



| The ESOP Association

FOR IMMEDIATE RELEASE

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The ESOP Association Petitions U.S. Department of Labor to Undertake Congressionally Mandated Rulemaking

Washington, D.C. – The ESOP Association (TEA), the national trade association representing companies with Employee Stock Ownership Plans (ESOPs) and ESOP professionals, today exercised rights under the Administrative Procedure Act to petition the U.S. Department of Labor (DOL) to undertake a long-delayed rulemaking essential to the formation and ongoing operation of ESOPs. Since 1974, the Department of Labor has steadfastly refused to fulfill requirements of the Employee Retirement Income Security Act (ERISA) in violation of Congressional direction and stakeholders' rights under the Administrative Procedure Act (APA).

"The Department of Labor has flouted Congress' mandate within ERISA for nearly five decades. On behalf of the millions of Americans with ownership in an ESOP, we have filed this petition to compel Secretary Walsh to undertake the rulemaking Congress directed in 1974, which was nearly completed in 1988 but has been mothballed ever since," said James Bonham, President and CEO of The ESOP Association. "The Labor Department has failed to follow Congress' requirements, and the regulatory vacuum has created a chilling effect on ESOP formation and operation that has effectively denied millions of Americans the opportunity for a better retirement and ownership in the place where they work."

Employee Stock Ownership Plans (ESOPs) were created by Congress to provide a vehicle by which a company's employees could obtain an ownership stake in their employer through a Qualified Retirement Plan (QRP). Today, more than 6,247 companies are fully or partially owned by more than 10 million employees through an ESOP¹. However, because ESOPs are stuck in a regulatory no-man's land, countless businesses have turned away from an ESOP due to the DOL's failure to provide clear regulation and guidance as Congress directed. Instead, DOL has pursued a strategy of "regulation by litigation", undertaking thousands of investigations and filing lawsuits against ESOP trustees and founders.

The APA was enacted to specifically prevent government agencies from regulatory abuses like the DOL's approach to regulating ESOPs. Accordingly, The ESOP Association has formally registered an APA petition with U.S. Labor Secretary Marty Walsh, who is required to provide a formal, written response to the petition. Should the

¹ According to publicly available data included in most recent U.S. Department of Labor form 5500 from 2019

DOL respond that it will not enter a formal notice and comment rulemaking process, a court may force the Department to fulfill its responsibilities.

In its petition, The ESOP Association stated “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, driven others to dissolve their ESOPs, and prevented innumerable American workers from building wealth through equity as Congress intended. Employers, ESOP fiduciaries, and, most importantly, current and future ESOP participants, need the Department to regulate as Congress directed 50 years ago—transparently, prospectively, and with stakeholder input—so that American workers can reap the rewards that ESOPs provide.”

In a recent example of DOL’s abusive regulatory tactics, DOL investigated Bowers + Kubota Consulting, Inc., an architectural and engineering firm based in Hawaii, alleging the ESOP acquired its employer’s stock for more than fair market value. Bowers + Kubota’s founders refused to cave to DOL pressure, and after several years prevailed on every argument advanced by DOL in federal court. In fact, the federal judge presiding over the bench trial resoundingly struck down each of the government’s arguments and ruled that the defendants “did not violate any provision of ERISA with respect to the sale of the Company to the Company’s ESOP.”

The ESOP Association has joined the company through an amicus brief seeking to recover defendant’s legal fees from the government.

“Governing by threats, harassment, and the arbitrary whim of bureaucrats should not be standard procedure,” said Brian Bowers, President of Bowers + Kubota. “Although we won our case against the DOL, it took years of effort and millions of dollars in legal fees and the fight continues as we attempt to recover our costs based on the legal concept of loser pays. No business should endure what we did, especially when trying to secure employees’ financial futures. We urge the Department to work with the ESOP community and develop appropriate regulations so ESOPs can go about their business of empowering and enriching employee owners’ lives and not be subject to attack whenever the government decides to move the goalposts.”

As with all qualified employee benefit plans, ESOPs are governed by ERISA. Congress designed ERISA to allow ESOPs to buy employer stock using funds borrowed from the ESOP’s sponsoring company itself – employees almost never contribute any of their own funds for an ESOP’s acquisition – 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.”

When ERISA was passed in 1974, Congress directed the DOL to issue regulations outlining more specifically how parties to ESOP transactions could satisfy the Adequate Consideration Exemption. The Department itself has long recognized that such a

regulation is crucial to eliminate confusion surrounding the vaguely written standard and to protect ESOPs and their participants from potential abuse. To issue a regulation, the Department would need to engage with interested stakeholders in the notice-and-comment rule-making process required by the APA. Unfortunately, the Department has ignored Congress's directive and circumvented the APA's requirements using a procedurally improper tactic of "regulation by litigation."

Fleshing out the definition of the Adequate Consideration Exemption would create a uniform, transparent standard governing the process by which parties to ESOP transactions can establish a company's fair market value, which is crucial to ensure that ESOPs do not overpay for employer stock.

Bonham added: "When Labor Secretary Marty Walsh was mayor of Boston, he was a champion of employee ownership and ESOPs. On behalf of more than 10 million employee owners, we stand ready to work with Secretary Walsh to help the Department formulate a clear and fair rule that will eliminate uncertainty and help more Americans realize the dream and benefits of employee ownership. Failure to issue a rule will continue the chilling effect on ESOP formation at a time when our government is trying to promote retirement security and address the massive wealth and income gap plaguing our economy."

The ESOP Association's full petition to the DOL via the APA [can be found here](#). For the amicus brief in support of Bowers + Kubota Consulting's appeal to receive reimbursement of its legal fees, [click here](#). For more information on the APA, [click here](#).

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About the ESOP Association

The ESOP Association is the largest organization in the world supporting employee-owned companies, the more than 10 million U.S. employees who participate in an ESOP, and the professionals who provide services to them. Headquartered at the International Employee Ownership Center in Washington, DC and operating as a 501(c)6 organization with the affiliated Employee Ownership Foundation, The ESOP Association conducts and funds academic research, provides more than 160 annual conferences and events attended by nearly 15,000 individuals, and advocates on behalf of employee owners and their businesses to federal and state lawmakers.

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