

U.S. Department of Labor to Reconsider Proposed Regulation Impacting ESOP Appraisers 9.20.11

On September 19, 2011, the Employee Benefits Security Administration ("EBSA") of the Department of Labor ("DOL") announced it would reconsider and re-propose its regulation that would have included ESOP appraisers in the definition of "fiduciary" for ERISA purposes. ESOP-owned companies, along with The ESOP Association, the National Center for Employee Ownership and the Employee-Owned S Corporations of America voiced a number of objections to the proposed regulations, most importantly citing the significant negative impact the proposed regulation would have on the formation of new ESOPs, and the increased costs of operating existing ESOPs.

The DOL press release focuses largely on the aspects of the proposed regulations that impact 401(k) plans and defined benefit pension plans and does not specifically reference ESOPs. However, the press release mentions areas in which the EBSA anticipates revising the rule. Within this comment, EBSA mentions "routine appraisals." The comment may be an indication that the EBSA is considering exempting from the definition of "fiduciary" an appraiser's preparation of an annual stock valuation for an ESOP, which may be considered routine. The wording of the press release could be read to leave open the possibility that an ESOP appraiser would be considered a fiduciary when rendering fairness or other transaction opinions (those that are not "routine"), as is the case in the original proposal.

The DOL has stated that the purpose for the re-proposal is to allow more time for more input from those affected by the proposed regulation. Certainly, those with a view on the impact of the proposals should review the re-proposal when it becomes available and be prepared to provide their comments and insights.

For further information please contact a member of the ESOP Law Group.