STATEMENT OF JAMES J. BONHAM,
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TO THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
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On behalf of The ESOP Association and its members, thank you for the opportunity to submit this statement for the record. The ESOP Association greatly appreciates the Committee's consistent work to bring transparency, accountability, and fairness to the Department of Labor's enforcement practices. We especially thank former Chairwoman Virginia Foxx, whose November 2024 request helped bring this issue before the DOL Office of Inspector General, and current Committee Chairman Tim Walberg, who renewed that request and has continued to make oversight of the Employee Benefits Security Administration (EBSA) a clear priority.

The ESOP Association is the largest organization in the world supporting employee-owned companies, the over 15 million U.S. participants who benefit from employee stock ownership plans (ESOPs), and the professionals who serve them. We conduct and fund academic research, provide comprehensive services to employee-owned businesses, and represent employee owners and their companies before federal and state lawmakers.

Common Interest Agreements Undermine Fairness and Due Process

The ESOP Association has long been concerned that EBSA investigators use taxpayer resources and extrajudicial governmental investigatory powers to subsidize private plaintiffs' class action lawsuits through common interest agreements. EBSA possesses compulsory investigative authority, access to confidential plan information, and public resources that are often unavailable to private litigants. When information obtained through those powers is provided secretly to a plaintiffs' law firm, the government may provide a substantial litigation advantage while the plan sponsor or fiduciary has no comparable opportunity to learn what was shared, test its accuracy, or defend itself.

DOL's use of these arrangements with private plaintiffs' attorneys raises fundamental concerns. The government is not simply another litigant. It is the regulator, investigator, and potential enforcement authority. A plan fiduciary that cooperates with EBSA should not have to fear that information produced for the government will be routed to a class action firm for use in separate private litigation. That possibility discourages voluntary cooperation, undermines confidence in EBSA as a neutral regulator, and threatens the fairness owed to every regulated party.

The Envision Case Demonstrates That the Danger Is Real

This concern is not theoretical. It came to light, in part, through a secret common interest agreement used in ERISA litigation against Envision Management Holding Inc. After learning of the extensive cooperation between DOL and a private plaintiffs' law firm, Magistrate Judge Maritza Dominguez Braswell of the U.S. District Court for the District of Colorado warned that the arrangement *"could set a dangerous precedent."* Judge Braswell further stated:

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"It would allow a government agency to weaponize private litigation against some target before confirming the target should be a target. Moreover, the government could litigate in the shadows, without giving the opposing party an opportunity to adequately probe and defend itself."

That warning captures the central problem. Government investigative power should not be used as a back channel through which private attorneys obtain information, assistance, or strategic advantages that would not otherwise be available under ordinary discovery rules. Nor should private litigants be allowed to leverage the government's authority before the government itself has determined that enforcement is warranted. The ESOP Association continues to believe that DOL should end this practice entirely.

The OIG Report Confirms Serious Control Failures

The OIG's finding that DOL could not determine how many common interest agreements it had entered into, or provide assurance that it had identified all such agreements, exemplifies the haphazard nature of these arrangements. The Department initially identified 45 agreements, later discovered three more, and still could not demonstrate that the revised total was complete, because it had no centralized tracking system. DOL also used oral agreements. One of SOL's seven regional offices reported establishing an oral agreement through conversation, and DOL identified two cases, one EBSA case and one Wage and Hour case, in which no formal written agreement existed. Without a written instrument memorializing the authorization, scope, and terms, the arrangement leaves no reliable record of who approved it or what information could be exchanged. This is not a technical recordkeeping lapse. It means DOL could not account for its own use of confidential investigative information or demonstrate that basic boundaries were observed.

Equally concerning, EBSA and the Wage and Hour Division told the OIG that they were not always aware that the Office of the Solicitor had entered common interest agreements on their behalf or what information had been shared. The OIG identified two specific instances in which the relevant enforcement agency did not know that an agreement had been used. EBSA is the agency accountable for protecting employee benefit plans and administering ERISA enforcement. It should not be possible for an information-sharing arrangement involving an EBSA investigation to be established without EBSA's knowledge, approval, and a reliable record. This lack of coordination deprived agency leadership, the OIG, Congress, and affected parties of meaningful accountability.

The consequences were real. DOL reported that it shared investigative documents from one EBSA case and one Wage and Hour case before initiating litigation, and the OIG corroborated that information was shared with law firms in those two cases. The OIG also verified that witness statements from one investigation at each agency had been shared with outside law firms; DOL acknowledged that those statements would not have been accessible under normal discovery rules. For the regulated community, this is precisely the danger presented by these arrangements: a private firm can receive the benefit of federal investigative powers, personnel, and taxpayer resources that it could not obtain through the ordinary litigation process. The federal government should not use its power and investigative authority to direct or assist private law firms in pursuing their cases, particularly when the government is not itself a party to the litigation.

These secretive actions run directly counter to the policy of encouraging voluntary cooperation by plan fiduciaries with EBSA investigations. Voluntary cooperation should help EBSA identify and pursue genuinely abusive conduct that harms plan participants and endangers plan assets. Fiduciaries cannot be expected to cooperate candidly, however, if information provided to the government may be passed to private plaintiffs' firms or used to advance ESOP policy positions unsupported by statute or properly promulgated regulations. Rather than litigating unwritten policies through enforcement and facilitating private lawsuits, EBSA should focus its authority on abusive cases in which participants and plan assets are actually at risk.

Part of a Longer History of Anti-ESOP Enforcement

For the ESOP community, common interest agreements are a glaring example of the anti-ESOP bias that has characterized EBSA enforcement for decades. Beginning in 2005, ESOPs were singled out under a National Enforcement Project that continued for more than two decades and ended only this year. A 2009 DOL OIG report shows that, from fiscal years 2006 through 2008, EBSA charged approximately 7 percent of its civil-enforcement-project time to the ESOP project. That allocation was disproportionately high given that ESOPs account for less than 1 percent of private retirement plans. ESOP companies and fiduciaries have also faced lengthy investigations, repeated and expansive document demands, changing investigative personnel, and enforcement positions unsupported by clear regulations. These practices have imposed substantial costs and created a chilling effect on the formation and maintenance of ESOPs.

Secret cooperation with private plaintiffs' firms compounds that history. An ESOP trustee or company that voluntarily cooperates with an EBSA investigation must be able to trust that the Department will handle confidential information fairly and for legitimate governmental purposes. If that cooperation can instead be weaponized in private litigation, regulated parties have every incentive to become more guarded, not more cooperative. That result harms effective enforcement, weakens confidence in DOL, and ultimately works against the retirement interests of employee owners.

The OIG Recommendations Are Necessary, but Congress Must Ensure Transparency

The ESOP Association supports the OIG's eight recommendations. Standardizing the development, execution, and monitoring of common interest agreements will be extremely beneficial. So will clearly defined signatory authority, conflict and bias screening, formal coordination between SOL and its client agencies, comprehensive tracking of every agreement and disclosure, and training for all personnel involved. We appreciate that SOL, EBSA, and the Wage and Hour Division agreed to implement all eight recommendations.

Internal standards alone, however, are not enough. They can be changed, weakened, or ignored without the knowledge of Congress or affected parties. The safeguards recommended by the OIG will be even more effective if DOL is required by statute to report to Congress the information it collects under those new systems. Congressional reporting would provide the ultimate measure of transparency and accountability. It should also impose little additional administrative burden because DOL has already agreed to develop the policies, tracking mechanisms, records of information shared, and coordination procedures needed to compile the information.

The ESOP Association therefore thanks the Committee for approving Rep. Michael Rulli's Balance the Scales Act, H.R. 2958. This legislation would require a written agreement before DOL provides adverse assistance to a private attorney, require DOL to provide a copy of the agreement to any employer, plan sponsor, or fiduciary that may be directly and adversely affected, and require annual reports to Congress identifying the parties and describing the information, verbal communications, meetings, and assistance provided. It would also require DOL to explain how each agreement is consistent with the policy of promoting voluntary employee benefit plan sponsorship.

These are reasonable and necessary requirements. Although we continue to believe DOL should end the practice of using common interest agreements to assist private plaintiffs' litigation, H.R. 2958 would establish an essential safeguard for as long as the practice continues. The Department should not be permitted to use public authority and confidential investigative information in secret, beyond meaningful congressional oversight.

Conclusion

The OIG report validates the Committee's sustained oversight and demonstrates why voluntary administrative reforms must be reinforced by law. Employee owners, ESOP companies, plan fiduciaries, and the American taxpayers deserve confidence that DOL's enforcement powers are exercised fairly, impartially, and transparently. We thank the Subcommittee for considering this statement for the record and for its continued work to protect due process, strengthen congressional oversight, and promote employee ownership.