Evercore | Trust Company

COMPANY STOCK "SUNSETS"

Company stock has historically played an important role as a component in many defined contribution (DC) plans in the United States, particularly those sponsored by large firms. In the past many companies made matching contributions to their defined contribution plans in the form of company stock.

In some instances, corporate sponsors have determined to eliminate stock funds as an investment option. This elimination, usually referred to as a "sunset" of company stock plans, can happen for a variety of reasons, including a corporate event such as a spin-off or split-off. In these instances, stock in the spun-off or split-off company, which employees may currently hold or may be granted to shareholders as consideration when the spin-off or split-off occurs, needs to be sold. Partial sunsets may also occur when stock above mandated caps for individual account balances needs to be sold. Some plan committees have also decided to sunset company stock plans to eliminate the litigation risk tied to single stock holdings in defined contribution plans. Sensitivity to this litigation risk may also be heightened by the June 2014 Supreme Court decision in Fifth Third Bancorp vs. Dudenhoeffer, holding that company stock funds are subject to the general prudence standard of the Employment Retirement Income Security Act (ERISA) set forth in Section 404(a) of ERISA and rejecting the "presumption of prudence" (generally known as the "Moench Presumption," after the Third Circuit case in which it was first cited) that had previously been applied by the courts to reject plaintiffs' claims in litigation relating to company stock funds.

While a plan sponsor's decision to sunset a company stock plan is not a fiduciary decision, the implementation of the sunset is subject to ERISA's fiduciary standards. Typically, the company will determine to freeze the fund to new investment and advise participants of their right to transfer their company stock account balances to other investment funds and that all company stock remaining in the company stock fund will be liquidated after a specified time frame, typically between six and twelve months.

Because the implementation of the sunset is a fiduciary act, there are benefits to hiring an "independent fiduciary" to communicate the multi-step processes involved in the sunset to participants and to ultimately oversee the liquidation of any company stock remaining in the fund at the end of the sunset period. An independent fiduciary does not possess non-public information, and assumes fiduciary responsibility for the maintenance of the company stock fund pending the liquidation of the company stock, including the responsibility to determine whether it is required by ERISA to dispose of the stock prior to the termination date. This interim time period allows participants to determine when they wish to exit the stock fund, prior to the sunset date. Following the sunset date, the independent fiduciary oversees the orderly liquidation of those shares not sold by participants. The independent fiduciary may also be engaged to assume responsibility to vote company stock and to manage the company stock fund's liquidity.

The independent fiduciary will communicate to the plan's participants not only the role of the independent fiduciary in the sunset process and the mechanics of the liquidation of the company stock fund, but each participant's responsibility to determine to reallocate their company stock fund account balances prior to the sunset date based on their individual circumstances. A best practice usually involves the independent fiduciary also establishing a dedicated email account so that participants may contact the independent fiduciary with any questions regarding the stock fund, the sunset, or the independent fiduciary's role.

Evercore Trust has served as the Independent Fiduciary in company stock sunsets in a variety of situations. Selected engagements where Evercore Trust served as independent fiduciary with respect to the sunset of a Stock Fund include:

- **ALLETE:** Served as independent fiduciary to manage the sale of ADESA stock held in the ALLETE 401(k) and ESOP, which arose from the spin-off of ADESA by ALLETE.

- **Halliburton:** Served as independent fiduciary to the Halliburton Stock Fund in Halliburton's 401(k) plan to monitor the stock fund pending its elimination as a plan investment option, and to oversee the sale of any stock remaining in the stock fund following its termination.

- **HSBC, Inc.:** Served as independent fiduciary to HSBC 401(k) plan to manage disposition of HSBC ADRs.

- **Kansas City Southern, Inc.:** Served as investment manager to Stilwell Financial 401(k) plan to sell Kansas City Southern (KCSI) stock, a holding resulting from the spin-off of Stilwell Financial from KCSI.

- **KBR, Inc.:** Served as independent fiduciary to KBR 401(k) plans with respect to KBR and Halliburton stock in the plans pending the sunset of these investments, following KBR's split-off from Halliburton. Also assumed responsibility to vote the KBR and Halliburton plans' shares in connection with the split-off.

- **Pfizer:** Serve as an independent fiduciary to Pfizer 401(k) plans with respect to the sunset of the Zoetis Stock Fund.

- **Roadway Express:** Served as independent fiduciary to Roadway Express 401(k) plan to sell Federal Express stock following the spin-off of Roadway Express from Federal Express.

- **Spectra Energy:** Served as independent fiduciary to Spectra Energy 401(k) pending the sunset of the stock fund holding Duke Energy common stock, following Spectra's spin-off from Duke.

- **Telcordia:** Served as independent fiduciary to Telcordia 401(k) Plan to manage disposition of SAIC stock following the IPO of SAIC, the former parent company of Telcordia.

- **Williams Companies:** Served as investment manager to The Williams Companies defined contribution plan to sell Williams Communication Group (WCG) stock received as a result of the WCG spin-off, and to reinvest proceeds in stock of The Williams Companies.

- **Large Public Company ESOP:** Served as investment manager to a large publicly-traded ESOP in connection with the spin-off of two companies, resulting in the responsibility to manage the sale of the stock of the two new companies and to reinvest the proceeds in the company's stock.

- **Split-up of Large Public Company:** Served as investment manager to a large public company plan to divest non-employer stock of two other companies received by the plan in connection with three-way split-up of the predecessor company, and to reinvest the proceeds into employer stock.

- **Spin-off of Large Public Company:** Served as ESOP trustee in connection with a spin-off from a large public company; responsible for developing and executing program to exchange the spun-off share shares received by the predecessor company ESOP for predecessor company shares received by the spun-off company's ESOP.

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