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Attn: Independence of Accountant RFI (RIN 1210-AB09)

Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

e-ori@dol.gov

Re: *Request For Information Regarding Independence Of Employee Benefit Plan Accountants*

To the Office of Regulations and Interpretations:

Deloitte & Touche LLP is pleased to respond to the request of the Department of Labor (the “Department”) for comments regarding possible amendments to Interpretive Bulletin 75-9 (29 C.F.R. § 2509.75-9), *Interpretive bulletin relating to guidelines on independence of accountant retained by Employee Benefits Plan*. We fully support the decision of the Department to update its current guidelines. We appreciate the opportunity to discuss how Interpretive Bulletin 75-9, which is now thirty years old, might be made congruent with more recently formulated auditor independence standards. In this endeavor, we recommend to the Department the comprehensive standards on auditor independence promulgated and maintained by the American Institute of Certified Public Accountants (“AICPA”). While bearing in mind that appropriate amendments may be required to address issues particularly germane to

accounting firms retained by employee benefit plans, we suggest that the Department adopt by reference the AICPA's widely understood independence standards.

I. General Comments

We advocate using the independence standards of the AICPA Code of Professional Conduct (the "AICPA Code") for a number of reasons.¹ First and foremost, the AICPA Code is well established, widely understood and broadly followed in the profession. Indeed, many state boards of accountancy have explicitly adopted the AICPA Code's independence rules.² The AICPA Code thus already governs accountant independence in much of the country. Further, because the AICPA regularly updates its Code, the Department will not have to be concerned about its regulations being current if it adopts the AICPA Code by reference. Additionally, we

¹ See generally AICPA Code, ET § 101-1.

² See, e.g., N.M. Admin. Code 16.60.5.8 (adopting, with additions, the "the AICPA Code of Professional Conduct or any successor code of professional conduct promulgated by AICPA in meeting and maintaining [CPAs'] responsibilities and requirements of ethical and professional conduct in the practice of public accountancy"); see also Rules of the Colorado State Board of Accountancy, Ch. 7.2 (applying the AICPA Code's independence standards to certificate holders and registered firms performing professional services requiring independence); Del. Admin. Code, Tit. 24, Sec. 100, R. 2.1 (requiring all public accountants to comply with the AICPA Code of Professional Conduct); Nev. Admin. Code 628.500 (adopting with minor exceptions the AICPA Rules of Professional Conduct); Or. Admin. R. 801-030-0005 (adopting for the Oregon Board of Accountancy AICPA Independence Rule 101 and interpretations of Rule 101); Regulations of the Rhode Island Board of Accountancy Concerning Professional Conduct of Certified Public Accountants and Public Accountants, Article II (adopting the AICPA Code of Professional Conduct as the Rhode Island Code of Professional Conduct); Rules of Department of Commerce and Insurance, Division of Regulatory Boards, Tennessee State Board of Accountancy, R. 0020-3-.03 (mandating that all licensees, even if not members of the AICPA, conform to the AICPA Code's independence standards); Wisconsin Accounting Examining Board, Rules of Conduct, Accy 1.101 (adopting the AICPA's Code of Professional Conduct ET Section 101).

support the adoption of the AICPA Code because Interpretive Bulletin 75-9 has become out-of-date, particularly as to the scope of its independence requirements.

A. The development of comprehensive, novel standards is unnecessary because well-developed bodies of independence guidance already govern the accounting profession.

We believe that the Department should adopt the AICPA Code as it pertains to auditor independence, making appropriate modifications for plan auditing. As the Department recognizes, the Securities and Exchange Commission (“SEC”), the Government Accountability Office (“GAO”), and the Public Company Accounting Oversight Board (“PCAOB”) have also promulgated independence standards for the accounting profession.³ The SEC focuses its regulations on those accounting firms that have SEC issuers as clients, as does the PCAOB, while the GAO regulates the auditors of government contractors. The AICPA, however, broadly regulates all of its members, regardless of the status of the firm’s clients.⁴

Because of the broad range of firms it regulates and the constant input it receives from the profession, the public, and consumers of accounting services, the AICPA has developed a workable, coherent body of rules pertaining to auditor independence. Through an iterative process of proposed rulemaking and public comments, the AICPA has long promulgated and updated auditing regulations and accounting standards. The AICPA has amended its

³ See 17 C.F.R. § 210.2-01 (containing the SEC’s auditor independence standards); *Government Auditing Standards* (2003), GAO-03-673G (containing the GAO’s auditor independence standards); PCAOB Rule 3520 (mandating independence for registered public accounting firms and their associated members).

⁴ The AICPA regulates Certified Public Accountants (“CPAs”). Those accountants who are not CPAs are still subject to regulation by state accountancy boards.

interpretations of the AICPA Code's Rule 101 on independence numerous times over the last twenty years. In fact, the AICPA Professional Ethics Executive Committee is currently in the process of evaluating comments received on new independence interpretations.⁵ The comment process permits all members of the profession and other interested parties to play a role in the continuing evolution of professional standards and ethics. The process also allows the AICPA to implement a particularly well-considered and coherent collection of regulations. The AICPA is thus viewed as one of the leading standard-setting organizations within the profession.⁶

In addition, the experience accountants already have in complying with the AICPA Code means that the cost of compliance with new Department guidelines that adopt the AICPA Code's independence standards will be low. This will, in turn, lead to greater efficiency of compliance than would occur with entirely novel guidelines. The cost of imposing yet another comprehensive set of guidelines would be high, and accountants would be compelled to expend resources learning and implementing the new regulations. Significantly, the fees paid to accounting firms typically come out of retirement plans' assets. Thus, any increase in audit fees may directly impact employees' retirement security. The adoption of the AICPA Code will help

⁵ See AICPA Professional Ethics Executive Committee, *Omnibus Proposal of Professional Ethics Division Interpretations and Rulings*, September 8, 2006, available at http://www.aicpa.org/download/ethics/Final_ED_September_2006.pdf.

⁶ In 2002, Congress instructed the then newly-established PCAOB to "cooperate on an ongoing basis with professional groups of accountants" and authorized it to adopt the professional standards promulgated by those groups. 15 U.S.C. §§ 7213(c)(1), (a)(3)(A). The following year, on April 16, 2003, the PCAOB adopted as its interim independence standards, the independence standards described in the AICPA's Code of Professional Conduct Rule 101. See PCAOB, Rule 3600T.

ensure stability and continuity in the Department's regulation of the accounting profession, without the imposition of undue costs and burdens.

If the Department does choose to adopt existing regulations to update Interpretive Bulletin 75-9, we recommend the AICPA Code over more specialized regimes. The primary independence guidance for the auditing of public companies comes from the SEC. Naturally, the SEC crafted its regulations with only SEC issuers in mind. It recognizes that the regulatory needs of public companies differ greatly from those of private entities and that application of its rules to non-issuers may be inappropriate.⁷ In contrast to the large firms that usually perform audits for public corporations, the accounting firms retained by benefit plans are frequently smaller and may not have any public clients that subject them to the SEC rules. If the Department were to adopt the SEC rules, the cost of adapting to a new set of regulations—regulations that were not designed with these smaller firms' particular situations in mind—would be quite high for such firms. The difficulty smaller firms would have adjusting to and conforming with the SEC requirements would prove costly and, in turn, may lead smaller firms to raise prices and could even force some to exit the market. Such an exodus of smaller firms would inevitably reduce competition and further increase the cost of accounting services for benefit plans. A modified version of the AICPA Code adopted by the Department would seem to have little impact on accounting firms already auditing the benefit plans of SEC *issuers*. But

⁷ For instance, the SEC, when promulgating the 2001 revision to its independence rules, stated explicitly that its rules were designed to affect only *public* companies and the public securities market. *See SEC Final Rule: Revision of the Commission's Auditor Independence Requirements, Release No. 33-7919 (Feb. 5, 2001).*

the broader application of SEC-based rules to auditors of non-issuers would unnecessarily burden both the profession and benefit plans.

B. The current Department guidance unnecessarily restricts the ability of plans to change accountants.

Adoption of the AICPA Code by the Department would reflect the changes in the regulatory landscape that have occurred since Interpretive Bulletin 75-9 was first issued. The outdated limitations placed on accountants under the Department's current guidance make it costly for a plan or plan sponsor to change accounting firms. Amendments to the current Interpretive Bulletin can ease restrictions on the market, without sacrificing any meaningful independence safeguards.

1. The limitation on the time period during which accountants must be independent is unnecessarily restrictive.

Under Interpretive Bulletin 75-9, an accounting firm may not audit a company's financial statements if, at any time during the period covered by the financial statements, the accountant, or any member of the accounting firm, had a direct financial interest or any material indirect financial interest in the plan or its sponsor. The lack of any exception to this independence requirement severely curtails a plan administrator's ability to change accounting firms if it so wishes. For example, a calendar year publicly-traded sponsor of an employee benefit plan may decide to change its registered accountant in March 2006 effective for calendar year 2007. In that instance, the sponsor of the plan may believe it is most efficient to engage the new registered accountant to perform the audit of the benefit plan's calendar year 2006 financial statements, the report for which generally must be filed with the Department no later than July 31, 2007. Under existing Interpretive Bulletin 75-9, however, the new registered accountant for the sponsor would

be ineligible to audit the benefit plan's financial statements if even one partner of the firm held a financial interest in the sponsor at any time during 2006. Such limitations are unnecessarily restrictive and shrink the pool of available accounting firms.

The AICPA has recognized the harm of such unnecessarily restrictive time limitations. With respect to financial interests in the first year of an audit engagement, the AICPA Code limits the application of its independence requirement to the "period of the professional engagement."⁸ This approach, which does not mandate compliance with the financial interest independence requirements until around the time the new auditors are engaged, balances the requirement that a firm be independent with the flexibility in auditor selection that clients desire. It maintains the bright-line rule that an accountant must be free of prohibited financial interests at the time the audit commences, while accommodating a plan's need to shift accountants and the ability of any prospective firm to bid freely for a plan's business.

The SEC and the GAO have recognized the value of the AICPA's approach. For example, when the SEC adopted a new audit engagement exception, it allowed an accounting

⁸ AICPA Code, ET § 101-1. Under the AICPA Code,

The period of the professional engagement begins when a member either signs an initial engagement letter or other agreement to perform attest services or begins to perform an attest engagement for a client, whichever is earlier. The period lasts for the entire duration of the professional relationship (which could cover many periods) and ends with the formal or informal notification, either by the member or the client, of the termination of the professional relationship or by the issuance of a report, whichever is later. Accordingly, the period does not end with the issuance of a report and recommence with the beginning of the following year's attest engagement.

AICPA Code, ET § 92.24.

firm to bid for and to accept new audit engagements, *even if* the accountant was not currently independent under certain financial relationship provisions of the SEC's regulations.⁹ This exception applies only if the accountant did not audit the client's financial statements in the preceding fiscal year, and he or she fully complies with the independence rules prior to the signing of the engagement letter or by the commencement of the audit, whichever is earlier.¹⁰

2. *The scope of the guidelines governing those individuals who must meet the independence requirements is unnecessarily broad.*

Clients' ability to change accounting firms is further limited by the broad applicability of the Department's independence requirements. Under Interpretative Bulletin 75-9, a firm is not considered independent if any "member" of the firm has a financial interest in the client during the time period covered by the financial statements. "Member" includes not only partners, shareholder employees of the firm, and employees participating in the audit, but also those employees merely located in the primary participating office of the firm. This guideline sweeps too broadly, as it mandates independence from even those individuals who could not impact the audit. Independence is not enhanced by such a broad regulation.

⁹ The GAO's independence guidelines also allow for an accountant to address any impending independence impairment prior to commencing the audit. The 2003 guidelines state that, if an audit organization "identifies a personal impairment to independence, the impairment needs to be resolved in a timely manner." The GAO gives as an example the ability of the auditor to sell the financial interest that created the personal impairment. *See* GAO-03-673G. The GAO is in the process of revising its guidelines.

¹⁰ 17 C.F.R. § 210.2-01(c)(1)(iii)(B). The SEC specifically chose the "signing" of the attest engagement letter as the moment by which independence had to be established, thereby allowing an accounting firm to accept an engagement and still have a "grace period" during which to come into compliance with the independence requirements.

We favor the AICPA Code's scope of application. Under the AICPA Code, the individuals subject to the independence requirements are the "attest engagement team" members (which includes those who perform concurring and second partner reviews), individuals in a position to influence the attest engagement, partners or managers who provide ten or more hours of nonattest services to the client, or partners in the office in which the lead attest engagement partner primarily practices.¹¹ Similarly, under the SEC rules, the subject individuals are those on the "audit engagement team," members of the chain of command,¹² any partner, principal, shareholder, or managerial employee who has provided ten or more hours of nonaudit services to the client, or any other partner, principal, or shareholder from an "office" of the accounting firm in which the lead audit engagement partner primarily practices.¹³ For both the SEC and the

¹¹ See AICPA Code, ET §§ 92.02, 92.06.

¹² Under the SEC's regulations, the chain of command includes all persons who:

- (i) Supervise or have direct management responsibility for the audit, including at all successively senior levels through the accounting firm's chief executive;
- (ii) Evaluate the performance or recommend the compensation of the audit engagement team;
- (iii) Provide quality control or other oversight of the audit.

17 C.F.R. § 210.2-01(f)(8).

¹³ 17 C.F.R. § 210.2-01((f)(11). "Office" is defined as "a distinct sub-group within an accounting firm, whether distinguished along geographic or practice lines." 17 C.F.R. § 210.2-01(f)(15).

AICPA, the critical consideration is whether the individual either participates in the audit or has an opportunity to influence the audit.¹⁴

We urge the Department to adopt the guidance maintained by the AICPA. The AICPA Code adequately insulates the audit team from undue influence without unnecessarily impacting unrelated firm employees. They also reflect modern realities. Indeed, as we will discuss, the overly broad nature of the Department's current rules is amplified by the rise of dual-income households, because independence rules will also apply to the spouses of "members," in addition to other close family members, who may often be professionals, too.

II. Specific Responses To Questions

- (1) **Should the Department adopt, in whole or in part, current rules or guidelines on accountant independence of the SEC, AICPA, GAO or other governmental or nongovernmental entity? If the Department were to adopt a specific organization's rules or guidelines, what adjustments would be needed to reflect the audit requirements for or circumstances of employee benefit plans under ERISA?**

As discussed above, we believe that the Department should adopt preexisting standards, rather than impose a novel regime on an already heavily-regulated profession. However, the Department may choose to modify the AICPA Code's independence standards to reflect certain

¹⁴ Narrowing the application of the independence requirements has precedent in the field of accountancy regulation. Prior to 2001, the SEC, like the Department, applied its independence requirements broadly. But the SEC decided to reduce the scope of its requirements, citing the rise in dual-career families and the increasing geographic diversity of accounting firms as key factors precipitating its decision. The SEC also explained that "[a]ccounting professionals have become more mobile, and geographic location of firm personnel has become less important due to advances in telecommunications." SEC Final Rule, Release 33-7919. The SEC stated explicitly that its prior rule was "broader than necessary to protect investors and our securities markets." *Id.*

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issues particularly germane to plans and plan sponsors. For example, as we will discuss in our answer to Question 4 regarding the definition of “maintaining financial records,” certain nonattest services allowed by the AICPA, such as bookkeeping, are not permitted under current Department regulations. The Department can easily implement such a prohibition, if deemed prudent. But as this example shows, the adoption of the AICPA Code’s independence standards will allow the Department to begin regulating from the established AICPA baseline and against a backdrop of the regulated accountants’ AICPA compliance. Further, if the Department adopts by reference the AICPA Code’s independence standards, the Department’s regulations will remain current as the AICPA Code is updated.

We also note that in many instances, the AICPA Code is more comprehensive and stringent than current Department guidelines. For example, as we explain below, adoption of the AICPA Code will result in stricter independence guidelines concerning accountants’ family members, as well as the addition of an “appearance of independence” standard. Such regulations, which play an integral role in maintaining independence, are already followed by AICPA members.

- (2) **Should the Department modify, or otherwise provide guidance on, the prohibition in Interpretive Bulletin 75-9 on an independent accountant, his or her firm, or a member of the firm having a “direct financial interest” or a “material indirect financial interest” in a plan or plan sponsor? For example, should the Department issue guidance that clarifies whether, and under what circumstances, financial interests held by an accountant’s family members are deemed to be held by the accountant or his or her accounting firm for independence purposes? If so, what familial relationships should trigger the imposition of ownership attribution rules? Should the ownership attribution rules apply to all members of the accounting firm retained to perform the audit of the plan or should it be restricted to individuals who work directly on the audit or may be able to influence the audit?**

The Department should promulgate rules concerning the prohibition in Interpretative Bulletin 75-9 on an independent accountant, his or her firm, or a member of the firm having a “direct financial interest” or a “material indirect financial interest” in a plan or plan sponsor. We agree that the two key groups at issue for this guidance are those identified by the question: certain family members and the auditing firm’s professional personnel. With regard to both, we urge the Department to adopt the AICPA Code. In this and the following subsection, we address directly the issue of familial relationships. We discuss the question of the auditing firm’s professional personnel in section I(B)(2) above, as well in our answer to Question 6.

The AICPA divides family members into two categories. An “immediate family” member is one who is the spouse, spousal equivalent, or dependent of the accountant.¹⁵ A “close relative” is a parent, sibling, or nondependant child.¹⁶ The rules vary depending on a family member’s status. Both the accountant and the accountant’s immediate family members

¹⁵ AICPA Code, ET § 92.12.

¹⁶ *Id.* at § 92.04.

fall directly under the AICPA Code's independence requirements. That is, an accountant's independence is considered impaired if a member of his or her close family has a financial interest or other connection with a client that would, if the family member were the accountant, impair the accountant's independence.¹⁷ The AICPA Code stipulates, in contrast, that a close relative of someone participating in the engagement impairs independence if he or she possesses a financial interest in the client that is material or enables significant influence over the client,¹⁸ or, as discussed below, if he or she holds a key position with the client.¹⁹ We support the adoption of the AICPA Code's rules on financial interest.

- (3) **Should the Department issue guidance on whether, and under what circumstances, employment of an accountant's family members by a plan or plan sponsor that is a client of the accountant or his or her accounting firm impairs the independence of the accountant or accounting firm?**

We recommend that the Department issue guidance on whether, and under what circumstances, the employment of the family member of an accountant by a plan or plan sponsor would threaten an accountant's independence. Although the AICPA Code generally prevents family members of an accountant subject to the independence requirements from participating in

¹⁷ AICPA Code, ET § 101-1.

¹⁸ *Id.*

¹⁹ A "key position" is defined in the AICPA Code as "a position in which an individual: (a) [h]as primary responsibility for significant accounting functions that support material components of the financial statements; (b) [h]as primary responsibility for the preparation of the financial statements; or (c) [h]as the ability to exercise influence over the contents of the financial statements . . ." AICPA Code, ET § 92.17.

an employee benefit plan that is audited by the accountant,²⁰ there are certain limited exceptions.

First, independence is not impaired if a member of the accountant's immediate family is employed by the client in a position *other* than a key position. Second, independence is not impaired if a member of the immediate family of a partner or a manager who provides ten or more hours of nonattest service to the client participates in a retirement, savings, compensation, or similar plan that is itself a client, or is sponsored or financed by a client. Third, independence is not impaired if an immediate family member of a partner located in the office in which the lead attest engagement partner primarily practices participates in such plans.²¹

These exceptions balance the need to insulate the attest engagement team from improper influences with the understanding that the possibility of a family member being a plan participant or employee exists, particularly in light of the increase in dual-income households.²² We encourage the Department to adopt the AICPA Code to protect independence without sweeping too broadly.

²⁰ See AICPA Code ET § 101-15 (stating that participation in a retirement, savings, compensation or similar plan constitutes a direct financial interest).

²¹ AICPA Code, ET § 101-1.

²² The SEC, in 2001 amendments to its own regulations, specifically narrowed the reach of its independence requirement, and “shrink the circle of family members whose employment by an audit client impair[ed] an accountant’s independence.” The Commission noted the issue of participation in employee benefit plans by a member of the accountant’s family or by the spouse of a partner at the accounting firm. *See* SEC Final Rule, Release 33-7919.

- (4) **Interpretive Bulletin 75-9 states that an accountant will not be considered independent with respect to a plan if the accountant or member of his or her accounting firm maintains financial records for the employee benefit plan. Should the Department define the term “financial records” and provide guidance on what activities would constitute “maintaining” financial records. If so, what definitions should apply?**

Interpretative Bulletin 75-9 currently finds independence impaired if an accountant or a member of the accountant's firm maintains the financial records of an employee benefit plan. Although it is an established principle that accountants should not audit their own work, not all activities that could be reasonably described as “maintaining financial records” compromise independence. The AICPA has carefully considered the scope of activities that can impair independence, and the adoption of the AICPA Code would make it unnecessary to specifically define the term “maintaining financial records.”

For example, the AICPA has specifically evaluated the independence risks presented by certain employee benefit plan services. Under the AICPA Code, individuals providing nonattest services may “communicate summary plan data to [a] plan trustee; advise client management regarding the application or impact of provisions of the plan document; process transactions . . . initiated by plan participants . . . ; prepare account valuations for plan participants . . . ; [and] prepare and transmit participant statements to plan participants. . . .”²³ Accordingly, we urge the Department to adopt the reasoned guidance of the AICPA Code and permit these activities because they do not threaten independence. *See also* Response to Question 7.

²³ AICPA Code, ET § 101-3.

- (5) **Should the Department define the terms “promoter,” “underwriter,” “investment advisor,” “voting trustee,” “director,” “officer,” and “employee of the plan or plan sponsor,” as used in Interpretive Bulletin 75-9? Should the Department include and define additional disqualifying status positions in its independence guidelines? If so, what positions and how should they be defined?**

We do not believe it is necessary for the Department to formulate specific definitions of these terms. The terms are well understood throughout the profession.

- (6) **Interpretive Bulletin 75-9 defines the term “member of an accounting firm” as all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit. Should the Department revise and update the definition of “member?” If so, how should the definition be revised and updated?**

We believe that the current Department definition of “member” sweeps too broadly. For this reason, we urge the Department to update its definition.

The AICPA requires all “covered members” to be independent. That term includes only those individuals who serve on the attest engagement team, any individuals in a position to influence the attest engagement, any partner or manager who provides ten or more hours of nonattest services to the client, and any partner in the office in which the lead attest engagement partner primarily practices.²⁴ Thus, the AICPA Code, unlike the current Department guidelines, does not extend the independence requirements to *all* professional employees in the office participating in the audit, nor does it cover partners not located in the primary office of the lead attest engagement partner.

²⁴ AICPA Code, ET § 92.06. A “covered member” for the purposes of the AICPA Code also includes the firm, and any entity whose operating, financial, or accounting policies can be controlled by any of the individuals described above or the firm itself.

We support the adoption of the AICPA Code which focuses on the relationship between an individual and the attest engagement (or those participating in the attest engagement) rather than a broad regulation that is insensitive to the size or complexity of an accounting firm. This shift in emphasis will maintain firm independence while avoiding any unnecessary restrictions on the employment options and financial connections of those individuals not involved in the audit.

- (7) **What kinds of nonaudit services are accountants and accounting firms engaged to provide to the plans they audit or to the sponsor of plans they audit? Are there benefits for the plan or plan sponsor from entering into agreements to have the accountant or accounting firm provide nonaudit services and also perform the employee benefit plan audit? If so, what are the benefits? Should the Department issue guidance on the circumstances under which the performance of nonaudit services by accountants and accounting firms for the plan or plan sponsor would be treated as impairing an accountant's independence for purposes of auditing and rendering an opinion on the financial information required to be included in the plan's annual report? If so, what should the guidance provide?**

In some instances, plans can benefit from obtaining nonaudit services from their auditors. Some of these services include those we discuss above in our answer to Question 4, such as communicating summary benefit plan data to plan trustees, processing benefit plan transactions, or preparing account valuations or participant statements. Further, an accountant could provide benchmarking information to the plan, allowing the plan participants to compare the benefits, features, cost, and investment performance of their plan with comparable plans in their industry. Having the accountant provide these types of nonattest services, as well as auditing services, is more efficient for the plan administrator, because the administrator will not need to engage multiple firms to provide plan services.

Moreover, the familiarity an accountant gains with a plan through an audit would allow for the more efficient provision of the nonaudit services. Under Section 404 of ERISA, plan fiduciaries have a duty to select the best service providers at the most reasonable cost.²⁵ Preventing an accounting firm currently auditing a plan from providing limited, appropriate nonattest services to the same plan will necessarily reduce competition for the provision of those services and may correspondingly raise prices for such services. As we discussed above, an increase in price will directly impact the plan's financial health because service provider fees are typically paid from plan assets.

Currently, the AICPA Code provides well-reasoned, meaningful restrictions on certain types of nonaudit services. For instance, the AICPA deems making client investment decisions or having custody over client assets independence impairing. In addition, accountants may not design or develop a plan. These activities require a subjective analysis that benefits calculations do not, and are disallowed. In contrast, the AICPA explained that actuarial valuations of a client's pension or post-employment benefit liabilities generally do *not* pose an independence threat. Such calculations produce consistent, verifiable results and lack the types of subjective judgments that are potentially vulnerable to improper influence.²⁶ Similarly, in the employee benefit plan context, the results of benefit calculations and plan valuations will be consistent, as they do not invite significant subjective analysis. Furthermore, because these types of services

²⁵ Section 404(a)(1) of ERISA requires the plan fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— (A) for the exclusive purpose of . . . (ii) defraying reasonable expenses of administering the plan."

²⁶ AICPA Code, ET § 101-3.

do not involve the accountant auditing his or her own work, allowing these limited nonattest services poses no meaningful independence risk. Plans should thus be able to employ the same accounting firm for audits as for these services.

- (8) Interpretive Bulletin 75-9 requires an auditor to be independent during the period of professional engagement to examine the financial statements being reported, at the date of the opinion, and during the period covered by the financial statements. Should the Department change the Interpretive Bulletin to remove or otherwise provide exceptions for “the period covered by the financial statements” requirement? For example, should the requirement be changed so that an accountant’s independence would be impaired by a material direct financial interest in the plan or plan sponsor during the period covered by the financial statements rather than any direct financial interest?**

Interpretative Bulletin 75-9 currently mandates auditor independence during the entire period covered by the financial statements, as well as during the time period of the engagement and at the date of the opinion. As we stated in our general comments, with respect to changing auditors, the application of the independence requirement to the entire period covered by the financial statements limits the fluidity of the accounting market. We instead recommend applying the independence requirement only to the period of the professional engagement in the first year of an auditor’s engagement for a plan or its sponsor, as the AICPA or the SEC does. Such an approach maintains accountant independence without seriously impairing clients’ ability to select new firms or firms’ ability to seek new business.

- (9) Should there be special provisions in the Department’s independence guidelines for plans that have audit committees that hire and monitor an auditor’s independence, such as the audit committees described in the Sarbanes-Oxley Act applicable to public companies?**

As the Department notes, these audit committees generally serve public companies and are subject to the regulations of the Sarbanes-Oxley Act. With regard to public companies, the

audit committee for the parent company usually operates as the committee for the wholly-owned subsidiaries as well (and by extension to their benefit plans).²⁷ Insofar as companies and plans regulated by the SEC are subject to an audit committee requirement, we believe it is unnecessary for the Department to add to these regulations. Furthermore, as discussed more generally above, we suggest that those accounting firms that audit only private plans should not be subject to the more burdensome regulations designed for those firms that do audit issuers; and consequently we do not believe the Department should impose special regulations on those plans that have audit committees. The audit committee mechanism, while highly relevant under the Sarbanes-Oxley Act, should not be imported into the Department's regulations.

- (10) What types and level of fees, payments, and compensation are accountants and accounting firms receiving from plans they audit and sponsors of plans they audit for audit and nonaudit services provided to the plan? Should the Department issue guidance regarding whether receipt of particular types of fees, such as contingent fees and other fees and compensation received from parties other than the plan or plan sponsor, would be treated as impairing an accountant's independence for purposes of auditing and rendering an opinion on the financial information required to be included in the plan's annual report?**

We think that the Department should provide guidance on what types and levels of fees, payments and compensation that accountants receive from plans they audit could potentially impair independence. We recommend that the Department adopt the AICPA's guidance on fee arrangements. The AICPA Code focuses on one manner of compensation in particular—it prohibits the receipt of contingent fees for professional services. As such, accountants subject to the AICPA Code may not receive contingent fees for performing audits or for reviewing

²⁷ See SEC's FAQ on Auditor Independence, Question 1 (Aug. 13, 2003).

financial statements.²⁸ In addition, an accountant subject to the AICPA Code may not receive a commission in exchange for recommending or referring a service or product if that accountant is also engaged by the client to perform an audit, review financial statements, or compile financial statements which could be used by a third party ignorant of the independence impairment.²⁹ Currently, accountants covered by the AICPA Code adhere to these strictures and so their adoption by the Department would maintain consistency in accounting regulation.

- (11) Should the Department define the term “firm” in Interpretive Bulletin 75-9 or otherwise issue guidance on the treatment of subsidiaries and affiliates of an accounting firm in evaluating the independence of an accounting firm and members of the firm? If so, what should the guidance provide regarding subsidiaries and affiliates in the evaluation of the independence of an accountant or accounting firm?**

We believe it is unnecessary for the Department to offer specific guidance on the definition of “firm.” Should the Department decide to do so, we suggest that it adopt the AICPA definition.³⁰

²⁸ See AICPA Code, ET § 302.01; *see also* 17 C.F.R. § 210.2-01(c)(5) (stating that “an accountant is not independent, if at any point during the audit and professional engagement period, the accountant provides any service or product for a contingent fee or a commission . . .”). We note that under ET § 302.01 accountants are also barred from accepting from most attest clients contingent fees for any professional service.

²⁹ See AICPA Code, ET § 503.01.

³⁰ Under the AICPA, “[a] firm is a form of organization permitted by law or regulation whose characteristics conform to resolutions of the Council of the American Institute of Certified Public Accountants that is engaged in the practice of public accounting. Except for purposes of applying Rule 101 . . . the firm includes the individual partners thereof.” AICPA Code, ET § 92.10.

- (12) Should the Department’s independence guidance include an “appearance of independence” requirement in addition to the requirement that applies by reason of the ERISA requirement that the accountant perform the plan’s audit in accordance with GAAS?**

Safeguarding independence plays an important role in maintaining the public’s trust in the accounting profession. Maintaining this trust is particularly critical in the area of employee benefit plans—entities that directly impact millions of Americans. As such, we currently follow the AICPA Code’s guidance on the appearance of independence, and we believe that the Department should employ the same standard.³¹ The AICPA Code requires that an accountant “who provides auditing and other attestation services should be independent in fact and appearance.”³² Independence in appearance is defined as “[t]he avoidance of circumstances that would cause a reasonable and informed third party, having knowledge of all relevant information, including safeguards applied, to reasonably conclude that the integrity, objectivity, or professional skepticism of a firm or a member of the attest engagement team had been compromised.”³³

Furthermore, under the AICPA Code, if a particular situation seems unaddressed by the ethics guidance, the accountant “should evaluate whether that circumstance would lead a reasonable person aware of all the relevant facts to conclude that there is an unacceptable threat

³¹ Currently, ERISA mandates that auditors conform to GAAS. AU Section 220 under GAAS requires that “[i]ndependent auditors . . . should avoid situations that may lead outsiders to doubt their independence.”

³² AICPA Code, ET § 55.03.

³³ AICPA Code, ET § 100.06.

to . . . independence.”³⁴ This standard emphasizes that all members of the accounting profession must be vigilant to not only recognize actual independence threats, but also to avoid the appearance of independence impairment. We believe that, when adopting the AICPA Code’s independence guidelines, the Department also should incorporate the “appearance” standard.

- (13) Should the Department require accountants and accounting firms to have written policies and procedures on independence which apply when performing audits of employee benefit plans? If so, should the Department require those policies and procedures be disclosed to plan clients as part of the audit engagement?**

We do not think it is necessary for the Department to require that accountants and accounting firms maintain written policies and procedures on independence with regard to audits of employee benefit plans. Accounting firms already have a duty to maintain policies and procedures that preserve independence.³⁵ These procedures are already subject to oversight. All members of the AICPA must enroll in a practice-monitoring program. Only two are approved: the Center for Public Company Audit Firms Peer Review Program (the “Center PRP”) and the AICPA Peer Review Program.³⁶ The objectives of the peer review program requirement are to ensure that the reviewed firm’s system of quality controls is in accordance with the quality control standards set by the AICPA and that the reviewed firms’ policies and procedures offer

³⁴ See AICPA Code, ET § 101-1.

³⁵ The AICPA has also issued a Proposed Statement on Quality Control Standards: *A Firm’s System of Quality Control* that proposes to place an “unconditional obligation on a firm to establish a system of quality control.” The firm would also be required to document those policies and procedures.

³⁶ The Center PRP is designed for those entities that are required to be registered with and inspected by the PCAOB.

reasonable assurance of conformance with professional standards. The peer reviewer prepares a written report on the results of the review, and provides feedback to the reviewed firm. These third-party reviews help ensure compliance with the AICPA Code's independence standards and further protect plans and plan sponsors. Additionally, the PCAOB also inspects and reviews those accounting firms subject to its regulation.³⁷

(14) Should the Department adopt formal procedures under which the Department will refer accountants to state licensing boards for discipline when the Department concludes an accountant has conducted an employee benefit plan audit without being independent?

We do not in principle oppose the adoption of formal procedures to refer accountants to state licensing boards for violations of the independence requirement. We urge, however, that any referrals to state boards of accountancy also go to an AICPA ethics committee. Any firm referred to the AICPA will be subject to the AICPA's comprehensive enforcement process. The AICPA has a great interest in maintaining the integrity of the accounting profession and its disciplinary procedures are well-developed. The enforcement procedures are detailed in the Joint Ethics Enforcement Program ("JEEP") Manual of Procedures. Both the AICPA and state CPA societies participate in the JEEP. That cooperation allows the AICPA and the given state society to conduct a single investigation and impose a concerted disciplinary action. We do not

³⁷ See 15 U.S.C. § 7214. Furthermore, the SEC's rules pertaining to an auditing firm's quality control system provides that such a system will be inadequate if it lacks "written independence policies and procedures." 17 C.F.R. § 210.2-01(d)(4)(i).

recommend eliminating the involvement of the AICPA in disciplinary processes involving firms that are members of the AICPA.³⁸

(15) Should accountants and accounting firms be required to make any standard disclosures to plan clients about the accountant's and firm's independence as part of the audit engagement? If so, what standard disclosures should be required?

We see no need for a new requirement that accountants and accounting firms make standard disclosures to plan clients about their independence as part of an attest engagement. Because independence is a GAAS requirement, any opinion following GAAS must comply with the independence rules. Currently, the AICPA Code has no formal independence disclosure requirement and we do not think one is necessary. But if the Department does decide to implement such a requirement, we suggest that the new regulation be consistent with Independence Standards Board Standard No. 1.³⁹

³⁸ If a firm is not a member of the AICPA, the case should be referred directly to the state accountancy board.

³⁹ Standard No. 1 concerns independence discussions with audits committees. The standard reads:

This standard applies to any auditor intending to be considered an independent accountant with respect to a specific entity within the meaning of the Securities Acts (“the Acts”) administered by the [SEC]. At least annually, such an auditor shall:

- a. disclose to the audit committee of the company (or the board of directors if there is no audit committee), in writing, all relationships between the auditor and its related entities and the company and its related entities that in the auditor’s professional judgment may reasonably be thought to bear on independence;
- b. confirm in the letter that, in its professional judgment, it is independent of

[Footnote continued on next page]

III. Conclusion

We fully support the Department's decision to amend and update Interpretive Bulletin 75-9 and are pleased to offer assistance to that effort. We believe that adopting the AICPA Code (possibly with certain tailored revisions) as the new Department independence guidelines will benefit the Department, plans and plan sponsors, as well as accountants who service employee benefit plans.

We would be pleased to discuss the information conveyed in this letter and to provide further thoughts as the Department continues its deliberative process. If you have any questions, please feel free to contact James L. Curry at (203) 761-3689 or Richard M. Goligoski at (203) 761-3423.

Very truly yours,

Deloitte & Touche LLP

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the company within the meaning of the Acts; and

- c. discuss the auditor's independence with the audit committee.