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Congress of the United States
Washington, DC 20515

July 29, 2011

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EXEC. SECRETARIAT
OSEC-DOL
DEPT. OF LABOR
WASH, D.C.

The Honorable Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Solis:

On April 14th, we wrote to express serious concerns with the Employee Benefits Security Administration's (EBSA) proposed regulation to mandate all appraisers of private company ESOP stock be ERISA fiduciaries.

Private ESOP companies in our States provide good-paying jobs that benefit employees and their communities. These companies continue to express strong opposition to the Department's proposal. They remain concerned new regulations will cause costs to rise, negatively impact company expansion plans, create confusion between current ESOP trustees and appraisers, and generate costly legal disputes.

In public hearings on the proposed regulation, we have been informed EBSA officials disagreed with the view of some commentators that making private company ESOP appraisers ERISA fiduciaries would conflict with an appraiser's legal and professional obligations to be independent. Persons testifying in opposition to the proposed regulation cited the Internal Revenue Code Section 401 (a)(28)(C). Furthermore, a June 15th letter from the Appraisal Standards Board (ASB) - an organization Congress authorized in 1989 to establish standards for appraisers - supports this argument. The letter (copy attached) states an appraiser cannot be independent as required by accepted appraisal standards and also be an ERISA fiduciary.

Private ESOP companies also note the proposed regulation was developed in a manner that appears inconsistent with the Administration's directive to its agencies to avoid harmful, burdensome requirements through regulations when other effective approaches could be used to achieve the agencies' goals. Specifically, Executive Order 13563 sets forth steps that an agency is to follow in promulgating regulations. We have been told EBSA did not follow any of the recommended steps in EO 13563.

We respectfully ask the Department to provide in writing (1) its legal justification for maintaining an appraiser can be independent and an ERISA fiduciary in view of IRC Section 401 (a)(28)(C) and the ASB's letter, and (2) why the Department feels that EO 13563 is not applicable to its rule-making procedure involving appraisers of private company ESOP stock?

Thank you in advance for your consideration of this matter. We look forward to your response.

Sincerely,

Charles Boustany Jr., MD
Member of Congress

Geoff Davis
Member of Congress

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THE APPRAISAL FOUNDATION
Authorized by Congress as the Source of Appraisal Standards and Appraiser Qualifications

APPRAISAL STANDARDS BOARD

June 15, 2011

Employee Benefits Security Administration (EBSA)
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of Fiduciary Proposed Rule (RIN 1210-AB32)

Via Electronic Mail: e-ORI@DOL.gov

Dear Sir or Madam:

The Appraisal Standards Board (ASB) of The Appraisal Foundation is authorized by Congress as the source of appraisal standards. These standards are promulgated by the ASB via the Uniform Standards of Professional Appraisal Practice (USPAP).

It has recently come to the attention of the ASB that the Department of Labor is considering proposed regulations that would recognize *appraisers* as "fiduciaries" under the Employee Retirement Income Security Act (ERISA). Specifically, one of the tests in the proposed regulations that would establish an individual as a fiduciary is as follows:

> *Provide advice, **appraisals or fairness opinions as to the value of investments**, recommendations as to buying, selling or holding assets, or recommendations as to the management of securities or other property.* (Bold added for emphasis)

The ASB sees a significant potential conflict with USPAP if appraisers are recognized as fiduciaries. As you're certainly aware, *Black's Law Dictionary* defines "fiduciary," in part, as follows:

> *"...a person is a fiduciary who is invested with rights and powers to be exercised **for the benefit of another person.**"* (Bold added for emphasis)

An "appraiser" is defined in USPAP as:

> *"One who is expected to perform valuation services competently and in a manner that is **independent, impartial, and objective.**"* (Bold added for emphasis)

In addition, the first line of the PREAMBLE to USPAP states:

> *"The purpose of the Uniform Standards of Professional Appraisal Practice (USPAP) is to **promote and maintain a high level of public trust** in appraisal practice by establishing requirements for appraisers."* (Bold added for emphasis)

One of the primary tenets in achieving public trust has been fostered in the principle that an appraiser *must* be a disinterested third party in the transaction. In fact, the ETHICS RULE in USPAP prohibits an appraiser from performing with bias or advocating for "the cause or interest of any party or issue." Black's definition appears to require that a fiduciary perform as an advocate. The role of a fiduciary is clearly inconsistent with the recognized and accepted independent role of an appraiser.

It is the belief of the ASB that an individual cannot act "for the benefit of another person" and remain "independent, impartial, and objective" at the same time. As a result, if the proposed regulations are adopted, appraisers would be put in a position where they are conflicted between the Department of Labor regulations and USPAP (which state licensed and certified real estate appraisers are required by law to comply with).

As a result, the ASB strongly urges the Department of Labor not to include appraisers as fiduciaries in the regulations as currently proposed.

If you have any questions or need additional clarification, please feel free to contact us.

Sincerely,

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J. Carl Schultz, Jr.
Chair
Appraisal Standards Board