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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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OFFICE OF REGULATIONS
AND INTERPRETATIONS

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

Mohler, Nixon & Williams (MNW) is pleased to comment on the Department of Labor's (the DOL or Department) request for information (RFI) concerning the advisability of amending Interpretive Bulletin 75-9 relating to guidelines on independence of accountants retained by employee benefit plans under section 103(a)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA). MNW has been performing ERISA audits since the firm's inception in the early 1980s and currently audits over 500 benefit plans in this arena. MNW is firmly committed to working with the DOL on auditor independence issues as auditor independence is a core tenet of the accounting profession. We are also deeply committed to working with the DOL on other matters to ensure the quality and integrity of independent audits and the protection of the nation's employee benefit system.

In addition, we are encouraged by the steps the Department is taking in gathering information and analyzing possible changes that could be made to the Interpretive Bulletin 75-9 as over some years have passed since its enactment. We further hope that the DOL adopt guidelines under a framework which would foster future modernization of independence rules should they become necessary.

The following are our responses to the specific questions the Department has detailed in the RFI.

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?

We strongly encourage the DOL to incorporate the AICPA's independence standards as a basis for its independence rules. This would ensure harmonization of the profession's independence rules with those of other interested parties or regulatory bodies. The SEC independence rules are very similar to AICPA rules. We also recognize that there may be differences between public

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and nonpublic companies with respect to the nature and extent of the safeguards necessary to mitigate impairment of independence. It would also always be possible for the DOL to make adjustments as deemed necessary to this starting point by adding or deleting items to incorporate specific independence issues applicable to auditors of benefit plans subject to ERISA. We recognize that the AICPA independence standards may not fully cover all independence matters applicable to the audits of benefits plans under ERISA and that the Department may have concerns or disagree with certain AICPA independence standards as they apply to ERISA audits. However, the DOL could work with the AICPA to establish mechanisms to address these issues and resolve them and in turn communicate them to the CPA firm community. In addition, in performing audits in accordance with generally accepted auditing standards (GAAS), as required by ERISA, it seems the rules overlap one another already and seems logical for the independence rules to mirror one another.

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?

We believe the DOL should clarify independence guidelines related to financial interests held by an accountant’s family members and when that interest impairs independence for the covered member or the firm. There is a general consensus among the profession that there is generally less of a threat to independence when the financial relationships extend to a covered member’s certain close relatives (i.e., parents, siblings or non-dependent children) than the covered members themselves. Such relatives are also considered distant enough in that they do not impact the covered members’ clients or the engagement team members.

Having said that, the AICPA rules, which are comparable to the SEC rules, provide sound and practical rules that extend to covered member relatives, however, provide exceptions that make the applicability of the rules very practical and easy to understand and implement. They also allow for things like participation in sponsor retirement plans as offered to all employees of a company or the covered member.



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 believe this is another area related to independence which the DOL should either clarify or modify. This is also another area where there is not a great perceived threat to independence, unless the family members or relatives hold key positions at the plan sponsor and in a position to influence the plan. Otherwise, we believe that this is an area where it would be practical and sound for the DOL to adopt AICPA rules of independence, and in turn, it would be easier for the profession to comply with and implement.

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?

We believe the Department should define the term "financial records" and provide guidance on what activities would be considered "maintaining financial records." The AICPA, for example, provides specific guidance on what nonattest services can be provided to an attest client without jeopardizing independence. They are very clear and in turn help the auditor to stay in compliance. We do realize that for ERISA and the DOL, definitions of financial records of a plan will differ from a company's general ledger and may in fact need to be more stringent. However in their attempt to clarify the items mentioned above, the Department should consider the financial activity and records of benefit plans which are provided to auditors and how these records are compiled by external providers. This would ensure that the guidance provided will be applicable and helpful to the auditors in maintaining independence as required by the DOL.

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 that these terms mentioned above are ambiguous or not well understood in the profession and do not believe any revisions by the DOL is necessary at this time.

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 strongly believe the Department should revise the definition of “member” to be more in line with the AICPA and the SEC. We believe that the AICPA and SEC rules which are very practical in that they include as members those who can influence the outcome of an audit directly or through the engagement team. Meaning individuals who do not work directly on an audit engagement but work out of or are located in the same office which provides such audit services are really not in a position to influence the audit team or the outcome of an audit. Therefore, we would recommend that less restrictive rules be put into place by the Department for those individuals who are significantly removed from the audit team and engagement and the definition of a member be modified.

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?

There are many kinds of nonaudit services that accountants are engaged to provide to the plans they audit or the sponsor of the plans they audit. These include preparing financial statements for the plan, preparing the Form 5500 for the plan, or preparing IRS Forms such as the Form 5330 for certain plan corrections. There are many benefits for the plan or plan sponsor in providing these nonaudit services; the auditor is familiar with the respective plan and most of these services can be provided in tangent with the audit itself, therefore, ensuring the plan sponsor has prepared all necessary filings or has a reliable and accurate set of financial statements to file with the Department. If the auditor is not able to perform these nonaudit services, plan sponsors will be forced to engage external expert help to prepare financial statements as most plan sponsors lack internal capacity or knowledge within their companies to provide these services themselves to their auditors. The engaging of outside help places additional less cost-effective burdens on the plan sponsors and the plan participants if the plan allows for such expenses to be paid out of plan assets. Therefore, this would cause financial burdens that outweigh any benefits that might be reaped in the process. The Department should



provide guidance on the circumstances under which the performance of some of the above mentioned nonaudit services would impair the auditor's independence as it is not clear at the present time. We also believe that the Department should provide guidance on restrictions placed on the plan itself and those that can be placed on the plan sponsors. In providing this guidance, we believe the DOL should consider the AICPA rules which permit auditors to perform certain services such as bookkeeping services when certain safeguards are in place to confirm management participation and plan sponsor review and ultimate control of all financial statements filed with the Form 5500.

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?

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. We believe this is another area where it would be highly beneficial to adopt provisions closer to the AICPA and the SEC, which permit an audit firm to audit the financial statements of an entity if the auditor had a financial interest in such entity, provided that the financial interest was disposed of prior to the period of the professional engagement (i.e., prior to signing the initial audit engagement letter or commencing audit procedures). This really mitigates any threat of impairment as such disposition would occur prior to performing any audit work. This would also be very beneficial to plan sponsors and would help them tremendously in their selection of audit firms in that it would help remove a hindrance which so often occurs and the plan sponsors have to select a less qualified audit firm with less ERISA experience or they revert to the lowest costing audit firm merely to fulfill the audit requirement.

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?

We do not believe this is necessary to do; we believe that if the Department moves closer to the independence rules as outlined by the AICPA and the SEC, and clarifies such rules so that they are clear and practical, that such monitoring would not be that necessary or beneficial

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 do not believe additional guidance is required in this area from the Department. We are currently aware of the AICPA Rule 302, *Contingent Fees*, and Rule 503, *Commissions and Referral Fees*, which prohibits an accountant or accounting firm from accepting a contingent fee from an employee benefit plan audit client or from receiving a commission from a third party on behalf of such a client. We are also aware that the SEC and most state boards of accountancy prohibit such fee arrangements. Therefore, we believe that adequate monitoring and guidance in this area is available to accountants.

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?

In providing the feedback requested in this RFI, we believe there are many other pressing issues and areas which the Department should focus on if it is to make revisions in the future to their independence rules, and we would request that the DOL not focus on redefining the term "firm" at the present time. For consideration purposes however, we would once again point to the AICPA definition which expands beyond the firm to any entities whose operating, financial, or accounting policies can be controlled (as defined by generally accepted accounting principles for consolidation purposes) by the firm or members of the firm, individually or collectively.

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?

As we indicated in previous questions in this document, if the DOL were to consider adopting independence provisions set forth by the AICPA, we believe that the "appearance of independence" requirement would be covered in that case as it's currently a requirement under GAAS, in which case, we do not believe a separate requirement set forth by the Department would be necessary.



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 believe that the AICPA is currently working on a quality control manual that will address this issue. We believe that firms should be required to have written policies and procedures on independence. We also believe that the majority of firms do in fact have written policies and procedures in their quality control manuals that address independence. Accordingly, we do not believe it is necessary for Department to require these policies and procedures to be disclosed to clients.

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 believe the Department should put procedures in place for disciplinary actions related to independence issue, similar to the ones the DOL has currently in place for deficient audits, instead of reporting to state licensing boards. We further believe that the Department should also refer these cases to the AICPA Professional Ethics Division.

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 do not think that disclosing independence will always be beneficial as it's really the firm's responsibility to ensure they are independent as it's a fundamental part of our work. So we do not believe such disclosure should be part of the audit engagement. However, we would uphold any disclosures required by the Department, as long as it's clear what exactly needs to be communicated to the client/ plan sponsor, the timing of when a disclosure needs to be made and how the client/plan sponsor can utilize this information.



We appreciate this opportunity to share our comments with the Department as requested in the DOL's RFI. We respectfully request the Department consider our thoughts and comments and we invite the Department to contact us at any time to further discuss these comments in the future.

Sincerely,

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