Evercore | Trust Company

<u>HIRING AN INDEPENDENT FIDUCIARY FOR A 401(K) PLAN COMPANY STOCK FUND</u>

<u>Common Questions from Plan Sponsors and Plan Committees</u>

This document summarizes some common questions that plan sponsors and plan committees ask when considering appointing a discretionary independent fiduciary and investment manager for a 401(k) plan company stock fund.

Why should plan sponsors and internal fiduciaries be concerned about the oversight of the company stock fund in their 401(k) plan?

There are two broad reasons – potential liability and litigation risk for those managing a company stock fund internally, and the difficulty in establishing an appropriate internal process to monitor the fund.

- <u>Potential Legal and Fiduciary Liability for Internal Fiduciaries</u>
    - <u>Inside information</u>. Internal fiduciaries face additional litigation risk due to their actual or potential access to material non-public information, which could call into question their ability to make un-conflicted decisions regarding a company stock fund.
    - <u>Increased litigation risk</u>. Recent changes in the ERISA legal framework for company stock fund oversight have increased the risk of litigation as plaintiffs test these new standards.
    - <u>Dual roles of internal fiduciaries</u>. As company employees, internal fiduciaries must navigate potential conflicts between their jobs and their duty to act solely in the interests of the plan and the plan's participants.
    - <u>Personal holdings</u>. Internal fiduciaries may face potential conflicts stemming from personal holdings of company stock.

- <u>Plan Administration Issues</u>
    - <u>Lack of internal expertise</u>. Internal fiduciaries often lack the time or expertise to exercise proper financial review and fiduciary oversight of a company stock fund.
    - <u>Potential participant confusion</u>. Plan participants often do not fully understand their own investment responsibilities regarding a company stock fund, and may seek to hold internal fiduciaries responsible for "recommending" the purchase of company stock.

How does appointing a professional, experienced third party independent fiduciary and investment manager help to address the above risks of offering a company stock fund?

Appointing an independent fiduciary provides benefits both for plan participants and for other parties, including plan sponsors and internal plan fiduciaries.

- Benefits for Plan Participants
  - Assures participants that an independent party is protecting their interests
  - Provides un-conflicted oversight of a company stock fund by an experienced professional with specialized financial and fiduciary expertise
  - Facilitates clear communications with participants regarding the operation and risks of a company stock fund, without the burden of potential access to material non-public information

- Additional Benefits
  - Reduces demands on internal company and plan committee resources
  - Mitigates the litigation risk due to internal fiduciaries' actual or implied access to material nonpublic information
  - Helps ensure a prudent, well documented process of fiduciary oversight of a company stock fund that is designed to conform to current legal standards.
  - Puts the company stock fund on similar footing as other plan investment options that already have a professional investment manager.

What are some common misconceptions about appointing a discretionary independent fiduciary?

Two common misperceptions relate to the limited nature of the independent fiduciary's role under the law and the cost of retaining an independent fiduciary.

- Will an Independent Fiduciary Just Sell the Stock?
  - We believe there are limited circumstances where the law requires an independent fiduciary to act to restrict or eliminate a company stock fund.
  - Sponsors and plan committees should confirm that the independent fiduciary has a clear understanding of the applicable law and can delineate when they would consider taking action.

- Isn't the Cost Prohibitive?
  - The cost of an independent fiduciary typically is significantly less than the investment management fees for other plan investment options. Appointing a third party also saves significant internal resources that would otherwise be devoted to company stock fund monitoring and oversight.
  - Fees can be paid by the sponsor or from plan assets as a permissible expense of plan administration.

What is the typical market and participant reaction to the appointment of an independent fiduciary?

- In our experience, the appointment of an independent fiduciary is almost always viewed as a non-event by both the market and plan participants.

- An independent fiduciary can work with the plan committee to craft a cooperative communication strategy that further mitigates any concerns on this front.

What does Evercore Trust do as independent fiduciary for a company stock fund?

As independent fiduciary, Evercore Trust assumes the exclusive fiduciary responsibility to determine, based on all of the relevant facts and circumstances, whether action is required under ERISA with respect to a company stock fund. This involves a number of steps.

- Monitoring. Evercore Trust has developed a robust financial and legal monitoring process that combines in-depth experience in fiduciary decision making, in-house financial analysis, and legal and administrative expertise in dealing with company stock funds.

- Thorough Documentation of the Monitoring Process. Evercore Trust maintains a comprehensive record of both its monitoring process and its ongoing oversight of a company stock fund, which conforms with ERISA's fiduciary requirements. This record provides our clients with comfort that our actions are defensible should they be the subject of regulatory scrutiny or litigation.

- Communications with Plan Participants and Plan Committees. Working with the company and plan committee representatives, Evercore Trust regularly communicates with plan participants to inform them of the nature of the company stock fund, their responsibilities, and the limited circumstances under which Evercore Trust would consider taking action. Evercore Trust also meets periodically with internal fiduciaries to assist them in satisfying their oversight responsibilities.

What actions could Evercore Trust take as independent fiduciary for a company stock fund?

Were Evercore Trust to determine, based on an analysis of all of the relevant facts and circumstances, that it was required under ERISA to take action with respect to a company stock fund, these actions could include any of the following steps.

- Enhanced Monitoring.
- Additional Communications with Plan Participants. These communications would remind participants of the risks of an undiversified investment, and that in the ordinary course it is their decision whether to invest in company stock.
- Prohibit New Investment in the Company Stock Fund.
- Liquidate the Company Stock Fund, in the Most Extraordinary Circumstances.

What other roles can Evercore Trust assume with respect to company stock in a 401(k) plan?

There are a number of additional services that Evercore Trust can provide in connection with a company stock fund:

- Liquidity management for a unitized company stock fund.
- Proxy voting oversight, including voting undirected or unallocated shares in Evercore Trust's discretion.
- Serve as trustee with full discretionary authority for the company stock fund.
- Settlement fiduciary to determine, consistent with DOL guidance, whether to approve a plan's participation in litigation settlements relating to investment in company stock.

Contact Information

For more information regarding Evercore Trust's services as discretionary independent fiduciary for 401(k) plan company stock funds, please contact one of the following members of the Evercore Trust team. More information about Evercore Trust's services also can be found at www.evercoretrustcompany.com.

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