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**VIA FEDERAL E-RULEMAKING PORTAL ([HTTP://WWW.REGULATIONS.GOV](http://www.regulations.gov))**

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Office of Regulations and Interpretations  
Employee Benefits Security  
Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: ***Definition of Fiduciary Proposed Rule  
29 CFR Part 2510, RIN 1210-AB32***

Dear Sir or Madam:

We submit this comment on behalf of our client, the Western Conference of Teamsters Pension Trust Fund (the "WCT Fund"), in response to the Department's proposal to modify the regulation that defines the term "fiduciary" under Section 3(21)(A) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The WCT Fund is an employee benefit plan governed by ERISA and the Labor Management Relations Act of 1947, and qualified pension plan under section 401(a) of the Internal Revenue Code (the "Code") that is tax-exempt under Section 501(a) of the Code. The WCT Fund is the largest multiemployer pension plan in the United States, with over \$25 billion in assets, over 500,000 participants and almost 2,000 contributing employers employing over 240,000 workers in 50 different industries within the 13 western states of the United States.

This comment specifically addresses the proposal's expansion of the definition of "fiduciary" to include persons who provide advice, appraisals or fairness opinions concerning the value of securities or other property. As explained more fully below, we do not think that the definition of "fiduciary" should be expanded to include independent appraisers because such an expansion will: (1) cause plan costs to increase significantly; (2) reduce the number of qualified appraisers; (3) compromise plan fiduciaries' duty to diversify the investment of plan assets; and (4) unnecessarily saddle fiduciary responsibilities on persons who are already independent service providers to plans.

***Significant Increase in Plan Costs*** ERISA requires plan assets to be held in trust and prudently invested by trustees and other plan fiduciaries. ERISA also requires plan fiduciaries to

diversify plan investments so as to minimize the risk of large losses<sup>1</sup>. In furtherance of the duties of prudence and diversification, plan fiduciaries, including duly appointed investment managers<sup>2</sup>, invest in vehicles whose assets are considered “hard to value”. These investments include, but are not limited to, alternative investment vehicles and real property. Independent appraisers play a key role in providing valuations of the assets being managed by such fiduciary. In most cases, including investments in commingled investment funds, the independent appraiser provides a check on the already fully-audited valuation prepared by the investment manager. Moreover, such appraisers generally do not exercise any type of discretion or control with respect to the assets they value.

If appraisers are held liable as fiduciaries for the valuations they provide, appraisers will be required to incur additional expenses which, in turn, will be passed on to the plans to whom they provide services. These expenses include fiduciary liability insurance. We understand that such insurance is currently unavailable in the marketplace. Assuming insurance carriers will write this type of policy or rider, carriers will in all likelihood charge high premiums in the first few years before rates can be set on claims experience. Hence, the potential cost impact on plans could be very significant. Moreover, subjecting valuations to the fiduciary requirements of ERISA will increase plan fiduciaries’ exposure to co-fiduciary liability and related litigation.

***Chilling Effect on the Number of Qualified Appraisers.*** As referenced above, plan fiduciaries generally use independent appraisers to value “hard to value” assets. Because of the complexities associated with these assets, there is a limited number of entities that have the expertise required to provide valuation services to plans. If these entities are considered fiduciaries for simply providing valuations and fairness opinions, they may cease to perform work for any ERISA plans altogether as such work would be too cost-prohibitive. This will shrink the pool of qualified appraisal experts even further and will be detrimental to all plans and their participants.

***Compromise Duty to Diversify Plan Investments.*** If appraisals cause plans to incur additional expenses, plan fiduciaries may decide not to invest in a potentially fruitful investment because of the administrative costs associated with the investment. Such plan fiduciaries’ ability to diversify the plan’s investments, therefore, may be compromised if they are foreclosed from investing in vehicles involving “hard to value” assets.

***Imposing Fiduciary Obligations on Independent Appraisers Is Unnecessary.*** We understand from the preamble to the proposed regulation, that expanding the definition of “fiduciary” is intended to “protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA’s fiduciary requirements.” ERISA’s fiduciary requirements prohibit plan fiduciaries from acting in their own interest and from engaging in prohibited transactions with parties in interest. Thus, plan fiduciaries are required to ensure that the plan’s service providers are free

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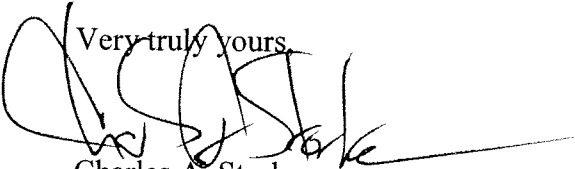
<sup>1</sup> 29 U.S.C. Section 1104(a).

<sup>2</sup> 29 U.S.C. Section 1105(d).

from any conflicts of interest. As such, most appraisers that are engaged by plan fiduciaries are necessarily independent appraisers. Because of this independent status, it is unnecessary for appraisers to be held to the standard of a fiduciary. The plan fiduciaries who engage the independent appraiser already have the fiduciary obligation to monitor the appraiser and the services they provide, including terminating the appraiser and filing suit against the appraiser to recover any losses relating to a faulty appraisal. Imposing fiduciary obligations on the independent appraiser is unnecessary.

Lastly, if appraisers are deemed to be fiduciaries on the ground that their opinions are relied upon by plan fiduciaries, then the same conclusion could be reached with respect to other plan professionals such as independent auditors, as their opinions form the basis of the valuation of the plan's total assets and compliance with ERISA's reporting requirements. Independent auditors, however, have not been found to be "fiduciaries". We believe that independent appraisers should be treated like independent auditors and deemed to be fiduciaries only if they in fact exercise discretion or control with respect to the assets of a plan. If the Department believes that some independent appraisers are not acting in full compliance with their professional responsibilities and obligations, the proper course is to attack the problem directly, much as the Department has done with plan auditors.

Based on the foregoing, we do not think that the definition of "fiduciary" should be expanded to include persons who provide advice, appraisals or fairness opinions concerning the value of securities or other property. We appreciate your consideration in reviewing our comments.

Very truly yours,  
  
Charles A. Storke

CAS:tns

- cc: Mr. Richard L. Dodge, Chairman, WCT Fund
- Mr. Chuck Mack, Co-Chairman/Secretary, WCT Fund
- Mr. Michael M. Sander, Administrative Manager, WCT Fund
- Mr. Alan D. Biller, Investment Advisor, WCT Fund