



March 4, 2011

The Honorable Devin Nunes  
United States House of Representatives  
1013 Longworth House Office Building  
Washington, DC 20515

Dear Representative Nunes:

On behalf of the nearly 30,000 members of our respective professional organizations, we would like to provide comment on how your bill, H.R. 567, the Public Employee Pension Transparency Act, which amends the Internal Revenue Code of 1986 to provide for reporting and disclosure by State and local public employee retirement pension plans, can be improved to ensure a clear analysis of current market trends and reduce risk in State and local public employee retirement pension plans.

Related to your legislation, we call your attention to the Department of Labor's ("DoL") Proposed Rule ("proposal") on the definition of "fiduciary" under the Employee Retirement Income Security Act (ERISA), which was published in the Federal Register on October 22, 2010. The proposal will affect whether appraisers, consultants, insurance agents, and others who work with pension and 401(k) plans and IRAs will be deemed to be fiduciary investment advisors. The consequences of being a fiduciary include a difference in the duty of care applicable to one's conduct, prohibitions on receipt of additional fees, prohibitions against recommending affiliated products or services, and prohibitions against engaging in principal transactions. Our organizations are deeply concerned by the proposal's extension of fiduciary status under ERISA to real estate appraisers.

As you may know, the role of real estate appraisers is to provide objective, impartial, and unbiased opinions about the value of real property to their client. Many appraisers are retained to provide such opinions by pension funds and other institutional investors for a variety of reasons, including mortgage financing, portfolio monitoring, financial reporting and asset management. The role of the appraisal primarily is risk management relating to commercial real estate.

Real estate appraisers do not act as advocates, but rather objective third parties who provide opinions of value based on research and analysis. The very definition of an appraiser is "one who is expected to perform valuation services competently and in a manner that is independent, impartial and objective."<sup>1</sup> *Independence* and *objectivity* are two factors that differentiate the services of our members from those conducted by real estate agents, investment advisors, accountants and others

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<sup>1</sup> From the *Uniform Standards of Professional Appraisal Practice*. Definitions. Available at <http://www.uspap.org/2010USPAP/USPAP/frwr/definitions.htm>

providing value opinions in the market. Generally speaking, it is unethical for appraisers to accept contingent fees under the Uniform Standards of Professional Appraisal Practice (“USPAP”). Further, under the Ethics Rule of USPAP, an appraiser “must not advocate the cause or interest of any party or issue.”

It is our view that offering investment advice is vastly different than providing objective opinions of value. One who offers investment advice is acting as an advocate for their client. Further, a fiduciary is someone who advocates at all times for their clients<sup>2</sup>. As stated above, appraisers are prohibited from advocating for any party or issue. For these reasons, we strongly object to including real estate appraisers in the same category as those who give investment advice when real estate appraisers, in the normal course of their practice, do real estate appraisals subject to USPAP and professional standards and rules.

We are concerned that the DoL’s proposal is overly broad and most likely will lead to increased costs for benefit plans in need of real estate-related services with little corresponding benefit, while hampering the ability of benefit plans to utilize the resources of trusted advisers in the best and most cost-effective way. The members of our organizations include employee benefit plans and various service providers to benefit plans that are subject to ERISA regulations. As such, we have an interest in ensuring that the proposal does not unduly restrict these constituents from engaging in routine business transactions with each other under arms-length terms.

### **Pension Valuations**

As far as the valuing of State and local public employee pension plans is concerned, our organizations strongly support industry standards that have been developed by the pension and financial analysts’ communities. Specifically, the CFA Institute publishes the Global Investment Performance Standards (“GIPS”) relating to real estate investment by investment funds. These standards have been modified to encourage an increase in the frequency of external valuations by fund managers from once every 36 months to once a year. Similarly, internal valuations are suggested to be increased from once a year to once per quarter. Similar to GIPS are the Real Estate Information Standards published by the Pension Real Estate Association and observed by the National Council of Real Estate Investment Fiduciaries (NCREIF). REIS standards also call for regular and ongoing internal and external valuations. We understand that these standards currently are under review with the potential for a similar increase in frequency like those called for in GIPS.

The circumstances within the real estate and financial services sector illustrate the importance of periodic valuations. Many real estate markets continue to be distressed; and, in the case of

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<sup>2</sup> “In a fiduciary relation one person, in a position of vulnerability, justifiably reposes confidence, good faith, reliance and trust in another whose aid, advice or protection is sought in some matter. In such a relation good conscience requires one to act at all times for the sole benefit and interests of another, with loyalty to those interests.” Available at <http://en.wikipedia.org/wiki/Fiduciary>

commercial real estate, a downturn in the economy that increases bankruptcies and vacancy rates could have a dramatic impact on real estate values. While internal valuations are important, it is critical that real estate values be analyzed by external professionals on a regular and ongoing basis to protect investors and promote transparency in the marketplace.

We wanted to call to your attention these strong industry standards for your consideration during your deliberations regarding pension asset valuations and management.

We would be happy to meet with you or your staff to discuss this issue further. If you have any questions, please contact Bill Garber, Director of Government Relations for the Appraisal Institute, at 202-292-5586 or [bgarber@appraisalinstitute.org](mailto:bgarber@appraisalinstitute.org), or Brian Rodgers, Manager of Federal Affairs, Appraisal Institute, at 202-298-5597 or [brodgers@appraisalinstitute.org](mailto:brodgers@appraisalinstitute.org).

Sincerely,

Appraisal Institute  
American Society of Farm Managers and Rural Appraisers

CC: Bill sponsors  
U.S. Department of Labor