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Rep. Guthrie Elicits Key On-the-Record Comments from Labor Secretary Acosta

Secretary Open to Hearing How Guidelines Can Be Made Clearer

Rep. Bret Guthrie (R-KY-2) has once again stepped forward to offer significant help to the ESOP community. At a May 1 [hearing](#) of the House Committee on Education and Labor, Rep. Guthrie quizzed Labor Secretary Alexander Acosta on his agency's position relative to ESOPs. The subsequent discussion resulted in

Secretary Acosta making key comments about ESOPs on the record.

Rep. Guthrie launched the conversation by noting that the ESOPs with which he is familiar have provided "extremely lucrative retirement plans for their employees." He then asked the Labor Secretary for an update on the department's regulatory activities relating to ESOPs, and what "Congress could do to help ensure that ESOPs continue to be created and thrive."

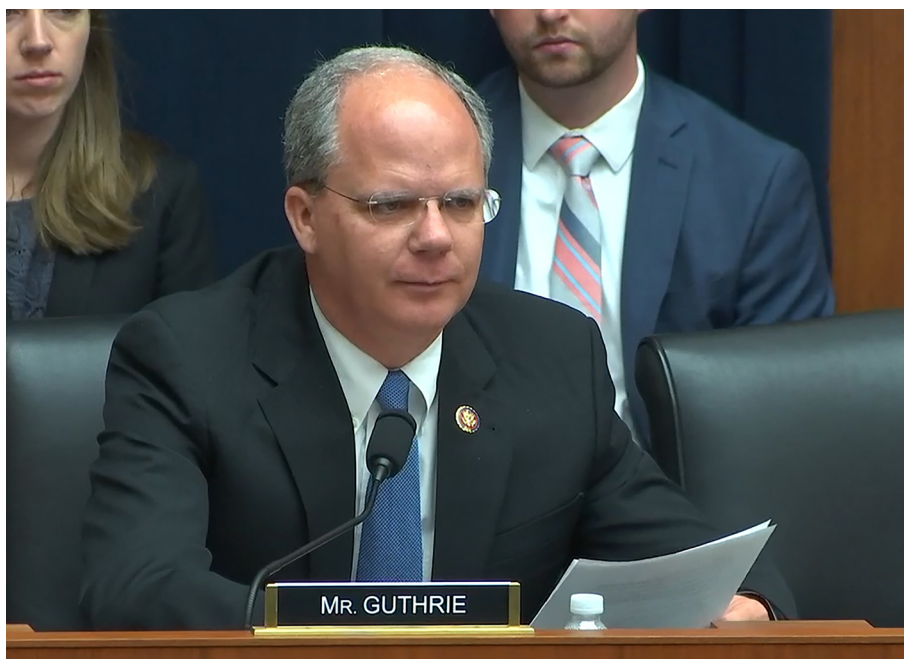
Sec. Acosta's answer may surprise members of the ESOP community.

"I strongly support ESOPs; I think ESOPs are of benefit to employees," said Sec. Acosta. "The industry is conforming much more closely to the law. I think the enforcement actions peaked sometime around 2013 and have declined since as the industry comes into greater conformity with what pension laws require."

Rep. Guthrie then told the Labor Secretary the industry is seeking clearer guidelines, especially relating to stock valuation.

"Fair," replied Acosta. "If there are particular areas where the guidelines need to be more clear, we'd appreciate knowing that so that we can focus in the inquiry."

"I owe you that," replied Guthrie, whose response suggests he may have opened a channel for sending input to the Labor



Rep. Brett Guthrie interacts with Labor Secretary Alexander Acosta during a hearing of the House Committee on Education and Labor, May 1.

Unique Factors

It does not, however, make new guidelines impossible.

His interaction with Acosta suggests that he will continue the tactful, diplomatic efforts he has engaged in so far. While members of Congress sometimes take umbrage with the agency leaders who testify before them, Rep. Guthrie has maintained a very professional discourse with Sec.

President's Corner

Change Is Coming; the Focus on Membership Quality is Constant

Let's start with Cindy Turcot, who has just completed her service on the Board. While she was Chair, Cindy created a taskforce aimed at evaluating and improving our conference experience. That taskforce generated a number of good ideas that were implemented and have continued to spark

Congress of the United States
Washington, DC 20515

October 1, 2018

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Trump:

We write today to express our concern regarding the Department of Labor's investigatory and enforcement policies toward Employee Stock Ownership Plans ("ESOPs"). Employee-owned companies are a vital piece of the American business fabric, and the decisions here are both important and risky for employee ownership throughout ESOPs. However, based on the feedback we have received, the Department's practice of "regulation by litigation" is harming small businesses and their employees. We respectfully request that you consider intervening in this issue to support over 7,000 American businesses and nearly 11 million American workers.

There is evidence from the past forty-one years demonstrating employee ownership through ESOPs is an efficient and effective means of improving retirement equity and building a stronger economy. For example, over the past decade, layoff rates from employee-owned companies in the United States were 4.8 times lower than layoff rates for conventionally owned companies.¹ Survival rates for ESOP companies are also higher than survival rates for their non-ESOP counterparts.² Post- and pre-retirement, ESOP-owned companies outperformed private companies.³ What is more, based on Department of Labor data, companies on average contribute 50 percent to 100 percent more to ESOPs than non-ESOP companies who contribute to 401(k) plans.⁴ And whereas 60 percent of the rate in a 401(k) plan comes from employee contributions, with few exceptions all the assets in an ESOP come from company contributions.⁵ Employee ownership is good for employees, companies, and the economy.

Unfortunately, the Department of Labor's enforcement policies are undermining ESOPs. We argue that bad action in the marketplace should be neutralized. However, the Department has relied less likely guidance or substantive issues including, for example, valuation. This makes it difficult for ESOP companies to make business decisions and to find someone willing to serve as a plan fiduciary. The Department also has employee counter-productive enforcement tactics, including taking inconsistent positions on legal issues. Ultimately, this investigatory approach is proving a destabilizing effect to many ESOP companies, which ESOP companies fear will result in material losses for workers.

Our constituents have made us aware of numerous cases that illustrate these enforcement issues. We were told that in one dispute with an ESOP company, the Department agreed to retain an independent valuation expert to try to resolve the outstanding valuation issues. However,


The Department disregarded the findings and filed a lawsuit against the company anyway. In another case, we understood that a Department official told an ESOP company to "terminate" its ESOP of risk being saved over the share valuation. The company, which was a small business, had no choice but to terminate because the company was not a public company. We also have heard many examples of investigations that drag on for many years. In at least one instance, a company faced immense difficulty in securing new financing for over three years because of the risk associated with an employee ownership investigation.


These tactics began under the prior Administration, but unfortunately have continued under this Administration. We fear that under the Department's current approach to regulating ESOPs, the system Congress carefully crafted to encourage employee ownership could be in jeopardy. Moreover, the Department's policies are proving workers' savings at risk as the excessive costs of responding to the Department ultimately reduce the value of ESOP companies.


We request your assistance in protecting ESOPs and employee ownership. Specifically, we believe the Department could immediately eliminate some of the regulatory uncertainty by collaborating with the ESOP community to develop clear guidance with respect to valuation and other important issues. Furthermore, the Department should consider immediately halting controversial oversight practices currently in use while the agency develops more efficient investigatory mechanisms that limit the burdens and costs on small businesses.


We appreciate your attention to this issue and would welcome the opportunity to discuss any of these issues further or answer any questions.


Sincerely,


Brett Gubins
Member of Congress


Tim Walberg
Member of Congress


David P. Roe, M.D.
Member of Congress


Rick Warren
Member of Congress


Bradley Hysse
Member of Congress



Rick Warren
Member of Congress

PHOTO BY MICHAEL STONE

Rep. Guthrie may be polite, but he remains steadfast in his support of ESOPs. He was the first member of the House to sign a letter to President Trump last fall asking for the Labor Department to provide greater regulatory clarity. At a similar hearing in late 2017, Rep. Guthrie pressed Sec. Acosta on the issue of overly broad use of the agency's subpoena power. [E](#)

ESOP Report



The Voice of The ESOP Association

The *ESOP Report* is published on a monthly basis by The ESOP Association, the national non-profit association of employee-owned companies and ESOP practitioners, located at:

1200 18th Street, N.W., Suite 1125, Washington, D.C. 20036-2506.

Phone: (202) 293-2971 • **Toll Free:** (866) 366-3832 • **Fax:** (202) 293-7568

E-mail: media@esopassociation.org • **Internet:** <http://www.esopassociation.org>

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new efforts and improvements, especially related to our National Conference in May.

The taskforce was led by Dave Fitz-Gerald, who was Vice Chair at the time. When Dave became Chair he vigorously implemented the taskforce's suggestions: He became a single-handed marketing machine who took to Twitter with relish, spurred us to make the National Conference more fun and engaging, and even donned a suit emblazoned with hearts to show all of us how much he loved his ESOP.

On May 1, Dave moved into the Immediate Past Chair role, and Gary Shorman took over as Chair. You can rest assured that the focus on continuing to improve the conference experience for our members will continue on Gary's watch as well.

In fact, it already has.

This National Conference will feature a powerful Keynote Speaker: Frank Luntz, an expert on communications and politics who will share unique insights on communicating in an employee owned environment.

During our Friday lunch, sponsored by the Employee Ownership Foundation (EOF), our attendees will be the first to hear about new research results on employee ownership. Those results will be presented by Professor Joseph Blasi of the Rutgers Institute for the Study of Employee Ownership and Profit Sharing. (The EOF, by the way, is a founding member of this Institute, which is keeping employee ownership top of mind for the academic community.)

This year's conference also will offer a special General Session at which Gary and I will share our vision for

the future of The ESOP Association and the employee ownership movement.

And finally, we will have a special event honoring J. Michael Keeling and his many contributions to this organization and employee ownership.

If you can't attend the conference, check out our [Facebook page](#) for a livestreaming of the events honoring




Michael and focused on our future. Those are unique occurrences we want all of our members to see and participate in.

Make no mistake, though—nothing will beat being there in person: We have other new conference

experiences planned that you'll need to see for yourself.

Yes, new people and new ideas are coming to The ESOP Association—and they will bring changes. And those changes will continue the focus of creating the best experience possible for our members, a focus that has long been a guiding principle of our community.

I look forward to seeing you in DC this month, and to working with all of you to forge a bright new future for employee ownership in this country. 

Ownership Advantage

Meaningful Participation Begins with Questions

By Jon M. Sweigart, Principal, Praxis Consulting Group, Inc.

How do you fix a broken tomato? This question may seem an odd way to begin an article about employee ownership, but for a moment, the question hijacked your brain and focused your attention on something you probably have not thought about before. That degree of engagement demonstrates for a moment the power of questions.

When asking questions becomes part of company culture, it invites the kind of meaningful participation that gives employee-owned companies competitive advantage.

How can questions ignite engagement? Read on.

What Kinds of Questions Invite Participation?

Questions come in two kinds: open- and closed-ended. Both have a purpose.

Closed-ended questions begin with words like do/did and are/is and usually elicit yes/no or short, factual responses. Closed-ended questions are good for quickly gathering and clarifying information the respondent already knows. However, managers and supervisors who routinely ask only closed-ended questions can create a pattern that feels like interrogation, suggests micromanagement, and communicates mistrust. These are hardly the conditions for meaningful participation.

In contrast, open-ended questions often spark new thinking for both the asker and the respondent. Open-ended questions begin with words like how/what and at their best spring from a genuine curiosity that engages both parties in learning new things together. Open-ended questions create a space for opinions, ideas, and stories, which human beings seem hardwired to tell as a way of making sense of the world.

When used well, no one really knows the answer to open-ended questions before the questions are asked. Compare your emotional response to “Did you complete the project?” (closed-ended) with “How is the project coming along?” (open-ended).

Notice what kinds of questions you and others ask most of the time at work. Asking closed-ended questions for information seems more habitual and comes easily for most people. Open-ended questions require more effort, thought, and emotional intelligence—for both the asker and respondent—and that is what can make them so challenging and engaging.

Without practice and feedback, it is easy to fall back into the habit of asking closed-ended questions and missing opportunities for engagement.

A misuse of open-ended questions occurs when you cloak opinions and advice or lead people toward the pre-

Some good advice for new managers and supervisors who need to shift to a more participatory mindset: Don't just do something, ask and coach!

determined answers you want. “How about you do it my way?” is an example of a leading question that can leave employees frustrated or cynical about how open you really are to what they have to offer. Using questions to steer others to your answers can feel manipulative, and undermines the spirit of participation.

Also, use questions beginning with “Why...?” with caution. While technically open-ended, questions that ask why often elicit explanation, blame, or defensiveness. Tone of voice goes a long way here, as does genuine curiosity. (By the way, why has your mind been wandering as you read this article?)

Who Owns Problems?

Leaders with participatory mindsets recognize problems as opportunities to share ownership and develop others. That means shifting from telling and doing, to asking questions and giving others a chance to take ownership for solutions. That is when questions become developmental, as they shift the conversation from compliance to creativity.

That shift—from doing to developing others to do—is a distinguishing trait of effective leaders and presents a significant challenge for managers and supervisors who built their reputations by quickly solving problems themselves. Some good advice for new managers and supervisors who need to shift to a more participatory mindset: Don't just do something, ask and coach!

Sharing ownership for problems requires leaders with the self-awareness to take the following steps:

- Recognize everyday problems as opportunities for sharing ownership.
- Resist the urge to fix it yourself.

- Clearly define ends (“This problem needs to get solved within two hours”) but not the means to get there (“How do you think we should go about it?”).
- Ask open-ended questions to engage employees in solving problems for themselves.
- Commit to making this a part of the company culture (“the way we do things around here”).

A word about questions and trust: Open-ended questions as an invitation to greater participation initially may be met with silence or hostility in a culture that has a history of mistrust. At best, employees might be suspicious of their manager's new behavior: Are the manager's questions a test or trick? Or employees may accuse the manager of trying to get out of taking responsibility for solutions, so if something goes wrong the manager can blame others. These concerns may cause employees to minimize their responses, leading managers to conclude that employees just do not have the skills or desire to participate more actively.

To build the necessary tools and trust, both leaders and employee owners may need skills training in asking questions and participating in problem-solving. Continuous improvement efforts are one example of how companies can build a formal process in which asking questions and solving problems together are expected behaviors for achieving greater efficiency and adding value.

What About Curiosity?

Given their power to engage, why don't people ask more questions? Ego, fear of looking stupid or being disruptive, lack of time or patience, anticipation of boring responses or no responses—the reasons are many and they all suffer from a lack of curiosity. Without curiosity you will not have much interest in what others have to offer. And if you are not interested, you are not likely to ask engaging questions.

How can you foster curiosity—in yourself and others?

First, examine your mindset. Stanford University professor Carol Dweck identifies two mindsets:

1. A fixed mindset, characterized by beliefs that talent is something a person is born with and does not change.
2. A growth mindset, characterized by beliefs that talent can be developed through work, practice, and mistakes.

When operating from a fixed mindset, you stick with what you know and avoid challenges that could reveal your lack of skill or knowledge. With a growth mindset, you seek out new experiences and are not afraid to ask questions about what you do not know.

A growth mindset values being curious over being correct.

Next, practice respectful curiosity. Find out what the people you work with care about and then ask questions about it. When you ask about things people care about, you demonstrate that you care about them beyond the tasks they do and the information they provide. Caring questions build trust and rapport and lay the groundwork needed to ask tougher questions later.

Who Gets to Ask the Questions?

Making it safe to ask questions among all organizational levels builds a culture of learning, innovation, and trust. This is especially true for employee-ownership cultures in which people expect their voices to be solicited, respected, and heard.

The behavior of senior leaders, managers, and supervisors in relation to questions sets the tone. How do leaders encourage questions? How do they insist on “devil’s advocates,” whose role is to ask provocative questions? How do senior leaders respond to questions—with defensive explanations or the curiosity of, “What other questions do you have?” These responses send messages about the role of questions, the culture, and what gets rewarded or punished.

Perhaps one of the best questions anybody at any level can ask is: “What question am I *not* asking you that I should?”

Research shows that employee-owned companies outperform their non-ESOP peers when they combine an ESOP with meaningful opportunities for employee

owners to participate through sharing information, making decisions, and influencing how work gets done. Asking and encouraging questions is a simple and powerful place to start.

Finally, what about the “How do you fix a tomato?” question posed at the beginning of this article? The question has many possible answers. Here’s mine: “Use tomato paste!” What answers do you have?

This article was reviewed and approved by the Chair of the Ownership Culture Committee, Jason Wellman, Senior Relationship Consultant, ESOP Partners. 

Calendar of Deadlines and Important Dates

May 22 ESOP Association National Awards Ceremony

May 23-24 [National Conference](#)

June 23-28 [Leading in an Ownership Setting](#)

Aug. 7-9 [Employee Owner Retreat](#)

Nov. 14-15 Las Vegas ESOP Conference & Trade Show

To see the full list of ESOP Association meetings, visit us online at: www.esopassociation.org.

Advisory Committee on Administration

Dealing with Uncashed Checks

By Scott Freund, Blue Ridge ESOP Associates
Reviewed by Kevin Rettler, Principal Financial Group

When participants in an ESOP terminate their employment, they typically are anxious to request a distribution of their vested ESOP balance. Given how diligent many participants are about requesting their ESOP distributions, it may be surprising to hear that some participants don’t cash their distribution checks once they receive them. Unfortunately, this has become a problem, not only for ESOPs but for all types of defined contribution plans.

Some advisors consider uncashed checks from qualified retirement plans to be plan assets. Therefore, plan sponsors still have a fiduciary responsibility with respect to these uncashed checks. They must work with their various service providers to establish steps to locate these participants who have not cashed their checks and prompt them to act.

Part of the reason why a check may remain uncashed is because participants may not be aware that payments were processed for them. A plan, for example, could have a provision stating that participants’ benefits can be paid out without their consent if their balances are less than \$1,000. (For more on paying distributions without participants’ consent, see the April *ESOP Report*.)

Participants with vested balances less than \$1,000 may have missed reading the consent and postponement language in their distribution forms and may have tossed out an envelope with a payment that they were not expecting.

Further complicating this force-out process, if former employees move and do not keep their addresses current with their former employer, the forced-out payment may have been delivered to an incorrect address.

The Department of Labor (DOL) and the Internal Revenue Service (IRS) have not provided clear guidance on how to manage uncashed checks. However, the DOL did provide some guidance on dealing with missing participants in their Field Assistance Bulletin (FAB) 2014-01 with respect to terminating defined contribution plans. This guidance can be useful in establishing a process for dealing with uncashed checks.

A reasonable first step in managing uncashed checks should be trying to locate the participant who has not cashed the check. FAB 2014-01 outlines the following four steps that a fiduciary should take with respect to lost participants:

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- Networking resources
- The latest on what to do and see in DC
- and much more!



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the App!

To download the app, scan the QR code to the right or search for "ESOP Events" in your app store.

Use certified mail. Sending a letter to a participant via certified mail is an easy way to find out whether the address you have on file for the participant is valid.

Check related plan and employer records. It is possible that the participant may have provided more up to date contact information for other plans sponsored by the employer.

Check with the designated plan beneficiary. If the missing participant has designated a beneficiary, that beneficiary may know how to contact the missing participant.

Use free electronic search tools. Fiduciaries must make reasonable use of Internet Search tools (such as Google) that do not charge a fee to find a missing participant or beneficiary.

If plan administrators follow the steps above, but do not find the missing participant or beneficiary, they should consider whether additional search steps are appropriate. They should consider the size of the participant's balance and the cost of further search efforts in determining whether additional search steps (such as using fee-based person locating services) are necessary.

It would be ideal to follow these steps for any plan mailing to help ensure you have up to date address information for all your participants.

If plan sponsors go through these initial steps to locate the participant and are not successful, they still have the

issue of what to do with the uncashed check. A few of the options the plan sponsor can consider are listed below:

Return the funds to the plan. One simple approach would be to do a stop payment on the check and to return the funds to the trust account to re-establish an account for the participant. If a Form 1099-R already has been prepared with respect to this payment, it would have to be amended if you do this. While this option would eliminate the uncashed check, you still have the problem that you cannot locate the participant.

Does your plan have a lost participant provision? Many plan documents have a specific provision allowing a plan sponsor to forfeit the account balance of a participant who is considered "lost." If your plan has this provision, and you have gone through the necessary steps to declare a participant as lost, this is an option with respect to the uncashed check. You would have to do a stop payment on the original check, return the funds to the plan trust, and forfeit the amounts returned. A 1099-R correction also may be required.

It's important to note that you must carefully track any amounts forfeited due to this provision. If the participant is subsequently found, you would be required to reinstate the account balance. This option works only if you have this specific provision in your plan.


Roll the funds over to an IRA. In 2001, the Internal Revenue Code was amended to allow plan sponsors to

establish “automatic rollover” IRAs for former employees who have vested account balances worth less than \$5,000. Use of an IRA rollover for missing participants in a terminated plan was mentioned in DOL FAB 2014-01 as the preferred method.

Plan sponsors interested in this approach must find a financial institution that is willing to setup this type of rollover account and that is familiar with the specific requirements this type of account must follow to qualify as a safe harbor automatic rollover IRA. The plan sponsor would then need to do a stop payment on the original check, and do a reissue to the financial institution that is setting up the rollover account for the participant.

There can be other complicating factors to this option, such as the need to correct a prior 1099-R and the need to recoup funds already submitted for withholding.

A benefit of this option is that once you setup the IRA account, the assets that were rolled over are no longer plan assets.

According to an October 2017 letter sent by the American Benefits Council to the DOL, DOL auditors have been aggressive in investigating the process that plan sponsors follow when dealing with missing participants. Taking this into account, it is more important than ever for plan sponsors to take appropriate steps to find missing participants and to have a procedure for handling uncashed checks for participants they cannot locate. 

This article was reviewed and approved by the Chair of the Administration Advisory Committee, Dolores Lawrence, Managing Director at Blue Ridge ESOP Associates.

Legal Update

Is the Door Now Open for More ESOP “Stock Drop” Cases?

By Tabitha Croscut, Esq. of Devine, Millimet & Branch, P.A. Stanley

Edited by Julie Govreau, Senior Vice President and Chief Legal Counsel, Greatbanc Trust Company, Lisle, IL

In *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (September 7, 2018), the Second Circuit Court of Appeals revived a complaint filed by participants in IBM’s ESOP. The complaint alleged the defendants (which includes IBM’s Chief Accounting Officer, Chief Financial Officer, and General Counsel) as members of IBM’s Retirement Committee, violated their fiduciary duty to prudently manage the ESOP’s assets, which caused a decline in IBM’s stock price.

This ruling is significant because this case marks the first time a stock drop claim has survived a motion to dismiss, following the Supreme Court’s ruling in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). This article provides an overview of the legal framework prior to *Jander*, summarizes the *Jander* decision, and offers a few key takeaways from the *Jander* case.

Framework

Pursuant to 29 U.S.C. § 1104, ERISA fiduciaries (including ESOP fiduciaries) are held to a “prudent person” standard regarding plan investment decisions and disposition of plan assets. Prior to *Dudenhoeffer*, the prevailing wisdom was that ESOP fiduciaries were entitled to a presumption that their fund management, particularly investment in employer stock, was prudent. (See *Moench v. Robertson*, 62 F.3d 553, 571-72, 3rd Cir. 1995.)

In *Dudenhoeffer*, the Supreme Court rejected this presumption, finding no statutory evidence of such a

presumption. Instead, the court explained that the motion to dismiss for failure to state a claim was the proper mechanism for weeding out meritless claims against ESOP fiduciaries.

The high court held that to plausibly plead a stock drop claim against an ESOP fiduciary, a plaintiff must allege an alternative action that the ESOP fiduciary could have taken—keeping in mind the following three considerations:

- The duty of prudence cannot require an ESOP fiduciary to perform an action that would violate securities laws.
- Whether refraining from making additional purchases of company stock—or disclosing information to the public so the company stock would no longer be overvalued—would conflict with federal securities laws or the objectives of such laws.
- Whether a prudent fiduciary could not have concluded the proposed alternative would do more harm than good by causing a decline in the company’s stock price and the value of stock already held by the ESOP.

The Supreme Court affirmed the three-part alternative action analysis from *Dudenhoeffer* two years later in *Amgen v. Harris*, 136 S. Ct. 758 (2016).

In the wake of *Dudenhoeffer* and *Amgen*, four circuit courts have analyzed whether plaintiffs satisfied the *Dudenhoeffer* alternative action analysis. In each case, the court found the plaintiffs had not offered an adequate alternative action, in large part because a prudent fiduciary

in the same position could have concluded the proposed action would have done more harm than good.

The Jander Case

In *Jander*, the plaintiffs alleged that in 2013, IBM began looking for a buyer for its microelectronics business, which was on track to incur annual losses of \$700 million. The plaintiffs alleged that, through accounting violations, IBM failed to publicly disclose these losses and overvalued the business at approximately \$2 billion.

On October 20, 2014, IBM announced it would pay GlobalFoundries \$1.5 billion to absorb the business. After this announcement, IBM's stock price declined by more than \$12.00 per share. The plaintiffs subsequently filed suit alleging the defendants were aware of the financial troubles facing the microelectronics business and continued to invest the ESOP's funds in IBM's stock.

The district court dismissed the suit, ruling that the plaintiffs failed to plausibly plead that the defendants could not have concluded that public disclosures were more likely to harm the value of IBM's stock than help.

The court identified that the key dispute between the parties was the third consideration in the *Dudenhoeffer* analysis outlined above. At the outset, the court highlighted a potential ambiguity in *Dudenhoeffer*. (See 910 F.3d 620 at 626-627, which notes that the Supreme Court first seemed to ask whether a prudent fiduciary in the same circumstances *would not* have viewed an alternative action as more likely to do harm than good, but later indicated the assessment was whether a prudent fiduciary *could not* have concluded the action would do more harm than good).

The court explained that this ambiguity meant it was

It was unclear whether lower courts should ask what the average prudent fiduciary would do or whether any prudent fiduciary could have viewed a proposed alternative as more harmful than helpful.

unclear whether lower courts should ask what the *average* prudent fiduciary would do or whether *any* prudent fiduciary could have viewed a proposed alternative as more harmful than helpful. The court ultimately set that issue aside, finding instead that the plaintiff's complaint met both approaches.

The court applied the *Dudenhoeffer* analysis to the plaintiff's proposed alternative action—that the defendants should have made an early corrective disclosure of the microelectronics division's shortcomings in conjunction with the normal SEC reporting process. The court found the plaintiffs plausibly pled this alternative because:

- The defendants were aware that IBM stock was artificially inflated due to accounting violations.

- The defendants had the power to disclose the inflated value of the stock without making additional or unusual disclosures that could “spook the market.”
- A reasonable fiduciary could have concluded that failure to disclose the true value of IBM's microelectronics division would reflect poorly on the company and injure the long-term prospects of IBM as an investment.
- Disclosure presumably would have caused diminution in stock value only by the amount it was artificially inflated.
- The defendants were aware disclosure was inevitable, as IBM was planning to sell the microelectronics division.

The court gave particular weight to the last point, recognizing that most stock drop cases involve the alternatives of “disclosure versus no disclosure,” while this case involved the alternatives of “disclosure now versus disclosure later.” Thus, the court concluded that, since non-disclosure was not a viable option, it was plausible that prior disclosure would have been no more harmful than the inevitable stock drop that would occur following a later disclosure.

Takeaways

After the Second Circuit's decision, the defendants filed a petition for rehearing, which the Second Circuit denied on January 18, 2019.


The defendants then requested that the Second Circuit stay the case so that the defendants could file a petition for a *writ of certiorari* to the Supreme Court, which the Second Circuit denied on February 4, 2019.

On March 4, 2019, the defendants proceeded to file a petition for a *writ of certiorari*; the Supreme Court has not yet made a decision regarding this petition.

A Supreme Court review of *Jander* likely would revolve around two issues:

- The “would” versus “could” ambiguity the Second Circuit highlighted from *Dudenhoeffer*.
- Whether, based on the appropriate standard, the plaintiffs in *Jander* did plausibly plead their stock drop claim.

As it stands, the door to pleading a claim against plan fiduciaries in stock drop cases is ajar where it once appeared shut. It may be the case that *Jander* was unique in that the defendants were aware that the microelectronics business was for sale and that disclosure of its true value was inevitable. Plaintiffs seeking to file stock drop suits without a similar fact pattern still likely face an uphill battle in surviving a motion to dismiss.

Should the Supreme Court elect to hear the appeal, its decision would clarify the appropriate pleading standard in stock drop cases and whether that standard can be met in practice. 

Washington Report

Excellence Is an Essential Part of Our Advocacy Strategy

By James Bonham, President and CEO, The ESOP Association

Advocacy has many different dimensions. Keeping on top of developments on Capitol Hill and working to protect and expand laws that promote ESOPs is certainly a key part of our efforts, but by no means is it the only one.

Excellence—specifically, your excellence—is one of the best tools in our advocacy tool kit.

When our member companies make the various lists of great places to work, earn awards for their high quality work, win new contracts, contribute meaningfully to their communities, and provide great benefits and engaging work environments to employee owners, their actions contribute to the overall positive brand for employee ownership.

Those actions show that ESOP companies are responsible, fair, and share the wealth. They separate us from industries and companies that—rightly or wrongly—have developed a reputation for being selfish, for cheating their customers, or for operating unfairly, unethically, or even illegally.

Anytime ESOP companies show they are positive and healthy members of the community, they show they are

worthy of support from federal and local lawmakers. And that can pay big dividends, politically speaking.

Negative Press from the DOL

Avoiding negative stereotypes fits seamlessly with our need for clearer guidelines from the Department of Labor (DOL) regarding things like company valuations.

The DOL likes to say it is focusing on pursuing “bad actors”—a point Labor Secretary Alexander Acosta reiterated at a May 1 hearing in the House of Representatives. One implication, for those who don’t know ESOPs well, is that our community is rife with bad actors. (See the cover story for more information on that hearing.)

It is patently unfair, though, to hold companies accountable for “bad behavior” and being “bad actors” when the agency that polices them fails to define what actions and behaviors qualify as “good.”

Without clear guidelines, we are all potentially vulnerable to being labeled “bad actors.” Currently, the ESOP

Publication Highlight

ESOP Briefs

When you want a concise overview of issues and concepts central to running a successful ESOP, look no further than our *ESOP Briefs*. Written by the experts on The ESOP Association’s Advisory Committees, these documents offer rock-solid data and veteran insights that will get you started on the path to ESOP success, whether you are just considering an ESOP or have had one in place for years.

Free for Members!

Visit www.esopassociation.org or call (202) 293-2971 to purchase.

ESOP BRIEF #3

Tax Advantages for Business Planning

By The ESOP Association

ESOP BRIEF #14

The Valuation of ESOP Stock

By The ESOP Association

ESOP BRIEF #24

Control Premium Issues

By The ESOP Association

This is an advanced ESOP Brief.

Minority Interest Discount:
The reduction, if any, in percentage or dollar terms, from the value of the entire business, which reflects the absence of the power of control.

An example of the various ownership values may be as follows:

(A) Control Value	\$1,000,000
(B) Aggregate Marketable	\$1,000,000
(C) Input Control Premium	A 5% + C or 52.0%
(D) Input Minority Interest Discount	A 5% + D or 52.0%

Current Practice
Most valuation practitioners recognize that the basis for valuation will differ depending on whether or not a block of stock being purchased carries elements of control. Generally a buyer will pay more for the stock if he/she can effectuate certain changes which could enhance the cash generating ability of the company, reduce the riskiness of the cash flows, improve liquidity of the investment through outright sale or otherwise, or some other way result in an improved financial situation for the owner and/or company. This additional value, as evidenced by higher price relative to what would be paid for a minority interest position in the company, often is referred to as a control premium.

There are also instances where a buyer may be able to realize the same benefits of control through ownership as a minority holder. Where several minority holders have purchased control of a company, a control price is paid although no individual investor (including perhaps an ESOP) actually obtains control. Viewed differently, control value and minority interest value may actually converge in change-of-control situations where maximum operational and financial improvements are made or are anticipated to be made.

Fair Market Value:
The price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well-informed about the asset and the market for that asset.

Control Value:
The price paid by a buyer to acquire an ownership position with elements of control, the value of a block of stock in which the holder (owner) either directly or indirectly has the ability to influence and control corporate policy, control the allocation of cash and other assets, and generally benefit from the prepayment of control.

Aggregate Marketable Minority Interest Value:
The sum of the value of each individual share assuming wide distribution of ownership and a ready market; the value represents the risk-adjusted expectation of benefits to be realized by a minority holder to influence or direct corporate policy.

Control Premium:
The difference, in percentage or dollar terms, between the control value and the aggregate marketable minority interest value.

community is driving down a highway on which there are no speed limits posted. We don't know if we are speeding until the DOL pulls over one of our companies and says, "Okay, *that* was too fast."

This situation is intolerable because the agency's positions are inconsistent with the best accounting practices, and are inconsistent even from one agency action to the next. This makes compliance unnecessarily difficult and increases the risk that our community—as a whole—will be perceived in a negative light.

That perception can be countered effectively when the public and political leaders know our community well and understand the value we bring—especially regarding issues such as job stability, wealth inequality, economic fairness, and employee engagement.

For example, during that May 1 House hearing, Rep. Bret Guthrie (R-KY-2) countered Secretary Acosta by agreeing that all bad actors should be pursued—then deftly shifted the Secretary's attention to the bigger issue of providing clearer regulations and guidance for the ESOP community.

In defending ESOPs, Rep. Guthrie relied on his own personal experiences. He noted that the ESOPs with which he is familiar provide "extremely lucrative retirement plans for their employees." At a November 2017 hearing also attended by the Labor Secretary, Rep. Guthrie said he knew of employee owners working in grocery stores who needed financial counseling because their ESOP accounts were so

large that their standard of living was set to *increase* in retirement. (See the [Nov. 2017 ESOP Report](#) cover story for more on that exchange.)


In short, excellence among ESOP companies led Rep. Guthrie to support our community on May 1. And excellence will embolden other members of Congress to help us in the future as well.

Rest assured, The ESOP Association will continue to address the need for clearer DOL guidance, and will do so through all available channels. We will be sure to report back on this issue, as it develops.

Blow Your Horn

In the meantime, you can do your part by bragging. Anytime you excel, let us know and we will help spread the word through social media, our website, and our events.

Just as importantly, share your accomplishments with your elected officials—especially if you are visiting them in May prior to our [National Conference](#). Make sure your members of the House and Senate know that your ESOP has benefited employee owners, the community, and customers.

That kind of positive branding goes a long way toward overcoming the potential negative perceptions others might try to hang on our community and that might undermine our support on Capitol Hill. 

Employee Owner Retreat Is Rarin' to Go

August Is the Time for Employee Owners to Gather, Network, Develop New Friendships, and Learn to Boost Their ESOPs

Looking for a way to gain additional knowledge and insights about employee ownership? Want to reward members of your ESOP Communications Committee and contribute to their ongoing development? Wishing you could find a way to learn from experts in employee owner engagement, as well as your peers at other ESOP companies?

If you answered yes to one or more of those questions, you owe it to yourself—and to your ESOP company—to check out the [Employee Owner Retreat](#).

The event takes place August 7-9 at Downers Grove, outside Chicago.

Designed primarily for hourly and salaried non-managerial employee owners, this event offers a combination of small group discussions and structured exercises to help attendees develop new perspectives on ownership.

Best of all, attendees get to learn with—and from—one another. If you are facing an employee ownership related challenge at your organization, your peers at the retreat


might have suggestions, ideas, or even proven strategies for helping you move forward.

Topics at this year's event will include:

- Ownership Communication Forum & Knowledge Sharing
- Understanding Financial Information & Financial Analysis
- Team Problem Solving Skills
- Sharing Experiences
- The ABCs of ESOPs and The ESOP Game

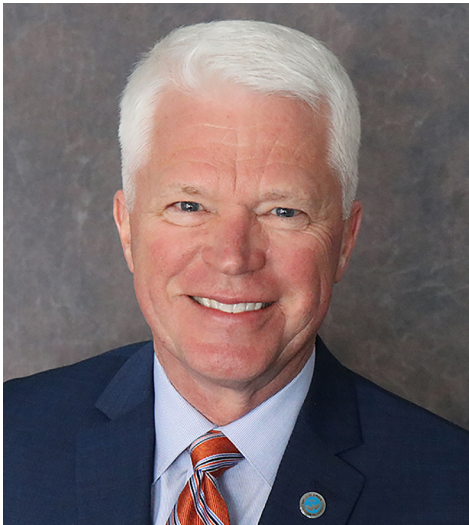
ESOP companies are encouraged to send up to six employee owners to the retreat, since sending multiple employee owners often makes post-retreat implementation more effective.

Cost for the first employee owner from your company (provided you are a member) is \$525. For each additional employee from your company, the price drops to \$415.

For more information or to register, visit the Employee Owner Retreat [page](#) on our website. 

New Term Brings Changes to TEA Board

Association Welcomes New Members, Thanks Past Members



Gary Shorman, Chair



Ali Jamshidi, Vice Chair



Karen Ellis, Secretary/Treasurer

The ESOP Association Board of Directors began a new term on May 1, leading to the addition of some members, new roles for others, and the departure of three members whose terms on the Board expired.

New Roles and New Members

Gary Shorman, president and CEO of Eagle Communications, moved from Vice Chair to Chair.

Ali Jamshidi, VP of Finance and CFO of CTL Engineering Inc., moved from Secretary/Treasurer to Vice Chair.

Karen Ellis, Executive VP of HR for Superior Farms/Transhumance Holding Company, joined the board, moving into the Secretary/Treasurer role.

David Fitz-Gerald, Vice President and CFO of Carris Reels Inc., moved from Chair to Immediate Past Chair.

In addition to Ellis, the Board gained two more individuals, both of whom are serving as At-Large Members.

They are:


- Brian Ippensen, President of First Bankers Trust.
- Peter Ney, Executive Vice President and Treasurer of EA Engineering, Science and Technology Inc.

Exiting Members

Three members of the Board successfully completed their terms on May 1 and have rotated off the Board.

Cindy Turcot, President of Gardner's Supply, vacated her role as Immediate Past Chair.

Two At Large Members—Sue Butler, Board Chair at Butler Till; and Ted Becker, Partner at McDermott, Will & Emery—completed their terms and have rotated off the Board.

We thank all our past Board members for the dedication and service, and welcome our new members and those who have moved into new roles. Serving on the Board is a major commitment to The Association and to the cause of employee ownership, and the entire ESOP community benefits from the efforts of these volunteer leaders. 

New Advisory Committee Chairs

The ESOP Association welcomes the following individuals who, on May 1 became new Advisory Committee Chairs.

Finance Committee

Fred Kaseff
Senior Vice President
GreatBanc Trust Company
Lisle, IL

Legislative & Regulatory Committee

Lars Golumbic
Principal
Groom Law Group, Chartered
Washington, DC

Valuation Committee

Chuck Coyne, ASA
Managing Director
Empire Valuation Consultants
West Hartford, CT



The ESOP Association

1200 18th Street, NW
Suite 1125
Washington, D.C. 20036-2506

Phone: (202) 293-2971 • **Fax:** (202) 293-7568

E-mail: esop@esopassociation.org

Website: <http://www.esopassociation.org>

Blog: <http://www.esopassociationblog.org>

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