



| The ESOP Association

Fact Sheet

The ESOP Association petition to the U.S. Department of Labor under the Administrative Procedure Act

Summary

When ERISA was enacted in 1974, Congress directed the U.S. Department of Labor to promulgate regulations interpreting the Adequate Consideration Exemption, a key regulation related to employee stock ownership plans (ESOPs). Yet for nearly 50 years, the Department has refused to issue formal guidance. The Department has instead preferred to follow its policy of “regulation through litigation,” which has enabled it to avoid working with and learning from industry participants as required by the Administrative Procedure Act, and to circumvent the necessary costs and difficulties of a formal notice-and-comment rulemaking process. The Department’s tactics have created an environment of profound regulatory uncertainty, which has frustrated Congress’s intent to expand employee ownership, ultimately harming employee owners.

What is an Employee Stock Ownership Plan (ESOP)?

ESOPs are a type of benefit plan that Congress designed to invest in the stock of a sponsoring employer company. ESOPs are regulated by the U.S. Department of Labor as a qualified employee benefit plan under the Employee Retirement Income Security Act of 1974 (“ERISA”). By establishing ESOPs and incentivizing their creation, Congress hoped to expand American workers’ equity ownership stake in American companies, which would allow workers to build wealth as their employers grow.

What is the Administrative Procedure Act (APA)?

The APA describes the procedure agencies must typically follow when making rules. Congress passed the Administrative Procedure Act (APA) to ensure that federal agencies are subject to constraints as they exercise their regulatory powers.

What is “Adequate Consideration”?

Congress designed ERISA to allow ESOPs to buy employer stock using funds borrowed from the ESOP’s sponsoring company itself so long as the ESOP pays no more than “adequate consideration.” Virtually all ESOPs are established via this legal standard, known as the “Adequate Consideration Exemption” which ERISA defines as “the fair market value of the asset as determined in good faith by a fiduciary and in accordance with regulations promulgated by the Secretary.”

What's the issue with the U.S. Department of Labor?

In the nearly half century since ERISA's passage, the Department has not issued any final regulations interpreting the Adequate Consideration Exemption. The Department's decades-long delay is not the result of an inadvertent omission, the unhurried machinations of a large federal agency, or indifference, but appears to be a deliberate regulatory choice to supplant Congress's vision with its own. Rather than issue regulations, the Department has chosen to pursue a policy of "regulation by litigation."

What's been the effect of the Department's failure to issue this regulation?

The Department's unchecked, *ex post facto* approach to regulation has been devastating: it has sown confusion, emboldened and expanded an opportunistic class action plaintiffs' bar, driven up insurance costs, and pushed insurers out of the market. At bottom, the Department's policies have discouraged companies from establishing new ESOPs and, thus, kept innumerable American workers from building wealth through equity as Congress intended. Also, by failing to promulgate regulations on the Adequate Consideration Exemption—despite Congress's direction to do so—the Department has thwarted public participation in the regulatory process, thereby liberating the Department from the checks and balances that public input provides.

What is The ESOP Association seeking with this petition?

The ESOP Association is petitioning the Department under the APA to undertake a notice-and-comment rulemaking process and issue a final regulation interpreting the Adequate Consideration Exemption.

Where can I find out more about ESOPs and employee ownership?

In the simplest terms, an ESOP is a retirement plan, but an ESOP is really so much more. The ESOP Association's website, <https://esopassociation.org>, has information about ESOPs and their benefits to employee owners, their companies, and communities.

For more information, please contact Greg Facchiano, Vice President of Government Relations and Public Affairs at The ESOP Association, at 202-293-6268 or gfacchiano@esopassociation.org