

## **THE DUTIES & RESPONSIBILITIES OF A TRUSTEE**

1. ESOPs are required by law to be represented by a Trustee. The Trustee **MUST** comply with the strict guidelines of a fiduciary under ERISA (Employee Retirement Income Security Act of 1974). The Trustee is the legal shareholder of the Stock held inside the ESOP.
2. A Trustee must act independently in all matters coming before him/her, representing only the best interests of the Plan Participants (and their beneficiaries) in all decisions. **FOR THIS REASON, IT IS NEVER ADVISABLE TO USE AN “INSIDE” TRUSTEE** (an individual who is an employee or stakeholder in the Sponsoring Company).
  - a. A Trustee must not participate in self-dealing or allow the ESOP to engage in transactions with persons having an interest in the ESOP (including the ESOP sponsor and individual participants).
  - b. The appointment of an Inside Trustee brings with it an unavoidable conflict of interest. As an officer or director of a company, one has the duty to protect and enhance the best interests of the company and to discharge his/her duties in the best interest of the company. Conversely, the Trustee has the legal duty to advance the best interest of the Plan Participants, even if contrary to the perceived wishes or plans of company management. One simply cannot wear both “hats.” Inside Trustees are the source of many of the law suits regarding ESOPs. Even if there is no wrong doing, there still exists the appearance of a conflict of interest.
3. A Trustee must not be unduly influenced by the Management of the Sponsoring Company, in terms of taking actions that would not be in the best interest of the Plan Participants. However, the Trustee must be reasonable and business-oriented, realizing that the long-term best interest of the Plan Participants is generally closely correlated with the long-term best interest of the Sponsoring Company.
  - a. A Trustee must act with reasoned judgment in all decisions regarding the ESOP. Trustees are held to standard of “substantive procedural prudence” in exercising their responsibilities of management and administration of the ESOP.
4. In cases where voting rights are passed through to ESOP participants, the Trustee must act as a neutral observer to ensure that such voting is conducted properly and that the Plan Participants are not subjected to undue influence on how they should vote their shares.

- a. In certain cases, the Trustee may override participant voting directions if the trustee believes that doing so would be in the Participants' best financial interest as ESOP beneficiaries.
5. The Trustee should carefully review all Plan documents for compliance with ERISA requirements, and be prepared to explain the requirements of the Plan to the Plan Participants and Management.
6. The Trustee should retain outside ERISA counsel as needed to advise him as to the Plan requirements and legal issues relating to ERISA and the DOL (Department of Labor).
7. At times, it might be necessary for a Trustee to order an Independent Fairness Opinion regarding some action contemplated by the Sponsoring Company.
8. The Trustee is responsible for the annual valuation of the stock held by the ESOP. Likewise he is responsible for choosing and retaining a qualified valuator to perform this function under the Rules of RR 59-60.
9. The Trustee should visit the Plan Participants and Sponsoring Company at least annually, or more often as necessary. At that meeting, the following should be accomplished:
  - a. Meet with Plan Participants to:
    - i. Discuss any perceived problems;
    - ii. Answer questions relating to the ESOP;
    - iii. Act as a sounding board for any problems or issues presented by the Plan Participants for consideration by the ESOP Committee or Board of Directors of the Sponsoring Company.
    - iv. Tour the Company facilities;
  - b. Meet with Management, the ESOP Committee, and the Board of Directors of the Sponsoring Company to:
    - i. Determine the financial health of the Company. Full financial statements should be made available to the Trustee quarterly.
    - ii. Determine the short-term and long-term outlook for the Company and its products or services;
    - iii. Explain the requirements of the Plan, and how it might impact the Company;
    - iv. Report on the mood of the Plan Participants, to include any issues the Participants want presented to Management;

- v. Meet with the Sponsoring Company's advisors to determine the Company's financial health and outlook for the future;
- vi. Offer input as appropriate.

10. The Trustee should offer suggestions to Management and the Plan Participants regarding issues affecting the ESOP. The Trustee should be knowledgeable regarding all major issues relating to the Sponsoring Company. A Trustee should have extensive business experience.
11. The Trustee must be available to Management and the Plan Participants regarding ESOP or Company issues that might affect the ESOP. The availability can often be via the phone, but on occasion must be in person.
12. The Trustee is expected to maintain a high degree of knowledge and expertise regarding ESOPs. The Trustee should attend the annual National ESOP Conference, as well as maintain an active membership in the NCEO (National Center for Employee Ownership). The Trustee should maintain other contacts in the professional community that will help ensure that he is knowledgeable regarding all current ESOP issues.
13. A Trustee must discharge his duties in accordance with the requirements of the Plan Documents, in so far as the Plan Documents are consistent with the requirements of ERISA.
14. The Trustee must require a Repurchase Liability Study at appropriate intervals to ensure that sufficient funds will be available to honor the Company's repurchase obligation. In addition, the Trustee should provide information and suggestions as to the various methods of funding for the repurchase obligation and must approve the program established by the Sponsoring Company. It is a primary duty of a Trustee to provide just benefits to Plan Participants (and their beneficiaries).
15. The Sponsoring Company is financially responsible for the following on-going costs relating to an Independent Trustee and ESOP:
  - a. Trustee's fee and travel costs;
  - b. Legal fees charged by Trustee's counsel;
  - c. Fees charged by Trustee's financial advisor (if required);
  - d. Cost of professional liability insurance covering the Trustee;
  - e. Cost of required annual valuations;
  - f. Cost of TPA fees (Third Party Administrator); and
  - g. Cost of annual Repurchase Liability Study.