From: Bill Roark [mailto:Bill.Roark@torchtechnologies.com]
Sent: Thursday, January 20, 2011 10:14 PM
To: EBSA, E-ORI - EBSA
Cc: Bill Roark
Subject: Definition of Fiduciary Proposed Rule

Comments on publication in Federal Register /Vol. 75, No. 204 / Friday, October 22, 2010 / Proposed Rules

Background: Torch Technologies, Inc. (Torch) is a rapid growing small business headquartered in Huntsville, Alabama. We were founded in 2002 and have grown to $50M in annual revenues in only 8 years. We currently employee 175 employees and approximately 35% of our stock is owned by a ESOP Trust. Our goal is to become 100% employee owned by 2012. With our employee ownership model as a foundation we have had considerable success. This is demonstrated by a multitude of customers have recognized Torch with commendation letters for outstanding performance and we have received several regional and national awards. We were the 2005 winner of the Better Business Bureau Torch Award for Business Ethics. We were 2007 Small Business of the Year from the Huntsville Chamber of Commerce. Torch was selected as a top 3 Small Business finalist by the Alabama Information Technology Association for the 2006 Technology Company of the Year. We were nationally recognized by Entrepreneur Magazine in July 2006 as one of the 100 fastest growing companies in America. We have been listed on the Inc5000 recognizing the fasted growing companies for four straight years and we have also been selected as one of the Best Places to Work in Madison County by the Huntsville / Madison County Chamber of Commerce and we are a Top Ten Best Places to Work for Employee Financial Security as recognized nationally by The Principal Financial Services Group. A lot of this success is directly attributable to our broad based employee ownership model made possible by the early adoption equity sharing through our ESOP Trust.

We offer our comments because we believe these proposed changes could have a detrimental impact on the ability of small companies to become an ESOP. One of the greatest challenges in implementation of an ESOP trust is the costs associated with implementing and maintaining an ESOP trust. These costs must be small relative to the benefit created by offering an ESOP to employees. If not then the potential value created for the employees will be consumed by the costs created in order to meet the regulatory demands. One of the most significant costs associated with this process is the cost of the appraisal. Implementation of the rules as proposed will very likely substantially increase the costs associated with the appraisal process, thus substantially limiting the ability of smaller businesses to become an ESOP. In our business this would have delayed our ability to become and ESOP for 5-10 years and thus effectively reduced the benefits to our employees by $5-$10 Million Dollars.

We agree there is the possibility of faulty ESOP appraisals. We agree with the proposals as recommended National Center for Employee Ownership (NCEO) via a separate communication. The DOL could consider these recommendations to address this issue more effectively. Per the NCEO, we identify several key problems with the proposed rule changes:

1. The absence of final regulations on how ESOPs should be appraised would create considerable confusion for courts, ESOP trustees, and appraisers on how to judge whether appraisers were following their fiduciary duties, which necessarily would be a legally ambiguous question.
2. Fewer ESOPs would get started, especially in smaller companies, because costs would rise substantially as valuation firms now required fiduciary insurance (assuming it could be obtained). This is especially worrisome because the data definitively show that ESOPs add not just to total retirement security but also to diversified retirement assets.
3. There would be fewer qualified ESOP appraisers because some of the most qualified appraisers would drop out of the ESOP appraisal business.
4. There would be considerable legal confusion over who is responsible for the errors and how responsibility is allocated.
5. Existing case law already provides that appraisers are fiduciaries when effectively exercising discretion over plan assets.

We believe there are a number of alternative approaches that may address the problems more effectively, including:

1. Issue final ESOP valuation regulations: This would provide much clearer guidance to existing fiduciaries and appraisers, which should reduce the problem significantly.
2. Provide regulatory guidance on what "independence" means: Current law requires that appraisers be independent, but this term has never been specifically defined.
3. Require that employer stock appraisers be credentialed by a professional appraisal organization: Consideration should be given to whether this requirement should specify that employer stock appraisers have professional training related to employer stock appraisals.
4. Set specific standards for fiduciaries with respect to valuation: Rather than creating an additional fiduciary with all the problems that arise from that, standards for existing fiduciaries could be tightened.
5. Establish an industry-DOL advisory committee to seek alternative approaches to the problem.

We respectfully request that you consider and act upon these alternatives prior to implementation of any rule changes. If you should have any questions about these recommendations, please do not hesitate to contact me at bill.roark@torchtechnologies.com or 256-319-6001 or at the address below.

Sincerely,

William Roark

CEO

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