

## SECRETARY OF LABOR REACHES \$80 MILLION AGREEMENT WITH WILMINGTON TRUST TO SETTLE THREE LAWSUITS AND 18 INVESTIGATIONS BY EBSA

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On April 30, 2020, the U.S. Secretary of Labor announced that it has reached an agreement with Wilmington Trust, N.A. – a Delaware-based bank and trust company – requiring Wilmington Trust to pay a combined \$80 million to 21 ESOPs for which it served as trustee. The settlement further requires Wilmington Trust to pay \$8 million in penalties to the government and to reimburse the plan sponsors of the ESOPs for legal costs and expenses advanced to Wilmington or its counsel in connection with the Secretary’s investigations and litigation.

In 18 investigations conducted by the U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) and three lawsuits instituted by the Secretary, the government alleged that Wilmington Trust caused losses to the ESOPs when, acting as ESOP trustee, it authorized the ESOPs to pay more than fair market value for privately held employer stock, a violation of the Employee Retirement Income Security Act (ERISA). Wilmington agreed to settle EBSA’s claims in the investigations and lawsuits without admitting or denying those allegations.

The other terms of the settlement have not been publicly disclosed and appear to be subject to a confidentiality provision in the agreement. Nor has the Department of Labor provided any public guidance as to how the ESOPs that will be receiving the settlement funds should distribute the funds to plan participants or whether any other uses of the funds may be permitted.

Among the questions raised by the ESOPs receiving the settlement funds may be whether funds can be used to pay down the “internal loan” between the ESOP trust and the sponsoring company, or to purchase more stock of the sponsor company so as to reduce any outstanding loans owed to the selling shareholders deriving from the ESOP transaction. Absent any further guidance from the Department, the overriding principle in resolving such questions must, of course, be protecting the best interests of the plan participants consistent with the trustee’s and plan administrator’s fiduciary duty.