Hon. Eugene Scalia
Secretary of Labor
200 Constitution Ave., NW Room S-2018
Washington, DC 20210

CC: Assistant Secretary Preston Rutledge
Principal Deputy Assistant Secretary Jeanne Klinefelter Wilson
James Sherk, Special Assistant to the President for Domestic Policy

RE: EMERGENCY FLEXIBILITY, INVESTIGATIVE RELIEF AND GUIDANCE FOR EMPLOYEE STOCK OWNERSHIP PLANS

Dear Secretary Scalia:

The ESOP Association is the largest and oldest non-profit organization in the nation representing all Employee Stock Ownership Plan (ESOP) companies and their professional advisors. More importantly, The ESOP Association represents the interests of the more than 10 million employee owners who are beneficial shareholders in ESOP retirement plans.

The economic impact of the COVID-19 pandemic is having a profound and immediate impact on ESOP companies across the nation. I am writing to you today to seek your agency’s assistance in granting certain flexibility, relief and plan administration guidance as ESOPs attempt to properly and successfully navigate highly uncertain economic conditions.

As both businesses and retirement plans, ESOPs face unique issues to which other businesses are not currently exposed. In addition to all of the same business concerns and turbulence all of our nation’s employers are facing during this crisis, ESOPs also face two additional categories of issues related to your agency: A) annual valuations as required by ERISA and the cascade of decisions and actions that flow from that valuation; and, B) the exercise of investigative authorities by the Employee Benefit Security Administration (EBSA).
The ESOP Association, on behalf of our membership, seeks the following relief, guidance or assistance during this National Emergency.

A) 2019 VALUATION GUIDANCE AFFIRMATION

The most immediate concern is related to required annual valuations. Most ESOP plans require a calendar year end valuation. In accordance with that requirement, the 2019 valuation process for these companies had begun, and in many cases nearly reached completion, for a final determination of year-end 2019 company value. These annual valuations are required for the administration of the ESOP trust including allocating stock, benefit statements, mandatory benefit payments, and plan diversification.

At the close of 2019, the COVID-19 pandemic was neither known nor knowable. These 2019 valuations that have not yet been completed or reported will therefore reflect economic and business conditions dramatically out of step with current reality. This creates a highly dangerous factual distortion during an economic emergency where every aspect of normal business has become disrupted and cash reserves are under severe strain. Because these year-end valuations will be used for many major activities of the ESOP, plan administrators are potentially facing impossible reporting or re-valuation decisions, both of which create significant regulatory, plan administration, and business continuity risks resulting from mandatory allocations, payouts and the like.

The ESOP Association and professional ESOP advisors are doing our best to provide reasonable guidance to these businesses, but your assistance in providing some regulatory clarity is critical to the survival for many ESOP businesses.

1) Annual Valuations

The following represents our suggested guidance to our membership. We would very much appreciate the Department of Labor’s immediate review and comment on the approach either in affirmation or in some alternative form of guidance:

- Annual valuations for 2019 should consider what was known and knowable as of that valuation date, including projections, costs of capital, etc. It should not factor in the current events of the COVID-19 pandemic.
- The annual valuation should include a statement disclosure clearly noting the macro and industry factors for the COVID-19 pandemic on the company have NOT been included in the annual valuation.
- To remediate the valuation disparity between the valuation date and the benefit distribution date, we are suggesting that plan fiduciaries consider an interim, post annual valuation for the processing of distributions. This interim valuation is likely to be a lower value than established for the annual valuation. Plan sponsors and trustees will need to consider a host of factors including the distribution method deployed, the cost of the additional analysis, the amount of distributions and impact to the company.

2) Interim Valuations

An interim valuation under current circumstances would likely be in the form of a bring-down valuation. This is typically an abbreviated report that considers the last valuation and the effect of events on that valuation. Presently, if a full valuation had to occur today, there are many, many unknowns such as
growth rates, costs of capital, effects of COVID-19 on the plan sponsors business, vendors and most importantly its workforce with remote working, sickness and even the possibility of death. Therefore we are NOT suggesting ESOPs undertake a new, full valuation.

We ask for your agency’s immediate comments and guidance if an interim valuation in a bring-down format for benefit payments is acceptable in the context of the current national emergency.

B) INVESTIGATORY MORATORIUM, PLAN FLEXIBILITY, AND REPORTING EXTENSION

The investigatory powers vested in the Employee Benefit Security Administration (EBSA) are an important power to protect the interests of employee owners. However, in a national health and economic emergency the companies that employ plan beneficiaries are fighting for the business to adapt and survive. It is critical that the Department of Labor and the leadership within EBSA recognize the dangerous and costly impact of launching new investigations, unreasonably adhering to timelines or production requests in ongoing matters, and overzealously scrutinizing decisions that will need to be made with imperfect information and under continuously changing circumstances.

Because of these and many other important considerations, we request the following investigatory relief, plan flexibility, and extension on reporting deadlines:

- A moratorium on all new, routine plan investigations by EBSA until December 31, 2020 and a temporary pause in existing investigations.

  Both of these requests are made in recognition that the costs of responding to current or new investigations includes staff resources to gather and respond; the cost of engaging professionals to assist in the process at a time when we our members are most vulnerable and correctly focused on business survival; and the diversion of leadership focus away from more urgent and mission critical matters. In this time, ESOP companies may not have the staff to respond or the resources to pay for such services. For the immediate future, the best interests of plan beneficiaries lies in efforts to preserve ongoing business operations, not responding to regulator investigations.

  We are not requesting a moratorium on new EBSA investigations under the auspices of fraud or other concerns.

- A process to allow Plan Sponsors to amend their current ESOP plan and trust documents for purposes of benefit payments. More specifically, plan sponsors may desire to make an amendment during the current crisis to allow for participant distribution flexibility. For example, giving the participants the election of stock or cash at an interim valuation (described above), or a combination of both stock and cash. Under a described process, it should note that EBSA will not consider a well written and documented rationale for plan amendments as a breach of fiduciary duty or a cutback provision.

- An additional 3-month extension for filing form 5500 under its normal extension. For example, if via normal extension the 5500 would be due October 15, 2020, we request that the final date be January 15, 2021.
Thank you for your immediate consideration of these important requests for regulatory relief, investigatory relief, and plan administration flexibility. We would be pleased to work with your agency to identify methods or approaches to solving these important issues for the success of ESOPs throughout the nation.

Warm regards,

[Signature]

James J. Bonham
President & CEO

Cc:  Sen. Lamar Alexander, Chairman
     Senate Health, Education, Labor & Pensions Committee

     Sen. Patty Murray, Ranking Member
     Senate Health Education, Labor & Pensions Committee

     Hon. Bobby Scott, Chairman
     House Committee on Education & Labor

     Hon. Virginia Foxx, Ranking Member
     House Committee on Education & Labor