From: Chris W. McDonald [mailto:cwm@keyknife.com]
Sent: Thursday, November 11, 2010 1:53 PM
To: EBSA, E-ORI - EBSA
Subject: Definition of Proposed Fiduciary Rule

The proposed revised definition of a Fiduciary in relation to required annual enterprise valuations will cause harm to Employee Stock Ownership Plans in violation of law.

The law specifically states:

90 Stat.1520, P.L. 94-455 Section 803
(h) Intent of Congress Concerning Employee Stock Ownership Plans. – The Congress, in a series of laws (the Regional Rail Reorganization Act of 1973, the Employee Retirement Income Security Act of 1974, and the Tax Reduction act of 1975) and this Act has made clear its
interest in encouraging employee stock ownership plans as a bold and innovative method of
strengthening the free private enterprise system which will solve the dual problems of securing
capital funds for necessary capital growth and of bringing about stock ownership by all corporate
employees. The Congress is deeply concerned that the objectives sought by this series of laws
will be made unattainable by regulations and rulings which treat employee stock ownership plans
as conventional retirement plans, which reduce the freedom of the employee trust and employers
to take the necessary steps to implement the plans, and which otherwise block the establishment
and success of these plans. (Pub. L. 94-455, 90 Stat. 1520)

In the Department of Labor's Proposed Regulation, **29 CFR Part 2510 RIN 1210–AB32 Definition of the Term** ''**Fiduciary**'', it appears that the solution for very specific past abuses is an across the board reduction of freedom of ESOTs and sponsoring companies to take the necessary steps to implement plans and would have the effect of blocking the establishment and success of these plans. This is akin to a doctor prescribing a powerful antibiotic that negatively affects the body's entire immune system and has significant negative consequences, when a targeted remedy for the specific ailment could and should be prescribed. This would be considered malpractice by a physician and should be considered malpractice when a similar regimen is prescribed by the DOL.

Employee Stock Ownership Trusts have at least one Fiduciary by existing regulation in the form of a Trustee. These Trustees are required to carry insurance coverage to reflect the high level of responsibility and the rigorous legal standard by which their decisions are judged. Reliance on the opinions or advice of an independent and impartial adviser or consultant, does not reduce the Trustee's liability or serve as an affirmative defense to charges of misconduct or lack of prudent decision-making. The Fiduciary of the Trust is ultimately responsible. In cases where imprudent decisions were made that harmed Plan participants or their beneficiaries, it is the Trustee that is ultimately and solely responsible. The proposed regulation would dilute the Trustee's responsibility.

Additionally, there will be financial harm caused to the Participants of such plans due to higher costs of Plan Administration. The Fiduciary insurance required for an independent valuator, who should already meet very rigorous standards if the Trustee is performing their job properly, will only increase the cost to perform the required annual ESOP valuations. In the vast majority of ESOP's, expenses will go up, reducing plan assets and benefits of participants, and will not serve to further protect the Plan Participants at all. There may also be a reduction in the number of appraisers who are willing to work with ESOPs due to increased liability and the negative consequences in a litigious society. Lack of appraisers and higher costs would serve to block establishment of ESOP's, that may otherwise be viable, in violation of the above highlighted Congressional concern.

The Trust for which I am responsible saw the negative financial effects of application of the Fiduciary definition first hand. When seeking an Independent Trustee to determine if it was prudent to exercise an option, we were given a price of $5,000-$10,000. When it was determined that the advisor would be considered a Fiduciary, the cost more than doubled to $20,000-$25,000.

The DOL already has a responsible party to hold accountable in the form of the Trustee. A greater focus on holding Trustees to the existing standards of prudence would be more beneficial than merely making more parties responsible and increasing costs. The use of the term "Investment Advisor" is typically used in **conventional retirement plans** and is being erroneously applied in this proposed regulation to cover annual appraisals, again in violation of the Congressional concern.

At a minimum, in the proposed regulation there should be an exemption to the Fiduciary definition for appraisers who are merely determining the value of the shares that are allocated to Plan Participant accounts annually. The application of "investment advice" in this instance is a stretch at best. This exemption would reduce the overall cost of maintaining an ESOP.

There is still a responsible party charged with ensuring that the participant's interest are foremost in the person of the Trustee. As noted in the Supplementary Information in the proposed regulation, "The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive statute designed to promote the interests of participants in employee benefit plans and their beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries of those plans. ERISA imposes a number of stringent duties on those who act as plan fiduciaries, including a duty of undivided loyalty, a duty to act for the exclusive purposes of providing plan benefits and defraying reasonable expenses of administering the plan, and a stringent duty of care grounded in the prudent man standard from trust law." The standards of conduct, responsibilities, and obligations of an ESOP fiduciary belong with the Trustee who is truly the only person that can abide by the rigorous standards set forth. There is a named Fiduciary in the Trustee, the DOL needs to look no further in determining responsibility.

Respectfully,

Chris McDonald
Trustee
Key Knife, Inc. Employee Stock Ownership Trust
503-403-2048
cwm@keyknife.com
