



THE APPRAISAL FOUNDATION

*Authorized by Congress as the Source of Appraisal
Standards and Appraiser Qualifications*

June 15, 2011

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

Via Electronic Mail: e-ORI@DOL.gov

RE: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Dear Sir or Madam:

It has come to the attention of The Appraisal Foundation that the Department of Labor is considering proposed regulations that would recognize appraisers as “fiduciaries” under the Employee Retirement Income Security Act (ERISA). We are writing to strongly urge the Department of Labor not to include appraisers as fiduciaries in the regulations as currently proposed.

By way of background, The Appraisal Foundation, a not-for-profit 501 (c) 3 organization, was given specific authority by the Congress in 1989 (Title XI of the Financial Institutions Reform Recovery and Enforcement Act) regarding the real property appraiser regulatory system.

Specifically, (1) all state licensed and certified real estate appraisers must adhere to our standards of conduct (the *Uniform Standards of Professional Appraisal Practice (USPAP)*), (2) all state licensed and certified appraisers must meet our minimum requirements for education and experience, and (3) all states and territories use our licensing and certification examinations. In addition, we have worked with several U.S. government agencies on improving their internal appraisal operations and last week signed a Memorandum of Understanding with the U.S. Department of Energy regarding the valuation of energy efficient (“green”) buildings.

We reference our experience with U.S. government agencies because we are unaware of any agency having to take such an extraordinary step as classifying appraisers as fiduciaries. Agencies have taken measures to ensure that appraisers are properly qualified and that they adhere to a set of recognized standards of conduct. As an example, the Internal Revenue Service recently addressed this issue by defining who is a “qualified appraiser” and what constitutes a “qualified appraisal.” There are several ways to ensure appraisal competency and professionalism and we would be pleased to meet with you to discuss the options.

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U.S. Department of Labor
June 15, 2011
Page Two

The standards of conduct that are referenced above, USPAP, are the generally recognized standards of the valuation profession and are referenced in court decisions involving valuation assignments of all types of assets. These standards are promulgated by our independent Appraisal Standards Board. As you can see from their enclosed correspondence, requiring an appraiser to be a fiduciary would place the appraiser in direct conflict with the core elements of the ethical standards of the valuation profession.

Accordingly, we strongly urge the Department of Labor not to include appraisers as fiduciaries in the regulations as currently proposed. As the Employee Benefits Security Administration moves forward to ensure that competent, professional appraisers are producing independent and credible appraisals, we hope that you will view The Appraisal Foundation and the Appraisal Standards Board as a resource in your efforts.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Bunton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David S. Bunton
President

Enclosure



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APPRAISAL STANDARDS BOARD

June 15, 2011

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

RE: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Via Electronic Mail: e-ORI@DOL.gov

Dear Sir or Madam:

The Appraisal Standards Board (ASB) of The Appraisal Foundation is authorized by Congress as the source of appraisal standards. These standards are promulgated by the ASB via the Uniform Standards of Professional Appraisal Practice (USPAP).

It has recently come to the attention of the ASB that the Department of Labor is considering proposed regulations that would recognize *appraisers* as “fiduciaries” under the Employee Retirement Income Security Act (ERISA). Specifically, one of the tests in the proposed regulations that would establish an individual as a fiduciary is as follows:

*Provide advice, **appraisals or fairness opinions as to the value of investments, recommendations as to buying, selling or holding assets, or recommendations as to the management of securities or other property.*** (Bold added for emphasis)

The ASB sees a significant potential conflict with USPAP if appraisers are recognized as fiduciaries. As you’re certainly aware, *Black’s Law Dictionary* defines “fiduciary,” in part, as follows:

*“...a person is a fiduciary who is invested with rights and powers to be exercised **for the benefit of another person.**”* (Bold added for emphasis)

An “appraiser” is defined in USPAP as:

*“One who is expected to perform valuation services competently and in a manner that is **independent, impartial, and objective.**”* (Bold added for emphasis)

June 15, 2011

Page 2 of 2

In addition, the first line of the PREAMBLE to USPAP states:

*“The purpose of the Uniform Standards of Professional Appraisal Practice (USPAP) is to **promote and maintain a high level of public trust** in appraisal practice by establishing requirements for appraisers.” (Bold added for emphasis)*

One of the primary tenets in achieving public trust has been fostered in the principle that an appraiser *must* be a disinterested third party in the transaction. In fact, the ETHICS RULE in USPAP prohibits an appraiser from performing with bias or advocating for “the cause or interest of any party or issue.” Black’s definition appears to require that a fiduciary perform as an advocate. The role of a fiduciary is clearly inconsistent with the recognized and accepted independent role of an appraiser.

It is the belief of the ASB that an individual cannot act “for the benefit of another person” and remain “independent, impartial, and objective” at the same time. As a result, if the proposed regulations are adopted, appraisers would be put in a position where they are conflicted between the Department of Labor regulations and USPAP (which state licensed and certified real estate appraisers are required by law to comply with).

As a result, the ASB strongly urges the Department of Labor not to include appraisers as fiduciaries in the regulations as currently proposed.

If you have any questions or need additional clarification, please feel free to contact us.

Sincerely,



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J. Carl Schultz, Jr.

Chair

Appraisal Standards Board