

ability to buy stock even when the employer is not buying stock. The trustee should not be limited to the last independent bid price or the last sales price.

4. If recent SEC private letter rulings are made applicable on a general basis, the trustee would not be permitted to buy when the employer is prohibited from buying employer stock. This could include periods in which mergers or acquisitions are being negotiated which involve the employer's stock, and periods in which the employer may be selling new stock or convertible securities. It is not to be expected that a trustee making its own independent investment decision would be informed of the beginning of merger negotiations. It is not logical for such a trustee to suspend purchases for employees during such periods, which may be lengthy.

The above illustrates the effect of the proposed rules and regulations on savings plans. The effect in a profit sharing plan where the employer stock is purchased for an employee's account is similar. In a pension plan, the employer stock, when purchased, usually becomes part of the portfolio and stock is not bought for the account of individual employees but for all employees as a group. The proposed rules and regulations and the general application of the private letter rulings would actually prevent the trustees from performing their duty, which involves buying the employer's stock at such time, at such price and in such amounts as may operate to the greatest benefit of the trust beneficiaries.

EXISTING LAW AND REGULATIONS

We urge the Subcommittee to recognize that all qualified pension trusts, profit sharing trusts and savings plans trusts are true trusts. They involve a fiduciary relationship in which one person holds title to property subject to an equitable obligation to preserve and use the property for the benefit of other persons. It is not an ordinary business relationship, but a *fiduciary* relationship, in which the law charges the trustee with certain duties: to preserve the trust property and to make it productive, and to use such reasonable care as an ordinarily prudent man would in investing and reinvesting the trust property. The trustee's duty of loyalty is to the beneficiaries for whom he holds the property.

There is already an abundance of controls over these trusts. All qualified trusts are required to report the details of purchases of employer securities to the Internal Revenue Service. An improper purchase can result in the severe penalty of the loss of the tax exempt status of the trust. In addition, under the Welfare and Pension Plans Disclosure Act, the details of the purchase of employer securities must be reported and this information is available to the Secretary of Labor and the public. Furthermore, Congress is currently considering a Federal Fiduciary Responsibility Act for trustees under pension, profit sharing and other employee benefits plans (H.R. 5741 and S. 1024).

Underlying all this federal law is the common law of trusts. Under trust law, the loyalty of the trustee runs to the employees and their beneficiaries in these plans. Every transaction undertaken by the trustee must be measured in terms of this loyalty. Any trustee who acts improperly becomes personally liable. Obviously, no corporate trustee can afford the injury that would result to its reputation from improper or irregular acts in its capacity as trustee.

SUMMARY

In summary, the National Chamber recommends the elimination of the phrase, "any bonus, profit sharing, pension, retirement, thrift, incentive, stock purchase, or similar plan of the issuer" from Subsection (e) (2) of S. 510 and H.R. 14475. Alternatively, this subsection should be so modified as to exclude trustees that are independent of the employer, such as a corporate trustee, and where the trustee performs the function of purchasing the stock at his discretion without any direction or instructions of the employer.

The time limitations on this hearing did not afford us an opportunity to present oral testimony on this one subsection which has such serious implications. We will be happy to elaborate further if the Subcommittee desires additional information.