



January 19, 2011

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

Re: Definition of Fiduciary Proposed Rule

Dear Mr. Wong:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America’s engineering industry – I appreciate the opportunity to provide our comments on the Department of Labor’s (DOL) proposed rule that would change the definition of the term “fiduciary.”

ACEC members – numbering more than 5,000 firms representing hundreds of thousands of engineers and other specialists throughout the country – are engaged in a wide range of engineering works that propel the nation’s economy, and enhance and safeguard America’s quality of life. ACEC member firms are committed to providing high-quality benefits for their employees, including retirement benefits. Employee stock ownership plans (ESOPs) are a key tool with which many engineering firms enhance retirement security for their employees.

As you know, a person or firm that provides investment advice under the Employee Retirement Income Security Act (ERISA) is considered a fiduciary in certain circumstances. DOL narrowed the term “investment advice” in a 1976 advisory opinion to exclude the valuation of closely-held employer securities that an ESOP would rely on in purchasing such securities. The proposed rule would reverse this policy and include the valuation of employer securities for an ESOP in the definition of a fiduciary providing investment advice.

ACEC shares DOL’s concerns about the importance of accurate valuations of employer securities, which play a central role not just for ESOPs, but also 401(k) plans and mergers and acquisitions. Precise valuations are ultimately in the best interests of engineering firms and their employees.

However, the fiduciary role is inappropriate for an ESOP appraiser, which does not work for the firm but instead is a paid advisor to the ESOP Trustee. The appraiser does not have the authority to direct the operations of an ESOP firm. It is ultimately the responsibility of the Trustee, which is the principal fiduciary for the ESOP, and any other fiduciaries to evaluate and accept or reject the advice of the appraiser.

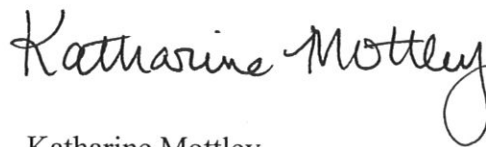
The opinion of the appraiser has both objective and subjective components and is governed by a standard of care, much like opinions in the engineering profession. If that standard of care is breached, or the appraiser is negligent in their duties, resulting in a flawed opinion of value, there is existing legal recourse available to the ESOP's fiduciary, firm and participants. Naming the appraiser as a fiduciary does not change the influence that an appraiser can hold over the success or failure of the ESOP.

Including appraisers of ESOP securities in the definition of fiduciary would increase the cost of valuations for two reasons. First, appraisers would be required to purchase fiduciary insurance, and this cost would be passed on to the ESOP firm. While arguments can be made in favor of such insurance, it is indisputable that it would make establishing and maintaining an ESOP more expensive. Second, implementation of the proposed rule would likely reduce the number of appraisers that are willing to provide valuations for ESOPs, resulting in decreased competition.

Finally, ACEC notes that there is a contradiction between the independent status of an appraiser as required by the Internal Revenue Code, and the status of a fiduciary. The proposed rule does not appear to address this conflict, and we request that DOL provide additional information addressing this issue.

Although ACEC shares DOL's concerns about accurate valuations of ESOP securities, we respectfully request that DOL reconsider its proposal to include valuers of ESOP securities in the definition of fiduciary.

Sincerely,

A handwritten signature in black ink that reads "Katharine Mottley". The signature is written in a cursive style with a large, looping 'M' and a long, sweeping tail on the 'y'.

Katharine Mottley
Director of Tax & Regulatory Affairs