

Testimony of  
Larry R Cook, CPA, ABV, CFF, CBA  
Before the  
United States Department of Labor  
Employee Benefits Security Administration  
Regarding the  
Proposed Definition of Fiduciary

March 2, 2011

 Larry R Cook & Associates, PC

Larry R Cook - DOL Testimony March 2, 2011

Thank you for allowing me to provide testimony today at the Department of Labor Fiduciary Definition Hearing. I can only hope that my testimony, along with many others opposing the proposed definition expansion of fiduciary to include appraisers, will provide the catalyst for reassessment and overcome this rule change.

It is with strong conviction that I come to Washington today compelled to respectfully oppose the manner the fiduciary definition rule seeks to strengthen the reliability of ESOP valuations. In my opinion, if this definition of fiduciary prevails it will spell the demise of small company ESOPs. It will force a substantial number of qualified appraisers to end their services to ESOP's.

I think it important that my testimony come from my direct personal knowledge and experiences from several career perspectives of which I've served for the past 38 years.

- I was out of college 2 years and an officer of a small private construction company when ERISA became law in 1974.
- As part of the succession plans of the then sole shareholder of this company, I researched, recommended and assisted in implementing a new retirement plan called an ESOP.
- At age 27 I became a beneficial stockholder of the company I worked for through the Employee Stock Ownership Plan.
- I served as a plan administrator for the ESOP and a long-standing profit sharing plan.
- When I left that company after nearly 11 years of service, I was fully vested in both plans.
- As a result of my activities with this ESOP, I chose a career path of a business appraiser.
- Over the next decades, I have worked with business owners and management of private businesses in a variety of successful engagements that included the implementation of employee equity initiatives and ownership through ESOPs.
- For the past 28 years, I've provided business appraisals for ESOP's.
- I have served several appraisal organizations at the national, state and local level.
- I've authored a book "Financial Valuation of Employee Stock Ownership Plan Shares",
- I've co-authored a technical valuation book "Financial Valuation – Applications and Models" with James R Hitcher & Others

I believe in the ideals of capitalism and that all employees can share in the opportunity to be enriched through a beneficial ownership of equity in the very company in which

we work. In a system where a shareholder of a private company has a mechanism of passing their equity shares to employees for their retirement. On numerous occasions, I have experienced the incentivizing power of a well-implemented and managed ESOP. I've witnessed the overwhelming strength an ESOP provides to every single person in a company... from janitor to engineer.... to participate as an owner of that company. I have lived the American dream of company ownership and spent a career promoting its benefits to others.

This is why I've traveled to DC today to represent not only for myself, but the collective views of the valuation members of the Financial Consulting Group, the Loren D Stark Company, and a voice of many company shareholders and employee participants, in hopes of providing a perspective that will assist in the continuation of that aspiration of widespread employee equity ownership.

In an attempt to minimize repetition and the interest of time, I hope to convey three straightforward points that this change in definition brings: from a plan, a participant, a sponsor, a fiduciary and an appraisers perspective.

#### Number 1 - Risk,

- In the proposed rule change context, the appraiser will be held personally responsible for any damages incurred by a plan participant as a result of a breach of duty;
- As it stands today, without the proposed rule change, I wonder what my responsibilities will actually be?
  - Will this duty extend to acts of management of the company?
  - Will corporate and participant transactions entail a duty?
  - What and how is control over the plan assets extended to the appraiser?
  - Will the appraiser be held liable for the actions of co-fiduciaries?
  - Who could bring an action against the appraiser in this context?
  - What actually is the statute of limitations of responsibility of the appraiser?

Looking back 30 years, I can't help but ask myself, if informed with the certainty of my person and profession being exposed to this level of risk and liability as currently proposed in this definition change, I would undoubtedly have chosen a different career path.

## Number 2 - Conflicts of Interest

- The appraiser, in the context of the proposed rule change, will act solely on behalf of participants and their beneficiaries with undivided loyalty. In reflecting on the proposal, I've asked myself, these among others?
  - Will the duty of the appraiser be likened to a power of attorney, where decisions are to be made solely on a principal's behalf?
  - How will the appraiser exercise discretion or control over the plan and the administration of benefit to participants?
  - How will the appraiser satisfy the professional ethics and standards of the appraisal societies with which they are members where this proposed definition change runs in direct contradiction of those core standards?

How very different this is than where appraisers practice today! And how the conflicts of interest landscape will change should this proposed definition rule be confirmed and allowed to stand. I come back to the same conclusion; this proposal is incompatible with the realities of professional standards and the practice of financial valuations.

Impartiality, objectivity & independence collectively spell professional neutrality and speak to those foundational standards that anchor the appraisal profession for all of us. The proposed rule will pose an uncompromising risk and conflict of interest for appraisers and the users of their services. Appraisers will no longer be independent or impartial of all parties at interest involved in transactions or annual valuations for participant's accounts. A sobering reality for us all to be aware of.

## Number 3 - Cost,

Why is it that professional liability insurance is so specific to exclude coverage for fiduciary responsibility and more specifically those related to ERISA?

- We know that the cost of insurance will increase the cost for ESOP valuation services and any increase in costs to a plan or the sponsor of the plan will negatively impact the plan participants.
- In this proposed rule context, appraisers will assess the potential cost of exposure to an expanded litigation environment.
- Additionally, regardless of the appraisers insurance coverage or the merits of a litigation filing, the added risk factors will necessitate the appraisers consideration of expenditure for deductibles, energies furnishing documents and the disruption of services on other engagements.

Without wide spread, reasonably priced professional liability coverage that extends to cover the appraiser as a fiduciary, few professional appraisers will assume the

personal liability. Additionally, and assuming adequate liability coverage is afforded, there remains the haunting cloud of expanded litigation defense of the appraisers work product not to mention this proposal runs foul of all independence standards. The proposed rule will impose costly, unnecessary and unrealistic burdens on appraisers and the plans they service.

As my friend from Houston, with over 50 years experience with thousands of ERISA plans – Donald Stark of The Loren D Stark Company said; “The single largest expense to a small ESOP is the cost of the appraisal. Should this DOL fiduciary proposal prevail, it will undeniably increase the cost of an appraisal and that alone will signal the end of the small ESOP”.

Finally:

Painting a picture of the existing climate of private business transitioning from one generation to another, we are in the midst of the baby boomers that own closely held companies transacting their equity ownership. The next eight years or so will mark the most significant transitioning by selling, gifting, contributing, or liquidating of non-public company ownership perhaps in our countries history. It is the time where the option of transitioning private company equity to the next generation can be made in whole or in part using an ESOP as the transition of choice for those companies that have a work force and management that possess the “think like owners” culture to do so.

Because of the level of personal liability that will be imposed on appraisers, the significant cost increase to the appraiser and further to the ESOP, and the conflict of interest posed under this proposed rule, I respectfully, but vehemently disagree with this potential rule.

With my years of professional experience involved in ESOPs and their valuations, it is my professional and personal belief that this proposed rule will be the nail in the coffin for small ESOPs.

I plead with the Department of Labor to reconsider this proposal as against the best interest of ESOP's and their participants.

This concludes my testimony and I again thank the Department of Labor for allowing me to be here today.

Testimony of Larry R Cook, CPA, ABV, CFF, CBA  
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