NCEO
NATIONAL CENTER FOR EMPLOYEE OWNERSHIP

EMPLOYEE OWNERSHIP REPORT

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ISSUE HIGHLIGHTS

- The White House nominated Senate Finance Committee staffer Preston Rutledge to be new head of the DOL's Employee Benefits Security Administration. See page 12.
- Conventional wisdom says that the number of court cases involving ESOPs is increasing, but the real numbers in the NCEO's review of litigation tell a different story. See page 3.
- Most ESOP companies are confident about their ability to manage their repurchase obligation. To see what they are doing, see the results of our 2017 repurchase obligation survey on page 6.
- The Supreme Court's standard from the *Dudenhoeffer* ruling continued to play out in courts around the country as plaintiffs in four stock-drop lawsuits suffered setbacks. See page 10.
- Having a dispersed work force is a big challenge to any company building a cohesive ownership culture, but page 9 shares concrete tools some companies have found to be effective solutions.
- As Washington focuses on tax reform, the employee ownership world considers what it might mean. See page 12.
- Two polls, one in the U.S. and one in the U.K., show broad public support for employee ownership. See page 12.
- Employee-owner Brad Berg says that when Realityworks became employee-owned, it "ensured that the vision and direction of the company remained with the very employees dedicated to our mission." See page 11 for two stories from Realityworks.
- Along with people around the country, employee-owned companies have been in the path of natural and human-made crises. The ways some of them responded is on page 15.

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CASE STUDY OWNERS' PAGE

The DOL Reaches Agreements with Two ESOP Trustees

Consent orders recently were entered in two lawsuits brought by the DOL against independent outside ESOP trustees, with one case filed in 2012 against First Bankers Trust Services (FBTS), and the other filed in 2015 against James F. Joyner III. Each consent order includes an agreement by the trustee to a fiduciary process for future ESOP transactions. These two agreements provide guidance that may be useful to other fiduciaries involved with ESOPs, and expand somewhat on prior guidance from the DOL in its 2014 Fiduciary Process Agreement with GreatBanc Trust Company.

Over 90% of the content of the FBTS and Joyner agreements is essentially the same as the GreatBanc process agreement. The main differences between these recent agreements and the earlier GreatBanc agreement elaborate on trustee responsibility to make sure the valuation advisor is independent and that financial information and projections used in the appraisal are reliable, although the FBTS agreement adds some new requirements relating to loans from executives and/or sellers to the ESOP as well as potential clawbacks if there are misrepresentations. (The FBTS settlement agreement, however, grew out of a very specific fact pattern, and thus the additional elements may not be indicative of the DOL's future actions.)

Read together, the three agreements provide useful guidance for ESOP trustees, albeit there will be disagreement on just how specifically to apply this guidance to any one case.

The FBTS agreement results from the case *Perez v. First Bankers Tr. Servs., Inc.* (S.D.N.Y., No. 1:12-cv-08648-GBD), relating to the Maran Inc. ESOP's purchase of 49% of Maran stock for $70 million in 2006. By 2009, Walmart, its primary customer, stopped buying from Maran and the stock value dropped to zero. Walmart later renewed the contract, and the stock was valued at $8.3 million. The DOL was concerned that the valuation firm had worked for the company before, that FBTS did not get information about a prior offer to sell the company, and that the engagement agreement between FBTS and the appraiser stipulated that the appraiser could rely on the projections of a Maran officer. The DOL also alleged FBTS failed to negotiate the offer.

—Continues on page 8

With 350 attendees, 48 sessions, and countless questions raised and answered, the NCEO's first Fall ESOP Forum in Tampa was, in the words of one anonymous person attending her first ESOP event, "a well-executed event that was both informative and intimate enough for us not to feel overwhelmed."

The Fall ESOP Forum
Best Practices in Employee Ownership

Join us again in 2018 at our annual conference (Atlanta, April 18–20, with a preconference on April 17) and at next year's Fall ESOP Forum (Albuquerque, October 2–3, preconference on October 1).

THE NCEO is a self-sustaining nonprofit membership organization that provides practical resources and objective, reliable information on employee stock ownership plans (ESOPs), equity compensation plans, and ownership culture. Our publications, meetings, webinars, and research are designed with you in mind.

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