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**From:** Marsha Fox [mailto:mfox@spectral.com]  
**Sent:** Thursday, February 03, 2011 9:24 AM  
**To:** EBSA, E-ORI - EBSA  
**Subject:** Definition of Fiduciary Proposed Rule

February 3, 2011

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

**SUBJECT:** Comments on the DOL Proposed Regulation – Definition of the Term "Fiduciary" (Federal Register, Volume 75, Number 204, Pages 65263-6578, October 22, 2010, Proposed Regulation)

Dear Mr. Wong:

The ESOP Association has brought to my attention that the above regulation is about to be acted upon. As an ESOP Trustee of our company, I believe that this new ruling requiring evaluators to be ESOP trustees will result in significant harm to ESOP participants, ESOP companies, and society.

1. As one of the ESOP trustees, we are fiduciaries that are currently responsible for determining the fair market value. Existing case law and current regulations provide remedies for when the ESOP trustee is using an incorrect valuation and when appraisers are acting with discretion over plan assets. Remedies also exist for parties that are not satisfying their legal, fiduciary, and contractual responsibilities.
2. The cost to perform an ESOP appraisal would significantly increase. Firms performing ESOP appraisals would need to obtain additional and more expensive insurance, hire counsel, and take additional steps to comply with the regulations and manage the additional risk of litigation. These additional costs will be passed through to the ESOP companies and negatively impact the accounts of ESOP participants.
3. The previously-mentioned additional cost and risk associated with performing ESOP appraisals would cause some to leave the industry. This would reduce the number and quality of available appraisers, which would further increase the cost of performing an appraisal and decrease the quality. These additional costs will also be passed through to the ESOP companies and negatively impact the accounts of ESOP participants.

4. The Internal Revenue Code requires that an appraiser be independent. The fiduciary responsibility to the plan participants would violate that independence.
5. The previously-mentioned lack of independence would likely cause a selling shareholder to hire a second valuation firm, further increasing the cost of implementing and maintaining an ESOP, and further negatively impacting the accounts of ESOP participants.
6. The fiduciary responsibilities of the trustee and appraiser would be unclear and would create confusion problems in determining who is responsible for what and how each party is supposed to satisfy their fiduciary obligations.
7. The increased costs to establish and maintain an ESOP would significantly reduce the number of new ESOPs and cause existing ESOP companies to terminate their ESOP. This would negatively impact ESOP participants, ESOP companies, and society. A study, summarized years of research on the effects of ESOPs and employee ownership. The study found that ESOP participants benefit by increased employee wealth and wages, greater employment stability, and increased job satisfaction. It found that ESOP companies experienced an increase in productivity, profitability, and likelihood of firm survival. It also found that ESOPs benefit society by providing economic growth with increased sales and employment growth.
8. The DOL proposed regulations do not address the root causes of the problems you have identified. These problems include a lack of clear, concise and current valuation regulations and a lack of professional competence standards, qualifications, and/or credentials to perform an ESOP appraisal.

I encourage you to modify the DOL proposed regulations to remove the requirement that persons providing ESOP appraisals and fairness opinions are fiduciaries. If you do not find that current regulations provide sufficient remedies, working with the ESOP professional community to create professional standards and enforcement procedures and providing the community with clear guidance are two solutions that would effectively address your concerns.

Sincerely,

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