal agency has ever regulated appraisal practice by imposing fiduciary status on appraisers, there is no empirical evidence whatsoever that making an appraiser a fiduciary will lead to better valuations. DOL’s proposal, if it were incorporated into a final rule, would be a case of first impression, an experiment which we believe would produce a number of unintended negative consequences without any promise or even likelihood that appraisal reliability would be improved.

The most positive thing that can be said for the appraiser as fiduciary concept is that it will result in an outcome that is unknowable at this time. If there were no other way to increase assurances that ESOP appraisals are reliable (assuming, for the sake of discussion, that there is a demonstrable need for improvement), then such an experiment might be justified. But, there are other ways which are tried and true – appraisal regulatory policies that were adopted years ago by other federal agencies, including IRS. We have discussed these federal appraiser regulatory policies – which are readily adaptable for DOL purposes – in great detail with EBSA on multiple occasions.

c. Because Appraiser E&O Insurance Does Not Include Fiduciary Liability Coverage,⁹ Making Appraisers Fiduciaries – Even For a Limited Number of ESOP Engagements Involving the Purchase, Sale or Exchange of Property that is Not Employer Securities – Would Substantially Increase the Costs of Such

⁸ Given the fact that there are occasional differences between even the most experienced and highly regarded appraisers as to the best methodology to value property, disagreements between plan trustees and plan appraisers are likely to arise with respect to whether an ESOP’s purchase, sale or exchange of property, based on the appraiser’s conclusion of value, is in the best interest of plan beneficiaries. Those differences and how they are to be resolved are greatly exacerbated in a situation where both the appraiser and the trustee are fiduciaries. In situations where the property being valued is real property and the individual performing the valuation is state certified or licensed, even a perception that the appraiser’s opinion of value has been influenced by his or her obligations as a fellow-fiduciary, could lead to an investigation by the appraiser’s state licensing agency and could conceivably result in imposition of a penalty, including in extreme circumstances, a loss of the appraiser’s license to practice. In situations where the property or interest in property being valued is not real property (and not the employer’s securities), a dispute over the independence of the valuation could trigger a disciplinary action by the professional appraisal organization which credentialed the appraiser.

⁹ We have been advised by one of the nation’s premier appraiser E&O insurance brokers that finding an insurance company willing to write appraiser fiduciary coverage would be extremely difficult and, perhaps, not possible.

Appraisals and Sharply Decrease the Number of Appraisers Willing to Perform Them

A strong consensus exists among the members of our organizations most experienced in performing ESOP valuations that adoption of the rule, as proposed, would produce two unintended and extremely negative consequences: First, it would necessitate a substantial increase in the cost of ESOP-related valuations covered by the fiduciary requirements (assuming that insurance carriers could be found to issue such policies) – costs which would be passed through to companies with ESOP plans; and, Second, it would reduce the numbers of professional appraisers willing to perform such ESOP valuations because of the increased liability exposure.

These consequences derive from the fact that appraiser E&O insurance does not cover claims based on fiduciary liability. Adding fiduciary coverage to existing E&O insurance policies would require appraiser E&O carriers to initiate a complex underwriting process to determine the costs, terms and conditions of such coverage. The steep costs likely to be required to add fiduciary coverage and the time it would take to reunderwrite existing E&O policies add significant weight, we believe, to our other reasons for opposing the “appraiser as fiduciary” provisions in the proposed rule.

- d. Another Important Reason for EBSA to Exclude the “Appraiser As Fiduciary” Concept From the Current Proposal Involves the Department’s Own Statement in its Commentary That It May Propose A Separate Rulemaking Governing All ESOP-Related Valuations (Including the Ones Carved Out of the Current Proposal). If a Final Version of the Current Proposal Were To Include the Appraiser As Fiduciary Language – to Be Followed Soon Thereafter by Another ESOP Appraisal Change – That Would Further Roil the ESOP Appraisal Process and Impose Unfair Additional Burdens on ESOP Appraisers and On ESOPs Themselves.**

We hope EBSA will share our conviction that there are more than ample reasons for it to amend the current proposal to exclude all categories of ESOP valuation engagements from fiduciary status. An important additional reason to do so can be found in the Department’s statement, in its commentary in the *Federal Register* rulemaking Notice, that it is considering the issuance of a separate rulemaking proposal that would regulate all ESOP appraisal engagements. We believe it would be highly inappropriate for EBSA to impose fiduciary status on appraisers for any category of property in the current proposal only to propose an entirely different set of ESOP appraisal regulatory standards in a contemplated subsequent rulemaking. We do not know the likelihood of such an additional rulemaking, but we nevertheless urge the Department to take notice of its own words and add it to the long list of reasons why the current proposal should not bring ESOP appraisers under any fiduciary obligations.

CONCLUSION

For the reasons stated above, our organizations respectfully urge EBSA to amend its conflict of interest proposal by carving out from fiduciary requirements all appraisals performed for ESOPs. In the event that the Department makes a decision to address ESOP appraisals in a separate rulemaking in the future, we would be pleased to offer our expertise in any such process.

Thank you for considering our views. If you have any questions or if we can furnish additional information, please contact Peter Barash, Government Relations Consultant, at (202) 466-2221,

peter@barashassociates.com or John Russell, Director of Government Relations for the American Society of Appraisers at (703) 733-2103 or jrussell@appraisers.org.

Sincerely,
American Society of Appraisers
National Association of Independent Fee Appraisers
American Society of Farm Managers and Rural Appraisers