

ESCA

EMPLOYEE-OWNED S CORPORATIONS OF AMERICA

January 25, 2011

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

Re: Hearing Request on Proposed Regulation Defining the Term "Fiduciary"

Dear Mr. Wong:

On behalf of the Employee-Owned S Corporations of America ("ESCA"), I request to testify at the March 1-2, 2011 hearing on the proposed regulation (the "Proposed Regulation") that would revise the existing regulatory definition of the term "fiduciary" under Section 3(21)(A) of Employee Retirement Income Security Act ("ERISA"). ESCA is the national voice for S corporations owned by employee stock ownership plans ("ESOPs"), and its exclusive mission is to preserve and protect employee-owned S corporations and the benefits provided to their employee-owners. ESCA members have a keen interest in the Proposed Regulation and its potential adverse effects on S corporation ESOPs. Attached please find an outline of my testimony.

Please let me know if you have any questions. I can be reached by phone at (202) 626-3666 or by email at lcarlisle@whitecase.com.

Sincerely,



Linda E. Carlisle
ESCA General Counsel

Outline of Testimony by the Employee-Owned S Corporations of America (“ESCA”)

Regarding EBSA’s Proposed Regulation Defining the Term “Fiduciary”

A. Existing Law.

1. Section 3(21)(A)(ii) of ERISA defines a “fiduciary” with respect to an employee benefit plan to include any person that renders “investment advice” for a fee or other compensation with respect to any moneys or other property of such plan or has any authority or responsibility to do so.
2. Regulations issued by the Department of Labor (“DOL”) in 1975 (the “Regulation”) further defined the circumstances under which a person is considered to render investment advice to an employee benefit within the meaning of section 3(21)(A)(ii) of ERISA.
3. Under the Regulation, a person that does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan is considered to render investment advice only if five conditions are met:
 - i. Such person renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;
 - ii. Such advice is rendered on a regular basis;
 - iii. Such advice is rendered pursuant to a mutual agreement, arrangement, or understanding, with the plan or a plan fiduciary;
 - iv. Such mutual agreement, arrangement or understanding is that the advice will serve as a primary basis for investment decisions with respect to plan assets;
and

v. Such mutual agreement, arrangement, or understanding is that the advice will be individualized based on the particular needs of the plan.

4. In 1976, the DOL issued Advisory Opinion 76-65A, which concluded that a valuation of closely-held employer securities to be purchased by an ESOP that did not involve an opinion as the relative merits of purchasing the securities but that would be relied upon in purchasing such securities would not constitute investment advice under the Regulation.

B. DOL's Stated Reasons for Changes Affecting ESOP Appraisals.

1. DOL's ESOP enforcement initiatives indicate that one of the most common problems is the incorrect valuation of employer securities, including cases where plan fiduciaries have reasonably relied on faulty valuations prepared by professional appraisers. DOL believes that broadening the definition of investment advice to include appraisals and fairness opinions provided in connection with a plan's purchase of securities or other property may directly or indirectly address these issues and align the duties of the persons providing such appraisals or opinions with those of the plan fiduciaries that rely upon such appraisals or opinions.
2. In testimony before Congress, the Government Accountability Office ("GAO") presented findings from several reports documenting undisclosed conflicts of interest between certain pension consultants and their clients. DOL believes that amending the Regulation to establish additional circumstances where investment advisors are subject to ERISA's fiduciary responsibilities would better protect the interests of employee benefit plans and their participants and beneficiaries. the

C. Proposed Changes Affecting ESOP Appraisals.

1. The Proposed Regulation would expand the types of advice and recommendations that result in fiduciary status under section 3(21)(A)(ii) of ERISA to include the provision of an appraisal or fairness opinion concerning the value of securities or other property under an agreement, understanding or arrangement that such appraisal or opinion may be considered in connection with making investment decisions.
2. This change would supersede DOL Advisory Opinion 76-65A.

D. Issues.

1. The Proposed Regulation would expose ESOP appraisers to a major expansion of legal liability and increased costs of insurance.
2. There is a concern that many established and well-respected appraisal firms will choose to discontinue their ESOP appraisal business rather than face the additional legal exposure and insurance costs that would result from the Proposed Regulation.
3. Taking these well-respected professional out of the market would increase the use of smaller, less-experienced appraisers, who may not provide superior service and expertise to ESOPs.
4. Increased insurance costs will inevitably be passed on to employee-owned S corporations and their employees, leading to fewer ESOPs and diminished retirement savings.
5. Imposing ERISA fiduciary responsibilities on ESOP appraisers will not reduce incorrect valuations that are made in good faith, but will have the unintended

consequence of reducing the number of competent appraisers who will be willing to make ESOP appraisals.

E. Conclusion.

Given the potential problems raised by the Proposed Regulation, ESCA respectfully requests that the DOL consider other ways to ensure that employee-owned S corporations receive reliable appraisals.