

# Employee Ownership Report

SEPTEMBER–OCTOBER 2014 / Volume XXXIV, No. 5

**IN THIS ISSUE:**

## Private Company ESOPs and the Supreme Court's *Dudenhoeffer* Decision

In *Fifth Third Bancorp v. Dudenhoeffer* the Supreme Court ruled unanimously on June 25 that “the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP’s holdings” (p. 8). This ruling overturns the so-called *Moench* presumption of prudence rule that has been applied to plan fiduciaries for certain 401(k) plans investing in company stock and ESOPs. Fiduciaries of such plans were presumed to be acting prudently unless they knew or should have known the company was in dire financial circumstances.

*Fifth Third Bancorp v. Dudenhoeffer* concerned a publicly traded company with a 401(k) plan in which the company matched employee contributions by contributing employer stock to an ESOP that was a component of the 401(k) plan. The plan document required the ESOP to invest primarily in company stock. The stock dropped precipitously, and employees sued. The trial court said fiduciaries were entitled to a presumption of prudence in continuing to offer the shares and dismissed the case. Upon review, the Sixth Circuit applied a stronger test for the presumption and rejected its applicability at the pleadings stage in this case, stating that the plaintiffs had stated a plausible duty-of-prudence claim. In its decision, the Supreme Court vacated the Sixth Circuit’s decision and remanded the case to the Sixth Circuit for consideration in light of the Court’s opinion.

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## DOL and GreatBanc Reach Agreement on Fiduciary Practices

On June 2, 2014, GreatBanc Trust Company and the Department of Labor entered into an “Agreement Concerning Fiduciary Engagements and Process Requirements for Employer Stock Transactions.” In the DOL’s press release, Assistant Secretary of Labor for the Employee Benefits Security Administration Phyllis C. Borzi said that “others in the industry would do well to take notice of the protections put in place by this agreement. ESOPs are an important tool to promote employee ownership, not a way to create big cash-outs for owners and top executives.”

In its press release, GreatBanc described the agreement as “a product of constructive and collaborative discussions with top DOL officials in Washington D.C.” and said it “is happy to have established

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## 2015 ANNUAL CONFERENCE Call for Sponsors and Speaker Proposals

On August 28, 2014, the 2015 Employee Ownership Conference proposal pages will become available on the NCEO Web site for sponsorship opportunities and speaking proposals. The conference will be April 20–23, 2015 in Denver.

Links to all the information you will need in order to sponsor and/or speak at the conference will be located at [www.nceo.org/conference](http://www.nceo.org/conference). You will certainly want to be a part of this major annual event.

Sponsorships and exhibit tables are awarded on a first-come, first-serve basis. Speaking proposals are due by October 3, 2014. Speaking proposals go through a selection process with an outside committee. Speakers will generally be notified before the end of December. ■

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