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June 7, 1976

Dear :

This is in response to your letter of November 14, 1975 to of this office concerning whether, by virtue of making valuations of closely held securities to be used in establishing employee stock ownership plans ("ESOPs"), Research Consultants ("Consultants") is acting as a fiduciary within the meaning of section 3(21) (A) of the Employee Retirement Income Security Act of 1974 (the Act,) and 29 CFR 2510.3-21.

Your letter represents that to date (Consultants) has been employed by companies considering the sponsorship of an ESOP to make evaluations of the closely held securities of such companies. (Consultants) has not been employed by the plans themselves. (Consultants) assumes, however, that it will periodically update such valuation. Your letter further states that (Consultants) does not make recommendations as to the advisability of investing in, purchasing, or selling securities, nor does it exercise discretionary authority or control with respect to purchases or sales of the securities which it values, but (Consultants) assumes that its valuations will be relied on in the purchase of employer securities by the ESOPs sponsored by such employers.

Initially, it should be noted that a person is a fiduciary, within the meaning of section 3(21) (A) of the Act, only to the extent that he performs any of the functions enumerated therein with respect to an employee benefit plan. Where a plan is not yet in existence, a fiduciary relationship within the meaning of section 3(21) (A) cannot be established. Moreover, since the term "party in interest" is defined in section 3(14) (B) of the Act as, among others, a person providing services to a plan, if the plan is not yet in existence, (Consultants) provision of services to an employer considering whether to establish a plan would not make (Consultants) a party in interest under section 3(14) (B). No opinion is expressed, however, as to when a plan is considered to be in existence for this purpose.

As to the role of (Consultants) respecting an already existing ESOP, 29 CFR 2510.3-21, clarifying the definition of "fiduciary," provides, in relevant part, that a person shall be deemed to be rendering "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of the Act if such person renders advice to the plan as to the value of securities and if such advice is rendered to the plan on a regular basis pursuant to a mutual agreement, arrangement, or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

It appears from your letter that the advice (Consultants) may render is limited to a valuation of the employer securities to assist in determining, inter alia, the "adequate consideration" for such securities. Investment in employer securities is an inherent element of an ESOP and the decision to invest in employer securities is an integral part of the process by which an ESOP is established. Under these circumstances, the advice rendered by (Consultants) would not involve an opinion as to the relative merits of purchasing the particular employer securities in question as opposed to other securities. If so limited, (Consultants) advice to the sponsor of an already existing ESOP or to the ESOP itself would not serve as a "primary basis for investment decisions with respect to plan assets," nor would it constitute advice as to the "value of securities" within the meaning of those terms as used in 29 CFR 2510.3-21. Accordingly, based on the representations set forth in your letter, (Consultants) is not a fiduciary with respect to ESOPs by reason of the services it performs in the valuation of employer securities for such plans.

Because your letter also raises questions under section 4975 of the Internal Revenue Code of 1954 and 26 CFR 54.4975-9, we have conferred with representatives of the Internal Revenue Service and they concur in the views set forth above as they apply to those provisions.

Sincerely,