



EYE ON **ESOPs**

3RD QUARTER 2011

Don't Miss the New South ESOP Chapter Big 5 Conference

October 5-6, 2011 » Marriott Atlanta Buckhead Hotel

It is conference season! Show your ESOP spirit and kick off Employee Ownership Month with members of the New South ESOP Community.

Conference Highlights include:

- Meet, greet and congratulate New South Chapter Award Winners, Haskell Company, and Neil Brittain, McCord Communications, at a complimentary Winners' Circle Tailgate Reception on October 5. **Show your spirit and wear your favorite game-day jersey.**
- Select from 10 educational sessions covering a wide range of topics focusing on communications, technical and legal issues important to ESOPs during a full-day, two-track event on Thursday, October 6.
- Hear a powerful economic update message during a keynote address by Michael Paslawskyj, FDIC Regional Economist.

The Chapter has drafted an All-Conference Team of speakers to bring you a winning event!

For a complete conference schedule, turn the page!



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New South ESOP Chapter Big 5 Conference Schedule

WEDNESDAY, OCTOBER 5, 2011

3:00pm 2012 Draft

New South ESOP Chapter Planning Meeting

Leaders of the New South ESOP Chapter are gathering to strategize and establish a game plan for the Chapter in 2012. Players, coaches, and interested spectators are all invited to attend and get involved in The New South ESOP Chapter!

5:30pm *Winner's Circle Tailgate Reception | Shula's 347 Lounge*

Conference fans are invited to meet, greet, network and congratulate the 2011 New South ESOP Chapter Award Winners at a complimentary opening reception. Cheers to Haskell Company, Jacksonville, Florida, and Neil Brittain, McCord Communications, Anniston, Alabama! **Attire: Show your spirit and wear your favorite game day jersey.** (Dinner is on your own.)

THURSDAY, OCTOBER 6, 2011

8:00pm - 8:30pm *Registration & Continental Breakfast*

8:30pm - 8:45pm *Team Huddle*

Introductions, Chapter Business, and Agenda Overview

Meet The New South ESOP Chapter Officers • Learn What's in Store for 2012 • Share your ideas with Sayward Masselter, Chapter President, and Chapter Officers

CONFERENCE LINE-UP

Each time slot offers a choice of two sessions:

OFFENSE

This track offers a range of topics focused on culture & communication. Learn tips and techniques to coach your team to the ESOP Super Bowl!

DEFENSE

This track delivers the technical, legal, and legislative information you need to avoid penalties and costly mistakes on the ESOP field of play.

8:50 - 9:45am *Opening Kick-Off*

HOW TO BUILD LEADERSHIP & EMPOWERMENT USING TEAMS

Jack Veale, PTCFO

Sayward Masselter, Atlanta West Carpets, Inc.

James Urbach, Urbach Law Group

To have a championship team, you need leaders on and off the field. Empowering your players will lead to more "first downs" which then lead to games won. Learn how Champion ESOPs win their games by developing empowered leaders and teams.

9:45am - 10:00am *Time Out*

10:00 - 10:50am *First Quarter*

ALL STAR TEAM TALK

WEB Industries Communication Committee

Winning teams know how to support individuals and how to create an effective team. Veteran players from the All Star 2010 ESOP Company of the Year will share secrets to their success in creating a winning company ownership culture, and what it means to be an employee owner now compared to the day they were drafted. Learn how to spread the enthusiasm to owners in your company.

FIDUCIARY ISSUES FOR INTERNAL TRUSTEES

Lance Studdard, Reliance Trust

Jay Maples, Sirote & Permutt

This presentation will cover ERISA's fiduciary duties and their application to an ESOP's internal trustees. Best practices for internal trustees and ways internal trustees may prepare for the DOL's proposed fiduciary regulations will be covered.

ECONOMIC & MARKET IMPACT ON UPCOMING YEAR-END VALUATIONS

Adrian Loud, Bennett Thrasher

Chip Brown, Willamette Management

Stock market volatility has increased, the country's debt rating was downgraded, unemployment remains high, transaction activity and multiples have increased, and there is encouraging news about corporate financial growth. What does all of this good and bad news mean for ESOP valuations as we approach year-end? This session will address market issues and touch on how evolving developments in valuation theory remove some of the old-fashioned guess work.

THURSDAY, OCTOBER 6, 2011 (Continued)

11:00 - 11:50am Second Quarter

BEST PRACTICES IN CORPORATE GOVERNANCE: HOW TO RECRUIT AND RUN AN EFFECTIVE BOARD

Stephen Smith, Krieg DeVault
J. Kirk Hancock, North Highland Group

Session will focus on Board recruitment and development in the North Highland Company, a 100% ESOP-owned consulting firm whose Board consists of 4 outside and 2 inside directors. It will include a discussion of the relationship between the ESOP trustee and the Board

I HAVE MY VALUATION REPORT - NOW WHAT?

Mark Dayman, CapVal-American Business Appraisers
Stephen Martin, Reliance Trust
Chris Best, Best Business Appraisals

The panel will discuss the process used by outside professional trustees to review and approve the ESOP valuation report. It will also discuss how an independent business appraisal firm can assist the ESOP fiduciary, whether an outside professional trustee or an internal trustee, in this process. This review process objectively examines the valuation report for completeness, adequacy, relevance, appropriateness, and reasonableness to ensure that the report is 'credible' and can be relied upon.

12:00 - 1:00pm Half Time Lunch & EOF Raffle

1:10 - 2:10pm Half-Time Program :: ECONOMIC OUTLOOK

Michael R. Paslawskyj, Regional Economist, FDIC Division of Insurance and Research

Ronald W. Sims, II, CFA, Senior Financial Analyst, FDIC Division of Insurance and Research

Mr. Paslawskyj is responsible for surveying economic conditions and highlighting economic risks to financial institutions within the seven state Atlanta region. Prior to joining the FDIC, Mike was a Senior Economist with the American Institute for Economic Research in Great Barrington, Massachusetts, where he managed the Institute's Statistical Indicators Project and performed research on business cycles. Mike also served as Vice President and Director of Economic Research at The CIT Group, a leading global finance company. As CIT's Chief Economist he was responsible for all research, forecasts and communication on economic issues. Mike has also worked at a number of banks, a brokerage firm, and taught economics at the college level.

Mr. Sims is the Senior Financial Analyst in the FDIC's Atlanta Region. In this capacity, he prepares analyses on banking and economic conditions and author's various FDIC publications. Mr. Sims brings a wealth of knowledge and experience to the FDIC having spent several years working in corporate and investment banking operations. Ronald is a seasoned professor of finance at the collegiate level and holds a BS in Economics from Florida A&M University and an MBA from Mercer University's Stetson School of Business in Atlanta, GA. In addition, Mr. Sims also holds the Charter of Financial Analyst designation.

2:10 - 3:00am Third Quarter

50 BEST EMPLOYEE COMMUNICATIONS, OWNERSHIP CULTURE IDEAS

Carla Klingler, PyraStar Pension Consultants
Tania Cable, Haskell Company
Daphne Wilson, McCord Communications
Brian Wylie, Avion Solutions, Inc.
Additional Corporate Member Panelists TBD

A team of company members will pitch out rapid-fire winning and losing employee communication ideas. Pick up tips and ideas just in time for Employee Ownership Month. Fan participation welcome!

HOW ESOPs AND 401(k)s WORK TOGETHER AND THE PROS AND CONS OF A KSOP

Rita Harris, GreenbergFarrow
Lisa Durham, Krieg DeVault
Susan Petrirena, Swerdlin

This session will cover nondiscrimination and top heavy testing of multiple plans, matching contribution options in an ESOP, 401(k) transfers to ESOPs and the pros and cons of merging plans into a KSOP.

3:00 - 3:15pm Time Out

3:15 - 4:05pm Fourth Quarter

THE PLAYBOOK FOR TODAY'S ECONOMY & VALUATION METHODS

Marshall Bartlett, Independence Trust
Nick Heinz, Mercer Capital

This session will review the current economic landscape and discuss how these factors impact valuation methods, including specific items companies can focus on to drive value.

STORIES FROM THE FRONT LINES

Eric Zaiman, J.P. Morgan Chase
Jeffrey Kahn, Greenberg Traurig, P.A.

An ESOP Banker and his counsel discusses common or not-so-common mistakes ESOP companies have made and their potential impact.

4:05pm WRAP-UP & CLOSE :: Return Your Evaluation Form and Name Badge for a Souvenir Game Ball

Conference Speakers



Marshall Bartlett » Independence Trust » Franklin, TN

Marshall Bartlett joined Independence Trust Company in 2005 as vice president in charge of investments. In this role he oversees portfolio management, trading, and other investment functions for the firm's clients. This includes serving as lead manager for the firm's dividend growth portfolio.



Chris E. Best, CPA/ABV, ASA-BV, MCBA, ABAR » Best Business Appraisals » Omaha, NE

Chris Best founded Best Business Appraisals, LLC, focusing solely on business valuations. Over the years, the success of the business led to the expansion of the firm to include additional staff. Since he began valuing businesses in 1987, he has prepared more than 1,000 valuations.



Frank A. (Chip) Brown, CPA/ABV » Willamette Management Associates » Atlanta, GA

Mr. Brown is the Senior Manager and the Dispute Advisory Services Director for the Willamette Management Associates Atlanta office. His practice focuses on dispute advisory, transaction advisory, and private equity valuations.



Tania Cable » Haskell Company » Jacksonville, FL

Corporate and institutional clients, developers and public agencies repeatedly select Haskell on the basis of its consistent record of performance excellence. Founded over forty years ago, the company ranks among the foremost design-build organizations in the U.S.



Mark A. Dayman, CPA/ABV, CVA » CapVal-American Business Appraisers » Atlanta, GA

Mr. Dayman is a partner of CapVal-American Business Appraisers and Managing Director of The McLean Group Investment Bankers. He has 35 years of consulting in company pricing and valuation, M&A, value enhancement, exit strategy, franchising, workout and turn-around, and litigation support and forensics.



Lisa A. Durham » Krieg DeVault » Atlanta, GA

Ms. Durham has expertise in a wide range of qualified plan and other employee benefit plan matters, including 401(k), money purchase and ESOPs. Ms. Durham helps plan sponsors, trustees and third-party administrators on administration issues and plan design. Ms. Durham works with IRS and DOL representatives frequently and also has extensive experience in the correcting of ESOP and other retirement plan qualification failures under the IRS's Employee Plans Compliance Resolution System (EPCRS).



J. Kirk Hancock » North Highland Group » Atlanta, GA

Mr. Hancock serves as CFO of North Highland Group. He has 23 years of experience in corporate finance and accounting. Formerly a manager with Arthur Andersen, Mr. Hancock also spent time as a controller with Delta Technologies and as director of finance for Knology.

Conference Speakers

Rita Harris » Greenberg-Farrow » Atlanta, GA

With over 30 years of experience and eight offices nationwide, GreenbergFarrow is a fully integrated architecture, planning, engineering and development services firm offering a comprehensive range of services to the retail and development communities. Having worked in nearly every state in thousands of cities nationwide, and having been involved in every aspect of the highly specialized practice of development services, GreenbergFarrow has gained an invaluable and unrivalled degree of knowledge and expertise.



Nicholas J. Heinz, ASA » Mercer Capital » Memphis, TN

Mr. Heinz leads Mercer Capital's Transaction Advisory Group. Mercer Capital is one of the largest independent business valuation firms in the nation. Mr. Heinz is responsible for valuation and transaction analyses in connection with ESOPs, fairness opinions, corporate financings, strategic planning, mergers and acquisitions, tax planning and compliance, and litigation matters.



Jeffrey S. Kahn » Greenberg Traurig » Boca Raton, FL

Mr. Kahn focuses his practice on employee benefits, executive compensation, and the design, implementation and operation of Employee Stock Ownership Plans ("ESOPs"). A frequent lecturer and author, Jeff has published articles in numerous professional and trade magazines and has lectured frequently before professional, charitable, financial, and business audiences on ERISA, ESOPs and other employee benefit subjects.



Carla Neal Klingler » PyraStar Pension Group, Inc. » Roswell, GA

For almost 30 years, Ms. Klingler, owner and President, has been a leader in developing and providing TPA services for all types of qualified and non-qualified retirement plans. PyraStar Pension Group, Inc. is a national pension administration and consulting firm.



Adrian R. Loud, CPA/ABV, CFF, CVA, ASA » Bennett Thrasher » Atlanta, GA

Mr. Loud is a partner/shareholder of Bennett Thrasher. The Bennett Thrasher valuation and litigation support team provides advisory services for a variety of purposes such as: gift, estate, and income tax planning and compliance; employee stock ownership plans feasibility and valuation; lost profits/economic damages calculations; international and interstate transfer pricing; reasonable compensation studies; intangible asset and intellectual property analyses; and financial reporting.

Stephen A. Martin » Reliance Trust Company » Atlanta, GA

Mr. Martin is a Senior Consultant for the Fiduciary Consultant Group at Reliance Trust Company, one of the nation's largest independent trust companies. Reliance Trust is a leading provider of customized retirement plan, trust, financial and investment solutions.



Jay G. Maples » Sirote & Permutt » Birmingham, AL

As a member of the Corporate and Tax practice group at Sirote, Mr. Maples focuses his practice on the business and tax needs of his clients. Prior to practicing law, Mr. Maples was a certified public accountant. Practice areas include business planning and corporate, director and officer liability, employee benefits, and tax.

Conference Speakers



Sayward Masselter » Atlanta West Carpets » Atlanta, GA

Ms. Masselter serves as President of the New South Chapter of the ESOP Association and is the Human Resources Director of Atlanta West Carpets. Atlanta West Carpets is a professional floor covering company offering selection and installation services for carpet, hardwood, ceramic tile, natural stone, laminate and vinyl servicing the new construction and remodeling markets.

Michael R. Paslawskyj » FDIC Division of Insurance & Research » Atlanta, GA

Mr. Paslawskyj is the Regional Economist in the FDIC's Division of Insurance and Research Atlanta, Georgia regional office. He joined the FDIC in January 2008 and is responsible for surveying economic conditions and highlighting economic risks to financial institutions within the seven state Atlanta regions.

Susan Petirena » Swerdlin & Company » Atlanta, GA

Swerdlin & Company, founded in 1980, is one of the nation's largest independent actuarial and employee benefits firms that does not sell financial products or provide investment advice. The firm has over 60 employees and hundreds of companies from all industries as clients. Represented in 31 states, our clients range from major employers with thousands of employees to smaller closely held companies.

Ronald W. Sims, II, CFA » FCIC Division of Insurance & Research » Atlanta, GA

Mr. Sims is the Senior Financial Analyst in the FDIC's Atlanta Region. In this capacity, he prepares analyses on banking and economic conditions and author's various FDIC publications. Mr. Sims brings a wealth of knowledge and experience to the FDIC having spent several years working in corporate and investment banking operations. Ronald is a seasoned professor of finance at the collegiate level and holds a BS in Economics from Florida A&M University and an MBA from Mercer University's Stetson School of Business in Atlanta, GA. In addition, Mr. Sims also holds the Charter of Financial Analyst designation.



Stephen D. Smith » Krieg DeVault » Indianapolis, IN & Atlanta, GA

Since 1984, Mr. Smith has dedicated his private law practice primarily to employee stock ownership plans ("ESOPs") and structuring ESOP transactions. He has been responsible for structuring over 200 ESOP transactions for public & private companies throughout the United States. He also designs and implements equity and non-equity-based incentive compensation programs for public & private companies. Mr. Smith represents ESOP sponsors, ESOP fiduciaries (including employer-appointed "committees") and independent ESOP trustees in ESOP transactions, including the sale of ESOP companies.

Lance T. Studdard » Reliance Trust Company » Atlanta, GA

Mr. Studdard is a Senior Consultant for the Fiduciary Consultant Group at Reliance Trust Company, one of the nation's largest independent trust companies. Reliance Trust is a leading provider of customized retirement plan, trust, financial and investment solutions.



James R. Urbach » Urbach Law Group » Orange Park, FL

Mr. Urbach is managing partner of Urbach Law Group, an Employee Benefits consulting practice in Orange Park, Florida. The Urbach Law Group offers consulting services to publicly traded and closely held corporations, Trustees, ERISA fiduciaries, shareholders, institutional trustees and lenders in all aspects of ESOP design, financing, implementation, management, stock acquisitions and sale. Services also include acting as independent fiduciary in transactions and ongoing independent trustee in situations requiring independence and insuring that best practices and prudent procedures have been met.

Conference Speakers



Jack Veale, MBA, CMC » PTCFO, Inc. » West Hartford, CT

Mr. Veale is a nationally recognized management consultant for privately held, family-owned and ESOP businesses. Using a results oriented approach to reach measurable outcomes, clients have enjoyed significant revenue and profit growth with less conflict and tension.

Web Industries, Inc. » Suwanee, GA

Web Industries helps companies bring their products to market by offering state-of-the-art converting services for flexible materials. The products we help convert span the range from airplane parts to diapers. Their customers have exacting requirements and precise demands. They meet their needs with a complete range of high-standard converting services, including slitting, rewinding, spooling, traverse winding, coating, laminating, and printing.

Daphne Wilson » McCord Communications » Anniston, AL

Ms. Wilson serves as Controller at McCord Communications. McCord Communications is a global leader in providing warning and communications solutions. Its combined 60 years of service and partnerships with the highest quality manufacturers in the world such as Whelen and Motorola gives McCord the ability to provide its customers with unsurpassed goods and services.

Brian Wylie » Avion Solutions, Inc. » Huntsville, AL

Avion is a veteran-owned small business providing high-quality, specialized engineering, logistics, software development, and technical services. Avion provides innovative solutions for technical and operational problems through the application of systems engineering, research, analysis, and software-engineering technologies. Avion built its reputation on integrity and commitment to customer satisfaction; 2008 revenues totaled \$20 million.

Eric Zaiman » JP Morgan Chase » New York, NY

Mr. Zaiman is a senior finance professional with broad experience assisting middle market companies in financial analysis, valuation, capital raising, transaction structuring and strategic assessment. He has direct experience with advising middle market companies and structuring leveraged ESOP and other types of liquidity transactions.

Registration Information

On or before September 23, 2011

Members: \$130 per person (1st registrant)
\$120 additional registrations per ESOP Company

Non-Members: \$175 per person

At the Door Registration Fee: \$250

After September 23, 2011

Members: \$155 per person (1st registrant)
\$145 additional registrations per ESOP Company

Non-Members: \$200 per person

Cancellation Policy: No refunds will be given after September 19, 2011. You may send a substitute from your company at no additional charge.

Register at <https://secure.esopassociation.org/secure/confreg/register.asp?confid=97>

Marriott Atlanta Buckhead Room Reservations » 1.888.855.7741
Reference Code: ESOESOA to receive conference rate

Thank You to Our Conference Sponsors!



Fiduciary Liability Insurance

Who Should Have It and What Is It?

Most companies of any size are likely to have, as part of or separate from their general business liability insurance, insurance to protect the directors and officers against claims involving allegations of wrongful acts occurring while performing their respective duties (D&O insurance coverage). Many of these same companies maintain employee benefit plans which are subject to the provisions of the Employee Retirement Income Security Act (ERISA). Frequently, the same persons who serve as officers and directors of the company are also fiduciaries of the company's employee benefit plans. Many companies therefore believe that their D&O insurance coverage also provides protection for the fiduciaries of their employee benefit plans. However, a careful reading of most D&O insurance policies will show that those policies frequently specifically exclude from coverage liability for claims brought against an officer, employee or director for a breach of fiduciary duty with respect to any employee benefit plan maintained by the company.

Persons who serve as fiduciaries of plans subject to ERISA are subject to an extraordinary duty of care in their dealings with respect to an ERISA-covered plan. They are required to perform their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." This is frequently referred to as the "prudent expert" standard. Subject to this standard, the fiduciary must perform his duties with respect to the plan "solely in the interest of the participants and beneficiaries ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries; and ... defraying the reasonable expenses of administering the plan." A fiduciary who deals with the assets of an ERISA-covered plan in his or her own interest or for his or her own account or who engages in one of the activities specified in ERISA as a prohibited transaction will be subject to excise taxes of up to 115% of the plan's assets. Persons serving as fiduciaries of ERISA-covered employee benefit plans have personal liability for a breach of their fiduciary duties under ERISA. Additionally, they have co-fiduciary liability in some circumstances where the fiduciary knowingly conceals a breach of another fiduciary of the plan, allows another fiduciary to commit a breach or, knowing that a breach has occurred, does not take steps to remedy the breach.

The definition of a fiduciary for purposes of ERISA is not based solely upon a person being appointed to a fiduciary position but also on the authority and control the person has and exerts over the ERISA-covered plan and its assets. This is frequently referred to as a "functional

fiduciary." Thus, on some occasions, a person may be serving in a fiduciary capacity without knowing that he is doing so and without knowing the standards which are applied to his behavior and the resulting personal liability attached to that position. While it is "best practices" to be certain all fiduciaries with respect to employee benefit plans have been appointed and are monitored in a systematic fashion, it is a fact that this is frequently not the case. This article is not intended to address best practices with respect to the appointment of ERISA fiduciaries, but rather to address the need for fiduciary liability insurance coverage.

Employee benefit plans are a frequent target for lawsuits both large and small. Gaining the most attention in recent years are "stock drop" class action lawsuits (where there has allegedly been a breach of fiduciary duty for not ceasing to invest plan assets in company stock as the stock price was declining precipitously) and "hidden or unreasonable fees" class actions (where the fiduciary allegedly breached its duty by

"The definition of a fiduciary for purposes of ERISA is not based solely upon a person being appointed to a fiduciary position but also on the authority and control the person has and exerts over the ERISA-covered plan and its assets."

allowing unreasonable expenses to be charged against the assets of the plan). Other common allegations of a breach of fiduciary duty include a failure to monitor the investment performance of assets held under the plan, whether participant or fiduciary directed; providing incorrect or misleading information to plan participants upon which the participants relied; engaging in a transaction which conflicts with the fiduciary's duties to the plan and its participants; engaging other service providers and fiduciaries with respect to the plan without adequately investigating the expertise of that person or entity; and allowing the plan to be administered in a manner which is not in compliance with its terms. Because of the possibility of personal

liability, the expense of the litigation and the potential for very large losses, it is advisable for companies to purchase fiduciary liability insurance to protect the company and its fiduciaries.¹

ERISA Section 410 specifically allows a plan, fiduciary or employer to purchase insurance to cover potential fiduciary liability claims. If a plan purchases the liability insurance, the insurance company must have recourse against the fiduciary in the event of a breach of fiduciary duty. One of the most important pieces of advice that attorneys give to their employer clients is to maintain adequate liability insurance protection for the fiduciaries (usually excluding institutional trustees) of the employer's employee benefit plans. Likewise, one of the most valuable services that attorneys can provide is to review employers' existing fiduciary liability policies to ensure adequate coverage or to have competent employee benefit attorneys provide the review. A review will ensure not only that the policy covers the intended persons (employers, directors, officers and employees) and plans, but also that the policy

Fiduciary Liability Insurance

(continued)

protects them from liability for actual or alleged violations of ERISA's fiduciary duties and responsibilities. A policy review will ensure that the policy provides coverage for plan-related errors and omissions that do not constitute fiduciary breaches, but may result in liability.

When reviewing fiduciary liability policies there are several areas of the policy which should be given particular attention. These include (1) whether and which defense costs are covered and whether defense of frivolous claims is covered, (2) whether the definition of a "wrongful act" only includes alleged or actual breaches of fiduciary duty or also includes errors which do not rise to or are not alleged to be breaches of fiduciary duties, and (3) whether the definition of "damages" covered by the policy includes all damages, including attorneys' fees. Most fiduciary liability policies are written on a "claims made" basis which means the claims must be made during the policy period and gives fiduciaries retroactive coverage under the policy so long as they had no knowledge of an incident giving rise to the claim when they entered into the policy.

Additionally, the reviewer should be certain that the policy covers all of the employer's employee benefit plans. Some policies do not cover employee stock ownership plans or do so only with a special rider. Other common inadequacies include: (1) failure to cover all of the intended fiduciaries or other persons, (2) failure to provide coverage for all potential liabilities, and (3) failure to provide adequate coverage limits. Adequate coverage limits are key, especially in light of the substantial costs to defend claims for breaches of ERISA's fiduciary duties, which defense costs are included in the limits of the insurance company's liabilities under the policy.

One new coverage feature of ERISA fiduciary liability insurance policies of note is coverage for the costs for correction of a plan's operational failures. There are several characteristics of this new coverage feature that you should know: coverage for costs associated with operational failures is typically offered as an available option instead of being included automatically; there is usually a small additional premium for this option; a separate deductible (usually relatively low) normally applies; and a separate and lower coverage limit (such as \$50,000 or \$100,000) often applies. As with all coverages under the policy, there are questions you should ask in considering the addition of this option -- what does it cover and what does it pay and, of equal importance, what does it not cover or pay? Generally, coverage for plan operational failures covers fees, penalties or sanctions imposed in connection with

any voluntary compliance resolution program or similar voluntary settlement program administered by either the Internal Revenue Service ("IRS") or the Department of Labor ("DOL").

"Most fiduciary liability policies are written on a "claims made" basis which means the claims must be made during the policy period and gives fiduciaries retroactive coverage under the policy so long as they had no knowledge of an incident giving rise to the claim when they entered into the policy."

In addition to reviewing the definitions and coverage of the fiduciary liability policy, both the D&O policy and the fiduciary liability policy should be carefully reviewed to be certain that the interaction between those policies does not result in inadequate coverage. This is often the case when the D&O policy and/or the fiduciary liability policy offset coverage provided under the other policy. It is frequently also a good practice to have the D&O coverage and the fiduciary liability policy written by the same carrier so there is no squabbling about whether the alleged wrongdoing was done by

an individual in his capacity as a fiduciary rather than as an officer or director or *vice versa*.

¹ Every ERISA-covered employee benefit plan is required to be covered by a fidelity bond in an amount not less than 10% of the plan's assets and not to exceed \$500,000 (\$1,000,000 in certain plans which hold the stock of the employer maintaining the plan). Many employers confuse this fidelity bond with fiduciary liability insurance, which is not a required coverage under ERISA.

Deborah C. McNear of Krieg DeVault concentrates her practice in the area of employee benefits and executive compensation.

She advises both governmental and private-sector employers, plans, fiduciaries and service providers concerning qualified and non-qualified retirement plans, cafeteria plans, health reimbursement arrangements and executive compensation plans.

Her practice includes plan drafting, advice on plan administration and plan compliance, including correction of administrative errors under the IRS Employee Plans Compliance Resolution System ("EPCRS") and the Department of Labor Voluntary Fiduciary Correction Program ("VFCP"). She has worked with a broad range of employers in the design and implementation of profit sharing, 401(k), defined benefit (including 401(h) accounts), new comparability (i.e. "cross-tested"), money purchase, employee stock ownership and cafeteria plans.

She has worked with corporate trustees, investment advisors and plan sponsors to put in place best-practices to fulfill their fiduciary responsibilities under ERISA. She also works as counsel to buyers and sellers in mergers and acquisitions as those transactions relate to employee benefit matters.

She can be reached at 317.238.6281 or dmcnear@kdlegal.com.

DOL Backs Off Proposed Fiduciary Regulation; To Issue New Version in Early 2012

From ESOP Association Legislative Alert » September 19, 2011

Since late October 2010, The ESOP Association, and the ESOP community, has protested vigorously against the Department of Labor's (DOL) proposed regulation to make all appraisers of private ESOP company stock ERISA fiduciaries. Today, the DOL issued a press release announcing that it would issue a new version of the regulation revising the definition of ERISA fiduciaries in January 2012, and begin the comment period, in essence, all over again.

This news is a good trend line for pro-ESOP voices. On October 22, 2010, to use an analogy, when the "game" started, the ESOP community was already down two touchdowns. Today, we can say we're at half time, and we're tied going into the locker room.

But, there is still plenty of play in the months leading up to 2012 and beyond. For example, the DOL press release hints at leaving in the provision making ESOP appraisers ERISA fiduciaries when they value stock being acquired by a private company. Read the release [here](#).

Such an outcome would dry up ESOP transactions in our view, and soon the number of ESOPs would dwindle, our voice in DC would be weaker, and ESOP benefits would be devastated.

So, do not back off; continue to bring concerns about this proposed regulation to the attention of members of Congress.

Clearly our message will be precise when the new proposed regulation is issued in early 2012. We will post suggested messages --- for letter, telephone call, or if you have email green light from a staff member of your Senators and Congress person's offices, for an email --- on our website, blog, and social media sites, as well as in our Advocacy and Congressional Visit Kits.

PS: Just a note of some pride from this corner. The DOL press release cites the Department's desire to comply with a White House directive issued in January 2011. The ESOP Association, to our knowledge, was the first to develop a point by point analysis why the October 22, 2010, DOL proposed regulation did not conform to the President's Executive Order, in a communication to the Office of Management and Budget.

Thank You to Our Newsletter Sponsors



Atlanta West Carpets



Bennett Thrasher

**MERCER
CAPITAL**



Upcoming Events

New South Chapter Big 5 Conference
October 5 - 6, 2011
Marriott Atlanta Buckhead
Conference Center
Atlanta, GA

The ESOP Association's Las Vegas Conference & Trade Show
November 3 - 4, 2011
Caesar's Palace
Las Vegas, NV
For more information, [CLICK HERE](#)

Tri-Chapter Regional Conference
March, 2012
Pinehurst Resort
Pinehurst, NC

The ESOP Association's 35th Annual Conference
May 10 - 11, 2012
Renaissance Washington Hotel
Washington, DC
Save the Date

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ABOUT EYE ON ESOPS

EYE ON ESOPs is published by The New South Chapter of The ESOP Association. With approximately 2,500 members, The ESOP Association is the national, non-profit association of companies with employee stock ownership plans (ESOPs) and service providers with a professional commitment to ESOPs. The New South Chapter is one of eighteen chapters nationwide. When you join The ESOP Association you are automatically enrolled in the chapter serving your geographic area. The New South Chapter is comprised of 153 members (78 corporate and 75 professional) from Alabama, Florida, Georgia, Mississippi and Tennessee. Chapter membership provides the opportunity to network and learn with members from other ESOP companies in the New South area at chapter-sponsored events.

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