

Employee Stock Ownership Plans in Corporate Transactions

A Lexis Practice Advisor® Practice Note by Gregory K. Brown, Polsinelli P.C.



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This practice note discusses issues related to employee stock ownership plans (ESOPs) that you may encounter in mergers and acquisitions, including those arising under the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, federal and state securities laws, and state corporation law. It also addresses issues that may arise in corporate transactions that involve ESOPs.

This practice note discusses the following specific subjects:

- Types of Corporate Transactions Involving ESOPs
- ESOP Issues That May Arise in Corporate Transactions
- Using ESOPs to Defend Against Hostile Takeovers
- Treasury Department and DOL Joint Statement on Benefit Plans in Tender Offer Situations

For more information on retirement plans more generally in the context of corporate transactions, see [Retirement Plan Issues in Corporate Transactions](#).

Corporate Transactions Involving ESOPs

An ESOP is a unique type of retirement plan that invests primarily in the employer's stock. See I.R.C. § 4975(e)(7) and [Employee Stock Ownership Plan Design and Compliance](#). The following sections describe different types of corporate transactions in which ESOPs may be involved.

Sale by Owner in an I.R.C. § 1042 Transaction

ESOPs commonly facilitate shareholders' sale of a corporation's shares of stock to an ESOP. In this context, the parties structure the transaction to satisfy the I.R.C. § 1042 requirements for nonrecognition of gain. In such a transaction, the selling shareholders often will sell at least 30% of the corporation's outstanding shares to the ESOP to achieve liquidity, diversification, and tax deferral.

The lender for an I.R.C. § 1042 transaction typically will provide the employer a five- to seven-year term loan, which the corporation's assets secure. The corporation then re-loans the proceeds to the ESOP. Note that the amortization schedule for the loan from the lender to the corporation may differ from the amortization schedule for the back-to-back loan by the corporation to the ESOP. The ESOP then uses the loan proceeds to purchase stock from the selling shareholders. The ESOP pledges the stocks that it has purchased to the corporation as collateral for the (re)loan from the corporation to the ESOP.

During the years following such a transaction, the corporation makes tax-deductible contributions to the ESOP (and, possibly, also pays tax-deductible dividends on the stock held by the ESOP). The ESOP uses these contributions (and dividends) to repay its loan to the corporation. As the ESOP makes payments to the corporation for the loan's principal and interest, the shares of stock the ESOP acquired with the loan proceeds and pledged as collateral are gradually released from the pledge according to a formula, and subsequently allocated to the individual accounts of the ESOP participants.

Of course, an ESOP may purchase shares of the employer's stock in other manners. For example, the ESOP could borrow cash for the purchase directly from a lender other than the employer, or the ESOP could give the employer (or selling

shareholders) a promissory note for the purchase price of the stock. However, if the promissory note approach is used, the ESOP may need to pay the employer cash for a nominal “capital” portion (usually, set by the employer’s board of directors based on a relatively low par value per share) of the purchase price, and provide the promissory note for the large balance of the purchase price. The actual mechanics of this type of combination payment arrangement usually depend on the state law requirements for considering shares of stock issued by a corporation to be “fully paid and non-assessable.”

Corporate Divestiture

An ESOP also can be used in a corporate divestiture transaction. This type of deal usually is structured so that a new corporation is formed by the executives of a subsidiary of the old corporation. The new corporation establishes an ESOP, which buys stock from the new corporation. When the new corporation buys the subsidiary corporation from the old corporation, and merges the subsidiary into the new corporation, the stock of the new corporation held by the ESOP is converted into the subsidiary corporation’s stock.

Sale by ESOP

In the situation where a corporation (the target) is majority-owned by an ESOP, another corporation, possibly publicly held (the acquirer), may approach the target’s board of directors and attempt to purchase all of the target’s outstanding stock. The acquirer probably will offer to pay a higher price for the stock than the per share value listed on the most recent ESOP appraisal. Additionally, the acquirer likely will offer management employees employment contracts, increased salaries, bonus potential, and the opportunity to invest in the acquirer’s stock after the sale. For the ESOP, such a sale would result in a substantial cash profit, even if the ESOP has to pay off any outstanding stock acquisition debt from the sale proceeds it receives.

Sale of Assets or Merger

In the context of a sale of all or substantially all of a company’s assets, or the merger or consolidation of a company, state corporate law will require a stockholder vote to approve the transaction. The voting rights of the company stock held in the ESOP will pass through to the ESOP’s participants to instruct the ESOP trustee as to how to vote the shares allocated to their respective accounts. Otherwise—for the ESOP—the transaction will be substantially similar to a stock sale. Of course, such a transaction will have far different tax and accounting implications for the other parties.

Troubled Company ESOP

Another transactional situation may involve a corporation that previously had a management-led leveraged buyout, which was facilitated by having an ESOP buy a substantial portion of the outstanding stock. Because of the substantial amount of leverage (mainly, through loans) involved in such a buyout situation, if the corporation encounters adverse business conditions, it may face a possible default on its acquisition debt.

In such a situation, the corporation may decide to issue additional common stock representing a majority interest in the corporation, and offer it for sale to a private equity firm or a venture capital fund. If the sale offer is accepted, the corporation then would apply some of the new capital received from the private equity firm or venture capital fund to reduce its acquisition debt. The corporation also may forgive a portion of the ESOP debt, and may even extend the amortization of the ESOP loan. Of course, all shareholders of the corporation prior to this transaction, including the ESOP, would experience a dilution in their proportional equity from before the transaction because of the newly issued common stock.

Common ESOP-Related Issues Arising in Corporate Transactions

When advising clients about the sale or purchase of a corporation that maintains an ESOP for its employees, you must carefully consider various fiduciary and other issues.

Should an ESOP Repay an Unsecured Loan from the Employer?

Whether or not an ESOP must repay an unsecured loan from the employer raises fiduciary issues that have not been fully resolved.

The Department of Labor (DOL) has issued advisory opinions ruling that ESOP fiduciaries violate ERISA’s rules regarding general fiduciary responsibility if they repay loans absent an enforceable obligation to do so. See, e.g., [DOL Op. No. 93-35](#).

But, the Sixth Circuit disagrees. It held that—even in the absence of a loan agreement that provides a security interest in the employer’s stock held by the ESOP as collateral for the loan between the ESOP and the employer—an ESOP trustee did not breach its fiduciary duty by voluntarily repaying the loan. See *Benefits Committee of St. Gobain Corp. v. Key Trust*

Co. of Ohio (St. Gobain), 313 F.3d 919 (6th Cir. 2002). The court found that nonpayment of a loan would result in an unintended windfall for participants, which fails to serve the purposes of ERISA. In addition, permitting an ESOP to use a technical application of ERISA fiduciary standards to “stiff” an employer would not serve the law and/or policy surrounding ESOPs.

However, this holding does not mean that a fiduciary cannot, or should not, negotiate to have all, or part, of the debt forgiven. If a fiduciary believes that negotiating a debt forgiveness structure is necessary for a transaction to be financially fair to the ESOP, the fiduciary may so negotiate.

Provisions that Protect Pre-Closing ESOP Participants

When advising a client, note that, oftentimes, corporate acquisition agreements contain covenants on employee benefit plan issues that affect pre-transaction employees of the acquired entity. For example, such covenants may provide for accelerated vesting and/or payout rights or, in the case of a leveraged ESOP involved in a stock-for-stock transaction, forgiveness of all or a portion of the ESOP's debt or accelerated amortization of that debt. It is important to append the plan amendments necessary to implement such covenants as exhibits or appendices to the acquisition agreement. Additionally, the parties must execute the plan amendments at closing.

ERISA Preemption of Transaction Agreement Provisions That Protect Pre-closing ESOP Participants

The parties to a corporate transaction involving an ESOP will sometimes include provisions in the transaction agreement to protect pre-closing ESOP participants. The pre-closing ESOP participants, however, may find it difficult to enforce these promises.

ERISA typically provides the exclusive remedy for a claim that the parties to a transaction breached deal provisions relating to the plan. See *Hutchison et. al v. Fifth Third Bancorp*, 469 F.3d 583 (6th Cir. 2006). In *Hutchison*, which involved a stock-for-stock merger, plan participants alleged that the successor plan sponsor failed to fulfill contractual commitments to the plan contained in the merger agreement. In the context of a state law breach of contract claim, the Sixth Circuit found that—even if the claim is against a party that was not an ERISA fiduciary when the contract was executed—the claim nevertheless related to an ERISA plan, and thus was preempted by ERISA § 514. *Id.* The court had already dismissed the ERISA claim, which left class members without a remedy.

To avoid this result, it might be possible to amend the ESOP prior to and contingent upon the closing of the transaction to take into account the changes specified in the transaction agreement (see also discussion below about what constitutes a plan amendment).

Transaction Agreement Provisions that Protect Pre-closing ESOP Participants Are Considered Plan Amendments

A merger agreement may also constitute a plan amendment. See *Halliburton Company Benefits Committee v. Graves*, 463 F.3d 360 (5th Cir. 2006), petition for rehearing *en banc* denied and decision clarified, 479 F.3d 360 (5th Cir. 2007)). If a plan is so amended, then the question becomes whether the plan participants have the right to enforce the merger agreement covenants that are considered plan amendments and that directly affect them.

The court in *Halliburton* held that once a merger agreement amends a plan, ERISA preempts the merger agreement's “no-third-party-beneficiary” clause with respect to litigation to enforce the plan amendment. Thus, plan participants can enforce the merger agreement provision that also constitutes a plan amendment.

As a result, purchasers of corporations that maintain employee benefit plans, like ESOPs, must understand their employee benefits obligations under transaction agreement covenants, and make only commitments that they are willing to honor after the closing.

No Transaction Agreement Provisions that Protect Pre-closing ESOP Participants

In other cases, the parties to a transaction have not sought to protect pre-closing ESOP participants. Where the transaction agreement does not contain any provisions that protect the employees who participated in the ESOP prior to the closing, courts have been reluctant to enforce any additional rights that participants assert the transaction created.

In *Fox v. Herzog, Heine, Geduld, Inc.*, 2005 U.S. Dist. LEXIS 36414 (D.N.J. Dec. 27, 2005), *aff'd*, 232 Fed. Appx. 104 (3d Cir. 2007), the Third Circuit rejected the pre-closing original ESOP participants' assertion that only they should have received allocations of Merrill Lynch shares that were contributed to the original ESOP when it merged into the Merrill Lynch ESOP.

In *Bennett v. Conrail Matched Savings Plan Admin. Comm.*, 168 F.3d 671 (3d Cir. 1999), following a tender offer that exceeded market value, the Conrail retirement plan ended up with a \$533 million cash surplus in its unallocated account. Conrail then amended the retirement plan to allow

the allocation of that surplus to those employed from 1996 through 1998. Employees terminated before 1996 filed suit and asserted that they also were entitled to share in that allocation. The Third Circuit held that since ERISA only guarantees plan participants benefits accrued up to the point of employment termination, and the plaintiff-employees had been provided the total balance of their respective accounts at the time of their termination, they were not entitled to any of the surplus resulting from the tender offer.

Escrow of Portion of Sale Proceeds

Corporate transactions often employ escrow agreements. For example, the purchaser may place a portion of the purchase price in an escrow account for a defined period of time or until a particular contingency occurs. Once the escrow period ends, the escrowed amounts are released and distributed pursuant to the terms of the escrow agreement.

Most practitioners have long believed that (1) ERISA allows the use of an escrow agreement in a corporate transaction that involves an ESOP so long as the ESOP trustee determines in good faith that it is in the participants' best interests, and (2) the ESOP has no right to the escrowed amounts until they are released, and, until such time, the escrow account is not a plan asset. While not explicitly covered in ERISA's "plan asset" regulations, this is a fair reading of the regulations and makes sense.

An alternative course is for the ESOP trustee (and other selling shareholders) to purchase representation and warranty insurance. This option serves the interests of ESOP participants and the buyer where the insurance premium paid still leaves the ESOP with a fair yield from the transaction.

If an ESOP is a minority shareholder of a corporation involved in a transaction, the ESOP trustee may attempt to negotiate an exclusion from the escrow agreement for the transaction proceeds attributable to the ESOP. The trustee reasons that the employees who participate in the ESOP should not bear the risks that the non-ESOP, majority shareholders created. However, the greater the ESOP's proportionate share of the corporation, the non-ESOP shareholders will more vigorously object to this exclusion. If the ESOP's shareholder interest is not too large, one possible technique to avoid special escrow arrangements or exclusions for the ESOP would be for the corporation to redeem all the ESOP shares immediately before the closing of the transaction.

Pass-Through Voting

When advising a client that sponsors an ESOP in an asset sale (possibly with a follow-on liquidation) or corporate merger or

consolidation, it is important to review state corporate law, relevant Internal Revenue Code provisions, the corporation's articles and by-laws, and the plan document voting provisions.

Pass-Through Voting and Dissenters' Rights

I.R.C. § 409(e)(4) entitles ESOP participants and beneficiaries to direct the voting of stock allocated to their accounts if the employer corporation has a "registration-type class of securities." If the employer does not have a registration-type class of securities, participants have the right to approve or disapprove "any corporate merger or consolidation, recapitalization, reclassification, liquidation, dissolution, sale of substantially all assets of a trade or business, or such similar transaction as the Secretary [of the Treasury] may prescribe by regulations." Some employers provide for pass-through voting in their ESOPs, even when they are not required to do so. *Grindstaff v. Green*, 133 F.3d 416 (6th Cir. 1998).

Pass-through voting by ESOP participants and beneficiaries is fairly straightforward if the vote concerns the election of directors. It becomes more complicated when it involves a matter that entitles stockholders to exercise dissenters' rights. Normally, stockholders who do not vote in favor of an organic change in the corporation (e.g., a merger, consolidation, or sale of substantially all of the corporation's assets) are entitled to exercise dissenters' or appraisal rights to be paid the value of their stock, whereupon they cease to be stockholders of the corporation. See, e.g., 8 Del. Code § 217; 805 Ill. Comp. Stat. 5/11.65; NY CLS Bus Corp §§ 910, 623. Generally, state corporate laws provide that stock held in trust is voted by the trustee, and the record owner of the stock (i.e., the trustee)—rather than the beneficial owner—exercises dissenter's rights. See, e.g., 8 Del. Code § 217; 805 Ill. Comp. Stat. 5/11.65(c); and NY CLS Bus Corp § 623(d).

I.R.C. § 409(e) also dovetails with the corporate law voting requirements because participants merely direct the voting of stock allocated to their accounts; they do not vote the stock directly. However, nothing in I.R.C. § 409(e) covers whether ESOP participants and beneficiaries have the right to direct a plan fiduciary to exercise dissenters' rights on their behalf, or how such rights would be exercised in the context of an ESOP.

In certain circumstances, a vote on an organic change may be divorced from the exercise of dissenter's rights. For example, state law may permit the approval of a merger without a shareholders meeting if holders of a majority (two-thirds in some states) of the outstanding stock of the corporation sign a written consent—although all nonconsenting stockholders must be permitted to exercise dissenters' rights. If the merger

is approved in this fashion by stockholders other than the ESOP trustee, there is no vote as to which the trustee must be directed. Nothing in I.R.C. § 409(e) requires the trustee to seek direction from participants and beneficiaries on this nonvoting issue.

Tender Offers

Neither the Internal Revenue Code nor ERISA have provisions that address participant rights to direct a trustee on a response to a tender or exchange offer for shares of employer stock allocated to participants' accounts. The plan and/or trust agreement are, however, likely to have provisions that address such rights, but some interesting fiduciary concerns may arise in any event.

Instructions to Tender Shares

The plan fiduciaries need to carefully examine a tender or exchange offer and the process for receiving participation instructions relating thereto.

In the context of a tender offer for shares held by profit-sharing retirement income plan and other shareholders, the DOL approved procedures that allow participants to direct a trustee to tender shares only when the instructions received by the trustee complied with ERISA. In particular, the trustee must determine that the employer did not unduly or improperly influence the participants. If the employer exerted influence on the participants, the trustee has the duty to ignore the directions. In addition, if a participant does not direct the trust to tender the shares, the trustee should not rely on a provision that deems a participant who gave no directions to have instructed the trustee to vote in a certain manner. Instead, the trustee must independently determine whether the stock allocated to that participant's account should be tendered. See DOL Information Letter to John Welch regarding Carter Hawley Hale Stores Profit-Sharing Retirement Income Plan (April 30, 1984).

However, a district court has held that ERISA does not permit an ESOP fiduciary to rely on instructions from ESOP participants with respect to shares of stock which are unallocated (i.e., shares in the ESOP loan suspense account). See *Reich v. NationsBank of Ga.*, 1995 U.S. Dist. LEXIS 5328 (N.D. Ga. Mar. 29, 1995), *aff'd in part and rev'd in part sub nom.*, *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997)). This is so even if the plan document provides that the trustee should vote (or tender) unallocated shares in the same proportions as the instructions it received on allocated shares. The court stated that the trustee must take exclusive responsibility for decisions regarding both unallocated

shares and allocated shares for which the trustee receives no affirmative directions.

Pass-Through Voting on Tender Offers

The voting provisions of I.R.C. § 409(e)(3) may not require pass-through voting with respect to a tender offer. See *Central Trust Co., N.A. v. American Avents Corp.*, 771 F. Supp. 871 (S.D. Ohio 1989). Rather, the trustee's fiduciary obligations may override specific plan provisions that require the approval of any tender offer by participants, the administrative committee, and the company. No person may employ these or any other provisions to prevent the trustee from tendering the shares in the ESOP to the offeror if the trustee has made a reasonable, prudent, skillful, and diligent determination that the sale of the shares is fair, adequate, and in the best interests of the ESOP participants and their beneficiaries.

Proper Disclosure to Participants

What must the trustee or the plan administrator disclose to ensure proper participant direction? The term "proper" has been interpreted by the DOL to mean in accordance with the plan's written procedures and to be free of concern, undue influence, or inaccurate information. Nothing in the Internal Revenue Code or ERISA provides guidance. The only authority addressing this issue applies to TRASOPs, a form of ESOP that no longer exists, and it merely states that participants must receive the same information that is provided to shareholders. 26 C.F.R. § 1.46-8(d)(8). Federal and state securities laws prescribe what public companies must disclose before a shareholder vote. Thus, participants in public company ESOPs usually receive the same proxy statement provided to shareholders.

Whether a public company must distribute competing proxy materials to the participants in its ESOP was addressed in *In re Sears, Roebuck & Co. Securities Litigation*, 792 F. Supp. 977 (E.D. Pa. 1992). The term "competing proxy materials" means proposals from dissident shareholder groups and third parties that urge action contrary to that recommended by the board of directors of the company issuing the corporate proxy materials. The court upheld Sears, Roebuck & Co.'s refusal to mail competing proxy solicitation materials to participants at the ESOP's expense. The court stated that an ERISA fiduciary may distribute plan assets solely for the purpose of providing benefits to participants, not to assist a board candidate in his or her solicitation efforts. *Id.* at 983-84. "For ERISA purposes," the court stated, "'benefits' consist only of a 'right to receive monies' and do not include a 'right to vote' in a corporate election." *Id.* at 984.

Using ESOPs to Defend Against Hostile Takeovers

Companies sometimes have created ESOPs to try to defend against hostile takeovers. The availability of establishing an ESOP, even in the midst of a takeover attempt, is especially important in light of legislation in Delaware and other states that permits a minority of shareholders to frustrate a potential takeover.

Under Delaware law, for example, an acquirer of stock cannot enter into a “business combination” with the target company for a three-year period without the approval of 85% of the voting stock of the target in the initial acquisition. 8 Del. C. §203. To take “control” of a target company without the ability to effect a “business combination” would be a meaningless victory. Thus, if 15% of the target’s ownership can be transferred to an ESOP or other presumably friendly hands, a public company can consider itself well-protected from a hostile takeover.

Courts have reached varying decisions on whether companies can create an ESOP to insulate itself from a hostile takeover. The first time that a court approved the creation of an ESOP as a defensive move in the midst of a hostile takeover contest occurred in *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257 (Del. Ch. 1989). Even though Polaroid decided to switch from a 5% ESOP to a 14% ESOP because of a takeover attempt, and even though it may have used deficient procedures to execute this decision, the court nevertheless upheld the board’s action because it found that it satisfied the highest standards of fairness to the shareholders.

The most critical factor, in the court’s view in *Polaroid*, was the ESOP transaction’s “shareholder neutrality,” i.e., that the combination of pay cuts, benefit plan changes, and tax savings that accompanied the ESOP investment would enable the corporation to fund the transaction without any additional cash outlays. In addition, the court found substantial evidence to support the proposition that an ESOP, by giving the employees of the company a “piece of the action,” creates incentives that can stimulate profitability and, ultimately, rewards for the shareholders. Thus, the court reasoned, if a transaction does not cost the company any money and promises to improve employee productivity, then that transaction is per se fair to the shareholders and should be upheld regardless of any procedural defects in the board’s deliberations.

In a later case, *NCR Corp v. American Tel. & Tel. Co.*, 761 F. Supp. 475 (S.D. Ohio 1991), a federal district court held that NCR Corp.’s (NCR) adoption of an ESOP was an improper

attempt by its management to perpetuate its control of NCR in the face of a takeover bid by American Telephone and Telegraph (AT&T). The court reached this conclusion because: (1) NCR’s benefit personnel did not support the ESOP idea, and NCR management did not solicit their opinion before the NCR board adopted the ESOP; (2) NCR’s acceptance of the ESOP trustee’s nonrecourse promissory note presented problems under Maryland law; and (3) NCR did not consider an unleveraged ESOP, even though such an ESOP offers certain tax advantages over the leveraged arrangement which the NCR board adopted. In holding that the NCR ESOP was invalid and unenforceable, the court barred any of the ESOP plan shares from voting at the special shareholders’ meeting that AT&T had called to vote on a change in corporate control.

Notably, in other cases, courts found the timing of a company’s decision to create an ESOP to be critical. In *Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984), the court applied New York law and enjoined the voting of shares held by the ESOP. It found that the ESOP established during the midst of the takeover controversy was a management entrenchment scheme and not a plan adopted for the benefit of the employees. In contrast, in *Danaher Corp. v. Chicago Pneumatic Tool Co.*, 633 F. Supp. 1066 (S.D.N.Y. 1986), the court permitted the ESOP shares to be voted precisely because the board had approved the ESOP’s acquisition of stock four months before the takeover threat emerged.

Treasury Department and DOL Joint Statement on Benefit Plans in Tender Offer Situations

On January 31, 1989, the Treasury Department and the DOL issued a joint statement on the duties of pension fund fiduciaries in response to tender offers, including cash offers that represent premiums above the market and merger proposals. The joint statement applies to all benefit plans, not just ESOPs.

The joint statement dispels the notion that—merely because a tender offer represents a premium over the prevailing market price for shares of the target company’s stock—ERISA requires pension fund fiduciaries to automatically tender their shares. The statement notes that, while fiduciaries must manage plan investments prudently and in the sole interests of plan participants and beneficiaries, a plan fiduciary need not automatically tender shares held by the plan to capture the premium over the market price represented by the tender offer.

Rather, plan fiduciaries must pursue the economic best interests of the plan when they make decisions relating to tender offers, recognizing that the plan is a separate legal entity designed to provide retirement income. Prudence also requires fiduciaries to make investment decisions, including tender offer decisions, based on the facts and circumstances applicable to a particular plan.

Thus, a fiduciary must evaluate a tender offer on the merits. In so doing, it would be appropriate to weigh a tender offer against the underlying intrinsic value of the target company and the likelihood of that value being realized by current management or in a subsequent tender offer. It also would be proper to weigh the long-term value of the company against the value represented by the tender offer and the ability to invest the proceeds elsewhere. In making these determinations, the long-term business plan of the target company's management would be relevant. A similar process should lead to the fund's decision to support or oppose a proposed transaction. The considerations relating to tender offers of shares of publicly held companies are the same for shares of privately held companies.

The balance of the joint statement warns about attempts by corporate management to use plan assets as an offensive or a defensive tool in battles for corporate control, noting that such actions would violate the ERISA requirement that plans be managed solely in the interest of plan participants and beneficiaries. The statement also reiterates the DOL's position that it will continue to monitor plan activity for any such violations.

Potential Conflict with IRS GCM 39870

However, a later I.R.S. General Counsel Memorandum, GCM 39870, 1992 GCM LEXIS 16 (Jan. 23, 1992), advises that an ESOP provision that allows the trustee to consider non-financial employment-related factors in tender offer situations, such as the continuing job security of participants, violates the exclusive benefit rule of I.R.C. § 401(a)(2), and the prudent person standard in Rev. Rul. 69-494, 1969-2 C.B. 88, because it permits the trustee to reject tender offers that would be acceptable if financial factors alone were considered.

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Greg Brown represents clients in a broad range of corporate and transactional matters. His practice focuses on employee stock ownership plans (ESOP), the Employee Retirement Income Security Act (ERISA) fiduciary matters, tax-qualified retirement plans, executive compensation and ERISA litigation. He is also experienced in handling audits and investigations of plans by the U.S. Department of Labor and Internal Revenue Service and advises clients on ways to minimize litigation risk through benefit plan design, governance and administration.

Greg represents both closely held companies and national *Fortune* 500 publicly traded companies on employee benefits matters, in addition to organizations throughout the food and beverage, government contracting, technology, retail and direct marketing, healthcare, banking and financial services industries.

Beyond his law practice, Greg is a regular author and speaker on a range of employee benefits law topics nationwide.

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