
From: Fitz-Gerald, Dave [mailto:dave.fitzgerald@carris.net]
Sent: Thursday, February 03, 2011 9:27 AM
To: EBSA, E-ORI - EBSA
Cc: Cota, Greg (Leahy); Gunnels, Warren (Sanders)
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)

Via email: e-ORI@dol.gov

CC: Greg Cota, in Senator Leahy's office Greg_Cota@leahy.senate.gov
CC: Warren Gunnels, in Senator Sanders' office
Warren_Gunnels@sanders.senate.gov

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:

My name is David Fitz-Gerald and I am the VP, CFO and Treasurer of Carris Financial Corp, a 100% employee-owned packaging manufacturing company headquartered in Rutland, Vermont. I am also a Trustee for the CFC ESOP. Our company has about 380 employee-owners in 8 divisions across the country. Our ESOP was founded in 1995, and we became 100% employee-owned in 2008. At Carris we know first-hand how meaningful it is for employees to share in the ownership of the company. We are very engaged in a community of employee-owned companies, and I proudly serve as President of the New England Chapter of The ESOP Association, and on the Board of Directors of the Vermont Employee Ownership Center (VEOC).

I'm writing to express my concerns about a rule proposed by the DOL which would significantly expand the definition of a "fiduciary" under ERISA. As I understand it, valuation firms that prepare appraisals and fairness opinions for closely held companies would be included as fiduciaries. Each year, closely held, employee-owned companies such as Carris are valued by an independent

external valuation firm, and the Trustees of the ESOP Plan determine the value based on the valuation firm's report. This is a responsibility that our Trustee committee takes very seriously. Another duty of our Trustee committee is to select a valuation advisor. Fortunately, there is a good number of high quality, affordable advisors to choose from. When we have made requests for proposals, there have been large differences in price – from \$10,000 on the low side to \$40,000 on the high side. The primary difference in cost is the larger firm's overhead and profit margin requirements. As a Trustee of Carris' ESOP Plan we always want to be sure that our valuation advisor is a well qualified expert. We look for membership in The ESOP Association and the American Society of Appraisers, and we look for our valuation advisor when we attend ESOP conferences.

My concern is that the proposed rule will result in much higher annual costs of conducting the Plan's business. Valuation firms will now be exposed to real or perceived additional risk. It is expected that the price of valuation reports will dramatically increase as a result of this proposed rule. A bigger concern is that well qualified valuation advisors will make the decision to no longer provide valuations for the ESOP community, and of course less competition means higher prices and fewer new employee-owned companies.

One requirement is that the valuation firm be independent of the company it is appraising. I don't understand how the valuation firm can be independent if the valuation firm is also a fiduciary. Would it make sense to have the CPA Audit firm be a fiduciary as well? There are certainly very stringent independence requirements for CPAs.

It isn't clear to me whether the DOL believes that some valuations are done improperly or whether the valuation methodologies themselves are flawed. Given that the same valuation methodologies are used to pay out selling shareholders and plan participants, it would seem that the system is working as it should be. Whatever the answer, if there is a problem I would hope that the solution is not detrimental to the employee-ownership movement. Perhaps it is overly naive to suggest that it feels like in grade school when the whole class is punished for something one kid did in the back row. Of course, if that comparison were applicable the DOL has plenty of remedies. The DOL has a very important role in looking out for plan participants. I understand there are unscrupulous people, and appreciate the job the DOL does to protect people. I am afraid in this case that millions of future potential employee-owners will lose the opportunity to share in the personal and financial rewards of owning a part of the company they work for.

Sincerely,

Dave Fitz-Gerald
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