



February 2, 2011

Employee Benefits Security Administration
Office of Regulations and Interpretations, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

Re: Proposed Regulation, "Definition of the Term Fiduciary"

Dear Ladies and Gentlemen:

As a professional who is deeply committed to promoting employee ownership through employee stock ownership plans ("ESOPs") and has worked with hundreds of successful ESOP companies throughout my career, I am strongly opposed to the Department of Labor's ("DOL's") proposed reversal of a 34-year-old policy to automatically redefine independent valuers of ESOP shares as fiduciaries (the "Proposed Definition") for three main reasons:

1. It will hinder the creation and operation of ESOPs, and will lead to few ESOPs and job losses;
2. It will have the exact opposite of the desired effect on valuations...it will actually *decrease* the quality of ESOP valuations; and
3. There are viable alternative solutions to ensure higher quality ESOP valuations that will not have a negative effect on ESOP companies.

Additionally, dozens of our ESOP company clients in Ohio and Indiana have contacted us expressing concerns about this Proposed Definition. In general, these companies' concerns seem to be similar to the concerns I outline below.

Proposed Definition Will Hinder the Creation and Operation of ESOPs

Current law recognizes the importance of employee ownership and ESOPs to the U.S. economy, and states that Congress seeks to encourage employee ownership through ESOPs by not making laws that hinder the creation or operation of ESOPs (please see adjacent excerpt). With this new rule, ESOP

90 Stat.1520, P.L. 94-455 Section 803

(h) Intent of Congress Concerning Employee Stock Ownership Plans. – The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, the Employee Retirement Income Security Act of 1974, and the Tax Reduction act of 1975) and this Act has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trust and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. (Pub. L. 94-455, 90 Stat. 1520)

valuators would be forced to seek additional fiduciary liability insurance (similar to ESOP trustees), the cost of which will be passed on to ESOP company clients. As such, the Proposed Definition will substantially increase the cost of installing and administering ESOPs, thus reducing the number of new ESOPs, increasing the number of companies who terminate their ESOPs, and increasing the cost for companies that continue to sponsor ESOPs, thus reducing profits, reducing stock values, and reducing retirement account balances.

Additionally, the Proposed Definition will eliminate the independence and objectivity of the valuation advisor by making them a fiduciary who is only concerned with what is best for the ESOP. When considering the installation of an ESOP, selling shareholders and trustees often rely heavily upon the advice and objectivity of independent valuation advisors. If such independent and objective advice is not available, many selling shareholders will elect not to pursue ESOPs, and will instead sell their companies by other means, oftentimes resulting in a substantial loss of jobs among the employees who helped build the company.

Proposed Definition Will Dramatically Reduce the Quality of ESOP Valuations

Independence and objectivity are cornerstones of the professional standards of the leading organizations that sponsor valuation-related professional designations such as the American Institute of Certified Public Accountants, the CFA Institute, the American Society of Appraisers, the Institute of Business Appraisers, and the National Association of Certified Valuation Analysts. By requiring ESOP valuers to be fiduciaries, the Proposed Definition precludes valuers from being independent and objective; thus, the Proposed Definition is in direct contrast to all professional appraisal standards. As such, professional valuers who hold professional designations (which constitute the most experienced, highest quality valuers), will be forced to withdraw from ESOP valuation assignments, abandon their long-time ESOP company clients, and exit the ESOP valuation market since their professional standards will preclude them from participating in ESOP valuations. The result will be the vast majority of ESOP companies having to replace their existing valuers with lower quality, lesser experienced, non-credentialed valuation advisors, thus reducing the reliability of their ESOP valuations and putting their participants' retirement accounts at risk.

Furthermore, the Proposed Definition will result in ESOP valuers needing to purchase additional fiduciary insurance, the cost of which would be passed on to ESOP companies and their employees. Also, the enhanced potential for frivolous lawsuits against ESOP valuers will drive high-quality valuers out of the ESOP valuation market. As a result, the only valuers who will remain in the ESOP valuation business will be low-quality providers who do not hold professional designations related to valuation, or who are unaware of the risks of potential lawsuits (or have such small practices that lawsuits are not a threat since there are no assets in their valuation businesses).

Alternative Solution to Improve Valuations without Harming ESOP Companies

I applaud the DOL's concern about ESOPs and its desire to increase the quality of ESOP valuations. I agree that the quality of many ESOP valuations needs to improve, and I fully

support measures that protect ESOP participants' retirement accounts. However, as discussed above, the Proposed Definition will have the exact opposite effect and in fact, will cripple ESOPs and may even effectively legislate ESOPs out of existence.

A much more appropriate solution would be to mirror the actions of another government agency, the Internal Revenue Service, by specifically defining the elements of a "qualified appraisal" and a "qualified appraiser", and requiring ESOP trustees to seek independent valuations of ESOP shares only from such "qualified appraisers". Elements of a "qualified appraiser" would likely include consideration of the demonstration of an active valuation practice, valuation qualifications, number of appraisals completed, number of ESOP appraisals completed, professional designations related to valuation, or many other possible factors. Requiring ESOP trustees and plan sponsors to utilize only "qualified appraisers" who prepare "qualified appraisals" will increase the quality of ESOP valuations, improve the security of ESOP participants' retirement accounts, and eliminate unqualified and low-quality valuers from practicing in the ESOP market.

I would be in full support of this alternate proposal, and I suspect that many of the ESOP companies and ESOP service providers that I have worked with throughout my career would also support such an alternative.

Summary

ESOPs play an important role in our economy. They provide employers an opportunity to share ownership with employees, and allow employees to share in the financial success of the companies where they work. The DOL's Proposed Definition would greatly harm, and possibly eliminate ESOPs. I agree with many of the comment letters that have been submitted to-date, including the ESOP Association's comment letter dated January 31, 2011.

I urge you to reconsider this proposal and consider more reasonable alternatives, such as the one I outlined above, so that employee ownership through ESOPs can continue to flourish in the United States and employees can continue to share ownership in the companies where they work and share in the success and value that they help create.

Sincerely,

GBQ CONSULTING LLC

By: 

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