FOOD MARKETING INSTITUTE

February 4, 2011

Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary" - Proposed Rule (RIN 1210-AB32)[1]

Dear Sir or Madam:

On behalf of the Food Marketing Institute (FMI)[2] and our member companies that operate Employee Stock Ownership Plans (ESOPs), I am writing to express concern with the Department of Labor's proposed rule to change the definition of the term "fiduciary". Under the proposal, the annual valuation required of ESOPs will now be defined as investment advice, forcing the independent advisors that provide this assessment to be considered a fiduciary of the plan. This action represents a sharp break with the long-term existing policy that could have a dramatic impact on the establishment and maintenance of ESOPs and should not be made hastily.

The Department of Labor's proposal to define independent ESOP appraisers as fiduciaries will almost certainly raise the cost of creating and operating an ESOP. Appraisers will have to purchase fiduciary insurance (an expense that can be significant) and will face greater vulnerability to frivolous lawsuits. As a worst case scenario, these new expenses could force some firms out of the business of providing valuation estimates, making it more difficult and more expensive to receive this mandated annual evaluation. At the very least, the increased costs will almost certainly be

[1] 75 Fed. Reg. 65263 (October 22, 2011).

[2] FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets.

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passed on to the ESOPs, meaning that the employee-participants will face the brunt of the expense, creating a less secure saving and investment vehicle. The Department explicitly recognizes the costs associated with this proposal in the rule, but fails to acknowledge the downstream impact on the ESOPs.

The proposed rule marks such a sharp change from the current, long-standing policy that it almost certainly will make ESOPs a less attractive option for companies that might be considering moving in this direction. And for those that already have one in place, the maintenance and growth of the plan becomes a more difficult and expensive process. In light of this, there are legitimate questions about whether this rule is consistent with current law and Congressional intent, which calls on the government not to adopt policies that make the creation and maintenance of ESOP more difficult (P.L 94-455, 90 Stat. 1520).

The fact that this rule is moving forward without a sufficient background of public hearings is also a concern. While we appreciate the DOL's announcement of a public hearing on March 1, a move of the significance of this rulemaking should not be rushed. FMI is sympathetic with the concerns about the current state of independent valuations and the negative role played by certain bad actors. But rather than responding with a fast-moving wholesale change in current procedures, we would urge the Department to work with the ESOP community to develop a more appropriate response.

In summary, it is our belief that the proposed rule is likely to increase costs for ESOPs without offering any clear benefits to offset these changes. In light of this, we would urge the Department to reconsider moving forward with the proposed rule and to work more closely with the ESOP community to come up with changes that strengthen the system.

Thank you for your attention in this matter.

Sincerely,

Erik R. Lieberman
Regulatory Counsel