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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210-AB09

Independence **of** Employee Benefit Plan Accountants

AGENCY: Employee Benefits Security Administration, DOL.

ACTION: Request for Information.

SUMMARY: This document requests information from the public concerning the advisability **of** amending Interpretive Bulletin 75-9 (29 CFR 2509.75-9) 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). Under ERISA, unless otherwise exempt, the plan administrator is required to retain on behalf **of** all plan participants an ``independent qualified public accountant'' to examine the financial statements **of** the plan and render an opinion as to whether the financial statements and schedules required to be included in the plan's annual report are presented fairly in conformity with generally accepted accounting principles (GAAP). The purpose **of** this notice is to obtain information to assist the **Department of Labor** in evaluating whether and to what extent Interpretive Bulletin 75-9 provides adequate guidance to meet the needs **of** plan administrators, other plan fiduciaries, participants and beneficiaries, accountants, and other affected parties on when a qualified public accountant is independent.

DATES: Written responses must be received by the **Department of Labor** on or before December 11, 2006.

ADDRESSES: Responses should be addressed to the Office **of** Regulations and Interpretations, Employee Benefits Security Administration (EBSA), Room N-5669, U.S. **Department of Labor**, 200 Constitution Avenue, NW., Washington, DC 20210. Attn: Independence **of** Accountant RFI (RIN 1210-AB09). Responses also may be submitted electronically to e-ori@dol.gov or by using the Federal eRulemaking Portal http://www.regulations.gov (follow instructions for submission **of** comments). EBSA will make all responses available to the public on its Web site at http://www.dol.gov/ebsa. The responses also will be available for public inspection at the Public Disclosure Room, N-1513, EBSA, U.S. **Department of Labor**, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Michael G. Leventhal, Office **of** Regulations and Interpretations, Employee Benefits Security Administration, U.S. **Department of Labor**, (202) 693-8523 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

The Employee Retirement Income Security Act (ERISA) was enacted in 1974 to remedy certain abuses in the nation's private-sector employee pension benefit plan and employee welfare benefit plan system. ERISA contains provisions designed to protect the interests **of** plan participants and beneficiaries by requiring the establishment **of** effective mechanisms to detect and deter abusive practices. These provisions include requiring annual reporting **of** financial information and activities **of** employee benefit plans to the **Department of Labor** (**Department**). An integral component **of** ERISA's annual reporting provisions is the requirement that employee benefit plans, unless otherwise exempt, be subjected to an annual audit performed by an independent qualified public accountant (IQPA) and that the accountant's report be included as part

of the plan's annual report filed with the **Department**.\1\

\1\ Certain employee benefit plans are eligible for waivers or limited exemptions from the IQPA audit requirements under regulations issued by the **Department**. For example, regulation section 2520.104-44 provides a limited exemption for welfare plans which are either unfunded, insured or partly unfunded-partly insured. If a plan does not comply with ERISA's annual reporting requirements, including failure to satisfy the requirement to have an audit report and opinion **of** an IQPA, the **Department** may reject the plan's annual report. If a satisfactorily revised report is not submitted, the **Department** may under section 104(a)(5) **of** ERISA retain an independent qualified public accountant on behalf **of** the participants to perform a sufficient audit, bring a civil suit for whatever relief may be appropriate, or take any other enforcement action authorized under Title I.

The IQPA requirements in ERISA were intended to provide participants, beneficiaries, plan administrators, other plan fiduciaries, and the **Department** with reliable information about an employee benefit plan and its financial soundness. The precursor to ERISA, the Welfare and Pension Plan Disclosure Act **of** 1958 (WPPDA), required a certified audit only when the Secretary **of Labor** found reasonable cause to investigate a plan. Legislative history **of** ERISA indicates that Congress found this requirement to be insufficient, and specifically replaced it with the annual certified audit requirements in section 103(a)(3)(A) **of** ERISA.

Section 103(a)(3)(A) **of** ERISA sets forth the requirements governing the IQPA's annual audit. The administrator **of** an employee benefit plan is required to engage, on behalf **of** all plan participants, an IQPA to conduct an examination **of** the plan's financial statements, and other books and records **of** the plan, as the accountant deems necessary to allow the accountant to form an opinion as to whether the financial statements and schedules required to be included in the plan's annual report are presented fairly in accordance with generally accepted accounting principles (GAAP) applied on a basis consistent with that **of** the preceding year. The accountant's examination must be conducted ``in accordance with generally accepted auditing standards (GAAS), and shall involve such tests **of** the books and records **of** the plan as are considered necessary by the independent qualified public accountant.'' The accountant's report must contain certain opinions with respect to the financial statements and schedules covered by the report and the accounting principles and practices reflected in such report. Further, the accountant's report must identify any matters to which the accountant takes exception, whether the matters to which the accountant takes exception are the result **of Department**'s regulations and, to the extent practicable, the effect on the financial statements **of** the matters to which the accountant has taken exception. If the auditor's independence is considered to have been impaired after the audit is completed, a new audit by another accountant may be required.

Section 103(a)(3)(D) **of** ERISA states that the term ``qualified public accountant'' means--(i) a person who is a certified public accountant, certified by a regulatory authority **of** a State; (ii) a person who is a licensed public accountant, licensed by a regulatory authority **of** a State, or (iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by the Secretary for a person who practices in States where there is no certification or licensing procedure for accountants. ERISA does not, however, define what would constitute ``independence'' for purposes **of** the audit requirements.

In the **Department**'s view, an accountant's independence is at least **of** equal importance to the professional competence he or she brings to an engagement in rendering an opinion and issuing a report on the financial statements **of** an employee benefit plan. Pursuant to the authority provided to the **Department** by section 103(a)(3)(A), the **Department** issued Interpretive Bulletin 75-9 in 1975 to provide guidelines for determining when an accountant is independent for purposes **of** ERISA's annual reporting requirements. The bulletin explains that the **Department** will not recognize any person as an independent qualified public accountant with respect to an employee benefit plan who is not in fact independent.

The rule also specifically describes three kinds **of** relationships that will cause an accountant not to be independent. During the audit engagement and during the period covered by the audit, the accountant, his or her firm, and any member **of** the firm cannot: (1) Have or be committed to acquire any direct financial interest or any material indirect financial interest in the plan or the plan sponsor; (2) have a connection to the plan or plan sponsor as a promoter, underwriter, investment advisor, voting trustee, director, officer or employee **of** the plan or plan sponsor; and (3) maintain financial records for the employee benefit plan. The Interpretive Bulletin defines ``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. The Interpretive Bulletin provides that independence is required during the period **of** professional engagement, at the date **of** the opinion, and during the period covered by the financial statements. In addition to the specific proscriptions, the Bulletin cautions that the **Department** will give appropriate consideration to all relevant circumstances in determining whether an accountant or accounting firm is not, in fact, independent with respect to a particular plan, including evidence bearing on all relationships between the accountant or accounting firm and that **of** the plan sponsor or any affiliate. In that regard, Interpretive Bulletin 75-9 notes that an accountant will not fail to be recognized as independent merely because the accountant or his or her firm is retained or engaged on a professional basis by the plan sponsor, provided none **of** the three specific proscriptions are violated. Further, the Interpretive Bulletin states that the rendering **of** services to the plan or plan sponsor by an actuary associated with the accountant or accounting firm will not impair the accountant's independence.

In addition to ERISA's annual reporting requirements, accountants and accounting firms are subject to independence requirements **of** other governmental agencies and accounting industry self-regulatory bodies. For example, the Securities and Exchange Commission (SEC) has independence guidelines for auditors reporting on financial statements included in SEC filings. Those guidelines were for many years contained in Rule 2-01 **of** Reg. S-X, Qualifications and Reports **of** Accountants. On January 28, 2003, the SEC adopted final rules regarding independence for auditors that file financial statements with the SEC implementing Title II **of** the Sarbanes-Oxley Act **of** 2002. The Sarbanes-Oxley Act also authorized the establishment **of** the Public Company Accounting Oversight Board (``PCAOB'') which itself has established ethics and independence requirements for registered public accounting firms. The United States Government Accountability Office (GAO) has auditor independence requirements under Government Auditing Standards \2\ that cover Federal entities and organizations receiving Federal funds. The American Institute **of** Certified Public Accountants (AICPA) sets GAAS requirements

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including standards by which the auditor must abide to avoid impairment **of** independence.\3\ Many States have an independence component in their requirements for licensed public accountants. Some have adopted the AICPA's Code **of** Conduct, including its independence guidelines. Others, however, have adopted specific rules, including limitations on offering or rendering services under a contingency fee arrangement as well as limitations on ownership interests in the enterprise being audited.\4\ Further, the nature and complexity **of** the business environment in which accountants perform services has changed in ways that have led many accounting firms to develop expertise in an array **of** activities peripheral to audit services, for example, business consulting, valuation and appraisal services, applications programming, electronic data processing and recordkeeping. The **Department** has received public comments indicating that these developments have made it a more complicated process for accountants and accounting firms to monitor compliance with the different independence standards that apply in the different business sectors in which they provide audit services.

\2\ Information about Government Auditing Standards (commonly referred to as ``Generally Accepted Government Auditing Standards,'' or ``GAGAS'') is available on the GAO Web site at http://www.gao.gov/govaud/ybk01.htm.

\3\ Information about AICPA's standards is available at http://www.aicpa.org/about/code/index.html.

\4\ See section 29.10(a)(5), (6), and (7) **of** New York State's Education **Department**'s Office **of** Profession's Rules **of** the Board **of** Regents (Special provisions for the profession **of** public accountancy) (http://www.op.nysed.gov/part29.htm#cpa).

B. Request for Information

The purpose **of** this Notice is to obtain information to assist the **Department** in evaluating whether and to what extent the guidelines in Interpretive Bulletin 75-9 provide adequate guidance regarding the independence **of** accountants who audit employee benefit plans to meet the needs **of** plan officials, participants and beneficiaries, accountants, and other affected parties. Given the changes that have taken place with respect to employee benefit plans and auditing practices and standards, as well as changes in the industry since the issuance **of** the guidelines in Interpretive Bulletin 75-9, EBSA is inviting interested persons to submit written comments and suggestions concerning whether and to what extent the current guidelines should be modified.

In order to assist interested parties in responding, this document contains a list **of** specific questions. The **Department** recognizes that these questions may not address all issues relevant to the independence **of** accountants who audit employee benefit plans. Accordingly, interested parties are invited to submit comments on other issues relating to Interpretive Bulletin 75-9 that they believe are pertinent to the **Department**'s consideration **of** new or additional independence guidelines.

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

Signed at Washington, DC, this 5th day **of** September 2006.

Ann L. Combs,
Assistant Secretary, Employee Benefits Security Administration.

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