

May 23, 2011

Mr. Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Executive Office of the President
Office of Management and Budget
Washington, DC 20503

RE: Department of Labor Ignores Executive Order 13563

Dear Administrator Sunstein:

On behalf of the approximately 2500 members of The ESOP Association, I write setting forth some of the points made in your February 2, 2011, memorandum to the Heads of Executive Department and Agencies, explaining Executive Order 13563 (EO 13563), “Improving Regulations and Regulatory Review”. I do so to contrast its purposes and directions to Executive agencies to the approach the Department of Labor took in proposing a rule to expand the definition of the term “fiduciary” to include appraisers of the stock held in employee stock ownership plans (ESOPs) sponsored by U.S. corporations that are not publicly-traded (referred to as “private” companies, or private ESOP companies.) See 75 Fed Reg. 65263 (Oct. 22, 2010) (referred to as proposed DOL regulation.)

This communication does not repeat the policy critique The ESOP Association has made on the proposed DOL regulation, but to note to you and your colleagues in the Executive Office of the President the obvious inconsistencies of certain provisions of EO 13563 and the process DOL followed in issuing the proposed DOL regulation.

Section 1: Cost Analysis Guidelines

Your February 2nd memorandum reiterates five principles from an earlier Executive Order 12866 in Section 1 of EO 13563 that agencies “use the best available techniques to quantify anticipated present costs as accurately as possible.”

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The proposed DOL regulation preamble states the “best” cost analysis as to costs the proposed DOL regulation will impose on private ESOP companies, is based on the assumption professional appraisers charged an average \$119 per hour for their work in the past.

\$119 per hour is a ridiculous number to use. Any cost analysis based on \$119 per hour is not accurate. 98% to 99% of U.S. corporations sponsoring ESOPs are private companies, approximately 92% of these private companies have fewer than 500 employees, and just over 50% have fewer than 100 employees. Thus the majority of U.S. corporations impacted by the proposed DOL regulation with regard to their appraisers becoming ERISA fiduciaries are small businesses, and the cost they will bear if their appraisers are fiduciaries is way more than additional work by appraisers at \$119 per hour. While one may submit that the drafters of the proposed DOL regulation was using the \$119 per hour rate as an example of the rate years ago, the mere fact DOL did not seek to obtain a more realistic per hour rate to cite is a flaunting of EO 12866 and EO 13563.

Section 2: Seek Input Before Regulation Proposed

Section 2 of EO 13563 “directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking. (Underline and italics added for emphasis.)

Private ESOP companies, individually, and in ad hoc groups, and through trade associations, in addition to The ESOP Association, and through individual member organizations of service providers to private ESOP companies, are all well known to DOL personnel in its Employee Benefits Security Administration (EBSA), dating back to the late 70s.

The proposal to mandate private company ESOP appraisers be ERISA fiduciaries was never, ever, discussed by anyone at DOL with any party in the ESOP community.

Section 3: Urges and Instructs Agencies to Co-ordinate

Section 3 of EO 13563 urges Executive Branch agencies to have more “co-ordination across agencies” to produce simplification and harmonization of rules.

In the matter of appraisers valuing shares of private ESOP companies, the IRS has a major responsibility to ensure Internal Revenue Code Section 401(a)(28)(C), which mandates an annual valuation of non-traded company stock in an ESOP be independently valued, or whenever circumstances might have a significant impact on ESOP share value, is adhered to by private ESOP companies. Because the IRS has for many years policed the accuracy of hard to value assets in areas of estate tax, charitable contributions, and ESOPs, the agency has several approaches to ensure appraisals are professionally done, and as accurate as possible.

Section 3 of EO 13563 instructs (note EO 13563 does not “ask”, “encourage”, recommend” but instructs) agencies (1) to consider the combined effects their regulations.... on particular sectors.... and (2) to promote coordination across agencies and harmonization of regulatory requirements. Section 3, thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens. Section 3 is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation.

While no one disputes DOL’s primary role in determining who is an ERISA fiduciary and its primary role in enforcing ERISA’s requirement that a private ESOP company acquire company stock only for fair-market value as determined by an appraiser, common sense says that DOL should follow EO 13563 Section 3’s instruction, and confer with IRS/Treasury officials who have expansive experience with making sure IRC Section 401(a)(28)(C) is complied with by private ESOP companies when their stock is appraised.

There is no evidence DOL personnel have discussed, even briefly, its proposed regulation making appraisers of private ESOP company stock with appropriate IRS/Treasury personnel before drafting and proposing appraisers of private ESOP company stock be ERISA fiduciaries. (Underline added for emphasis.)

The ESOP community has frequent communications with IRS/Treasury personnel.

Section 4: Admonishes Agencies to Seek Goals in Least Burdensome Manner

Section 4 of EO 13563 states that “each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice Such approaches include “warnings, appropriate default rules, and disclosure requirements

Section 4 acknowledges the importance of considering flexible approaches and alterations to mandate EO 13563 directs agencies to consider the use of tools that can provide tools that can promote regulatory goals through actions that are less expensive

The DOL proposed rule mandating appraisers of private company ESOP stock ignores all of the admonitions of Section 4. The ESOP appraiser mandate ignores the fact other Federal agencies use a variety of approaches to regulate appraisers of non-marketable assets. Particularly instructive are approaches taken by the IRS, which also has responsibility of enforcing ERISA statutes and regulations.

Summary

In sum, the DOL proposed regulation ignores provisions of Sections 1, 2, 3, and 4 of EO 13563 by:

1. Using a ridiculous number as the per hour charge by appraisers of private ESOP company stock;
2. Refusing to seek any input from the ESOP community before issuing the proposed regulation;
3. Ignoring input from other Federal agencies on their policies with regard to appraisers of non-marketable assets, particularly the IRS; and
4. Disregarding the less burdensome alternatives to reach its goal of ensuring professional, and qualified appraisals of private ESOP company stock tools used by other Federal agencies to ensure appraisers required under laws and regulations they are responsible for are professional and qualified.

Your review of this communication is appreciated.

Sincerely yours,

J. Michael Keeling, CAE
President

JMK:sgs