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Definition of the Term ‘Fiduciary’

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Definition of the Term Fiduciary

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Submitter Information

Name: Joseph Mannes
Address:
 1700 Pacific, Suite 2000
 Dallas, TX, 75201
Email: jmannes@samcocapital.com
Phone: 214-765-1466
Organization: SAMCO Capital Markets, Inc.

General Comment

SAMCO Capital Markets, Inc., is a small broker/dealer that, within its corporate finance practice, provides independent ESOP valuations, primarily to small, private community banks. Federal law requires that every year, as privately-held companies not traded on a public stock exchange, that community banks pay independent appraisers such as SAMCO to have a qualified, independent valuation establish the value of the employees’ shares in the ESOP.

On October 22, 2010, the Department of Labor issued a proposed regulation to reverse a 34 year old policy, honored by both Republican and Democratic administrations, that would automatically make any valuator of ESOP shares a fiduciary to an ESOP. Current law clearly makes the trustee, as well as company personnel with powers over the ESOP, the only plan fiduciaries.

If we, as a valuation provider, must become a fiduciary, we will have to purchase fiduciary insurance, which will significantly increase the cost of our engagements to our community bank customers, or completely withdraw from providing ESOPs valuation services. The alternative is to be subject to aggressive, needless lawsuits.

If the DOL proposal becomes effective, the cost of having an ESOP will increase, diminishing our clients’ profits, which means lower share value, and thus less retirement savings for employees.

Along with increasing costs to small businesses, the DOL proposal is contra to the law, which says Federal agencies are not to hinder the creation and operation of ESOPs.

Further it creates a contradiction with Internal Revenue Code § 401(a)(28)(c) which mandates the appraiser of private company ESOP stock be independent. If we as appraisers become a fiduciary to the ESOP, an issue arises whether our highest obligation would be to a share price as low as possible (to the ESOP shareholders) versus being independent.

We respectfully request that this rule not be approved.