

## The DOL's Latest Move

On June 2, 2014 GreatBanc Trust Company and the Department of Labor entered into a monetary settlement agreement in the case of *Perez v. GreatBanc Trust Company*, United States District Court for the Central District of California, 2014. In addition to the monetary settlement, GreatBanc and the DOL agreed to a set of policies and procedures ("Process Requirements") that GreatBanc must follow in the future when it is engaged to purchase or sell employer securities that are not publicly traded (see PDF copy page 6). What are the new Process Requirements?

First, for GreatBanc, it has made a written commitment to DOL to follow these Process Requirements. If GreatBanc fails to follow these procedures in the future, it presumably would be subject to some enforcement action from DOL. However, the Process Requirements are not a consent decree.

Second, for all other ERISA trustees, the Process Requirements do not create any direct obligation. The Process Requirements are not: (i) an amendment to the law (ERISA), (ii) a DOL regulation, (iii) a DOL advisory opinion, or (iv) a DOL Field Assistance Bulletin. That means, for example, the DOL could not cite these as legal authority or introduce the Process Requirements in court and ask a judge to find a trustee in violation of the Process Requirements.

Perhaps the best way to think about the Process Requirements is to consider them an insight into what the DOL expects of an ESOP Trustee when it is evaluating a purchase or sale of employer securities. Certainly, the DOL's press release makes clear it is expecting fiduciaries to adhere to these procedures. However, there are requirements created here for which the DOL has no statutory or even regulatory authority. For that reason, other trustees will need to decide whether to fully comply or perhaps modify the Process Requirements.

We have reviewed the Process Requirements and believe they can be sorted into three categories: (i) procedures which create new, substantive requirements that are likely to materially impact a trustee's business model and ways of doing business, (ii)

procedures that require more extensive documentation of matters already covered in most valuation reports or trustee records, and (iii) procedures we believe most trustees currently follow and for which no new work will be required.

We have focused on matters in the first category and provide below a description of these items and then some observations about particular effects of the requirements:

I. New Material Requirements or Changes:

A. Paragraph B of the Process Requirements prohibits the use of a valuation advisor who has ever performed work for:

1. The plan sponsor;
2. The seller (if the ESOP is a buyer), or buyer (if the ESOP is a seller);
3. The investment bank or other consultant who is structuring the transaction.

**Observation:** As applied to GreatBanc, this would prohibit the trustee's use of an appraiser who provided a preliminary valuation to a committee of a "to-be-formed-ESOP." It would also prohibit the trustee's use of an appraiser who had provided gift tax valuations to the seller in the past. As written, this limitation has no time limit. Notwithstanding this broad statement, a prudent trustee may conclude enough time has passed or other developments have occurred that make it prudent to select that appraiser. The fact that an investment banker recommends the same appraiser for more than one of its transactions would not be a conflict violation. However, the trustee would need to document that it created and followed a process to select the appraiser, rather than simply accepting a recommendation from the investment banker.

B. Paragraph D.2. requires either the trustee or the appraiser to provide a written opinion as to the reasonableness of the projections used by the appraiser. This written opinion cannot be conclusory. It must contain the reasons why the trustee or appraiser is concluding the projections are reasonable, and must specifically address a number of items listed in the Process Requirements.

**Observation:** The financial services industry has never provided opinions on the reasonableness of projections for obvious reasons. Presumably, this will fall to the trustees. Of course, many trustees

have always believed they could not rely on projections unless they believed the projections were reasonable in nature. The DOL did not require GreatBanc to obtain a “quality of earnings” report, which some had heard was a goal of DOL. This makes sense, as a quality of earnings report addresses historical earnings, not projections.

- C. Paragraph D.8. directs GreatBanc to consider (i) plan provisions regarding benefit distributions, (ii) the duration of the ESOP loan, and (iii) the age and tenure of the ESOP participants. GreatBanc is then required to consider how these three items might affect: (i) repurchase liability, (ii) prudence of a stock purchase, or (iii) the fair market value of the stock purchased.

**Observations:** Trustees have often considered projected repurchase liability in evaluating the prudence of a transaction. However, it is possible the DOL is suggesting that a company with an older work force, or one that provides accelerated payout of benefit distributions, might be worth less because its obligation to repurchase shares may arise sooner than for another company. That would seem to violate the fair market value definition of Rev. Rul. 59-60 and subsequent DOL positions.

- D. Paragraph D.9. requires the inclusion of a number of financial fairness considerations that the appraiser must consider. These items are standard in a well written fairness opinion used in a complex transaction. However, these factors may not be relevant in a simple minority interest purchase transaction.

**Observation:** Would a trustee be required to incur the expense of a financial fairness opinion in a transaction in which there are no material fairness issues to be addressed?

- E. Paragraph E. addresses financial statements. It requires the trustee to seek audited financial statements for the 5 previous fiscal years. It is worded in a way that almost creates a presumption that it is unreasonable to rely on unaudited financial statements, but allows the trustee to rely on unaudited statements if the trustee determines such reliance is reasonable and carefully documents its reasoning. Even if a plan sponsor has 5 years of audited financials, the Process Requirements make clear that any unaudited financial statements for any gap period

between the date of the last audit and the transaction date are subject to the same “presumption against reasonableness” that the trustee will need to overcome.

**Observations:** Trustees have always had a preference for audited financial statements and have had to consider the risks associated with moving ahead without them. The Process Requirements do not prohibit the trustee from engaging in a transaction without audited financial statements.

- F. Paragraph G seems to create a new “Trustee Report” that will constitute an analysis of the Valuation Report. There are 16 specific items that are required to be documented. For each of the 16, the trustee must state its conclusion and then document its reasoning.

**Observation:** While we do not know exactly what the DOL will require of GreatBanc in this Trustee Report, it appears to us the Trustee Report may be as extensive, and as detailed, as some Valuation Reports.

- G. Paragraph H.2. requires the documentation of the Trustee’s evaluation of the Valuation Report to include disclosure of material points on which personnel disagreed and why, as well as stating whether any personnel ever expressed the view that information provided was inconsistent.

**Observation:** It is pretty easy to see how this requirement will actually discourage, rather than encourage, critical assessment of the valuation report. Trustees should adopt a documentation approach that balances the need for an open discussion of concerns with the desire to create complete documentation. Plaintiff’s firms would be delighted to see documentation of disagreements among members of a fiduciary committee.

- H. Paragraph I.3. requires the preservation of all notes of all consideration of the proposed transaction. This would seem to be in conflict with the practice that at least at formal meetings, all attendees agree that the approved minutes speak for everyone as an accurate summary of the meeting.

**Observations:** If trustees violate basic governance practice by following the Process Requirements on this point, committee members may have conflicting notes on matters that were ultimately resolved to everyone's satisfaction that may undermine the credibility of the approved minutes of the meeting.

- I. Paragraph J prohibits the discounting of an ESOP promissory note in determining whether the ESOP has met the fair market value test of the adequate consideration requirement. As this is a somewhat unusual approach, this may be of no consequence to trustees.

**Observations:** This seems to be a rare practice and the prohibition will not materially change practices. It is interesting to note that the short reference to this point in the Process Requirements is the only item in the 11 page document that is even relevant to the DOL arguments made in the case that was the subject of this settlement.

- J. Paragraph K directs GreatBanc to consider negotiating for a claw-back or other purchase price reduction in the event of "significant corporate events" or "changed circumstances." The DOL in the past has refused to provide guidance on whether such arrangements are themselves prohibited transactions.

**Observation:** It is difficult to know the scope of what might be permissible in this area. Unfortunately, the use of the term "changed circumstances" reveals that the DOL views itself as free to apply 20/20 hindsight to second guess fiduciaries in a manner not permitted under ERISA. ERISA is designed to judge fiduciary actions by what was known at the time the decision was made, not by what changes become evident after the fact.



## AGREEMENT CONCERNING FIDUCIARY ENGAGEMENTS AND PROCESS REQUIREMENTS FOR EMPLOYER STOCK TRANSACTIONS

The Secretary of the United States Department of Labor (the "Secretary") and GreatBanc Trust Company ("the Trustee"), by and through their attorneys, have agreed that the policies and procedures described below apply whenever the Trustee serves as a trustee or other fiduciary of any employee stock ownership plan subject to Title I of ERISA ("ESOP") in connection with transactions in which the ESOP is purchasing or selling, is contemplating purchasing or selling, or receives an offer to purchase or sell, employer securities that are not publicly traded.

A. Selection and Use of Valuation Advisor – General. In all transactions involving the purchase or sale of employer securities that are not publicly traded, the Trustee will hire a qualified valuation advisor, and will do the following:

1. prudently investigate the valuation advisor's qualifications;
2. take reasonable steps to determine that the valuation advisor receives complete, accurate and current information necessary to value the employer securities; and
3. prudently determine that its reliance on the valuation advisor's advice is reasonable before entering into any transaction in reliance on the advice.

B. Selection of Valuation Advisor – Conflicts of Interest. The Trustee will not use a valuation advisor for a transaction that has previously performed work – including but not limited to a "preliminary valuation" – for or on behalf of the ESOP sponsor (as distinguished from the ESOP), any counterparty to the ESOP involved in the transaction, or any other entity that is structuring the transaction (such as an investment bank) for any party other than the ESOP or its trustee. The Trustee will not use a valuation advisor for a transaction that has a familial or corporate relationship (such as a parent-subsidary relationship) to any of the aforementioned persons or entities. The Trustee will obtain written confirmation from the valuation advisor selected that none of the above-referenced relations exist.

C. Selection of Valuation Advisor – Process. In selecting a valuation advisor for a transaction involving the purchase or sale of employer securities, the Trustee will prepare a written analysis addressing the following topics:

1. The reason for selecting the particular valuation advisor;
2. A list of all the valuation advisors that the Trustee considered;
3. A discussion of the qualifications of the valuation advisors that the Trustee considered;
4. A list of references checked and discussion of the references' views on the valuation advisors;
5. Whether the valuation advisor was the subject of prior criminal or civil proceedings; and
6. A full explanation of the bases for concluding that the Trustee's selection of the valuation advisor was prudent.

If the Trustee selects a valuation advisor from a roster of valuation advisors that it has previously used, the Trustee need not undertake anew the analysis outlined above if the following conditions are satisfied: (a) the Trustee previously performed the analysis in connection with a prior engagement of the valuation advisor; (b) the previous analysis was completed within the 15 month period immediately preceding the valuation advisor's selection for a specific transaction; (c) the Trustee documents in writing that it previously performed the analysis, the date(s) on which the Trustee performed the analysis, and the results of the analysis; and (d) the valuation advisor certifies that the information it previously provided pursuant to item (5) above is still accurate.

D. Oversight of Valuation Advisor – Required Analysis. In connection with any purchase or sale of employer securities that are not publicly traded, the Trustee will request that the valuation advisor document the following items in its valuation report,<sup>1</sup> and if the valuation advisor does not so document properly, the Trustee will prepare supplemental documentation of the following items to the extent they were not documented by the valuation advisor:

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<sup>1</sup> As used herein, "valuation report" means the final valuation report as opposed to previous versions or drafts.

1. Identify in writing the individuals responsible for providing any projections reflected in the valuation report, and as to those individuals, conduct reasonable inquiry as to:  
(a) whether those individuals have or reasonably may be determined to have any conflicts of interest in regard to the ESOP (including but not limited to any interest in the purchase or sale of the employer securities being considered); (b) whether those individuals serve as agents or employees of persons with such conflicts, and the precise nature of any such conflicts; and (c) record in writing how the Trustee and the valuation advisor considered such conflicts in determining the value of employer securities;
2. Document in writing an opinion as to the reasonableness of any projections considered in connection with the proposed transaction and explain in writing why and to what extent the projections are or are not reasonable. At a minimum, the analysis shall consider how the projections compare to, and whether they are reasonable in light of, the company's five-year historical averages and/or medians and the five-year historical averages and/or medians of a group of comparable public companies (if any exist) for the following metrics, unless five-year data are unavailable (in which case, the analyses shall use averages extending as far back as possible):
  - a. Return on assets
  - b. Return on equity
  - c. EBIT margins
  - d. EBITDA margins
  - e. Ratio of capital expenditures to sales
  - f. Revenue growth rate
  - g. Ratio of free cash flows (of the enterprise) to sales
3. If it is determined that any of these metrics should be disregarded in assessing the reasonableness of the projections, document in writing both the calculations of the metric (unless calculation is impossible) and the basis for the conclusion that the



metric should be disregarded. The use of additional metrics to evaluate the reasonableness of projections other than those listed in section D(2)(a)-(g) above is not precluded as long as the appropriateness of those metrics is documented in writing. If comparable companies are used for any part of a valuation – whether as part of a Guideline Public Company method, to gauge the reasonableness of projections, or for any other purpose – explain in writing the bases for concluding that the comparable companies are actually comparable to the company being valued, including on the basis of size, customer concentration (if such information is publicly available), and volatility of earnings. If a Guideline Public Company analysis is performed, explain in writing any discounts applied to the multiples selected, and if no discount is applied to any given multiple, explain in significant detail the reasons.

4. If the company is projected to meet or exceed its historical performance or the historical performance of the group of comparable public companies on any of the metrics described in paragraph D(2) above, document in writing all material assumptions supporting such projections and why those assumptions are reasonable.
5. To the extent that the Trustee or its valuation advisor considers any of the projections provided by the ESOP sponsor to be unreasonable, document in writing any adjustments made to the projections.
6. If adjustments are applied to the company's historical or projected financial metrics in a valuation analysis, determine and explain in writing why such adjustments are reasonable.
7. If greater weight is assigned to some valuation methods than to others, explain in writing the weighting assigned to each valuation method and the basis for the weightings assigned.
8. Consider, as appropriate, how the plan document provisions regarding stock distributions, the duration of the ESOP loan, and the age and tenure of the ESOP participants, may affect the ESOP sponsor's prospective repurchase obligation, the prudence of the stock purchase, or the fair market value of the stock.

9. Analyze and document in writing (a) whether the ESOP sponsor will be able to service the debt taken on in connection with the transaction (including the ability to service the debt in the event that the ESOP sponsor fails to meet the projections relied upon in valuing the stock); (b) whether the transaction is fair to the ESOP from a financial point of view; (c) whether the transaction is fair to the ESOP relative to all the other parties to the proposed transaction; (d) whether the terms of the financing of the proposed transaction are market-based, commercially reasonable, and in the best interests of the ESOP; and (e) the financial impact of the proposed transaction on the ESOP sponsor, and document in writing the factors considered in such analysis and conclusions drawn therefrom.

E. Financial Statements.

1. The Trustee will request that the company provide the Trustee and its valuation advisor with audited unqualified financial statements prepared by a CPA for the preceding five fiscal years, unless financial statements extending back five years are unavailable (in which case, the Trustee will request audited unqualified financial statement extending as far back as possible).
2. If the ESOP Sponsor provides to the Trustee or its valuation advisor unaudited or qualified financial statements prepared by a CPA for any of the preceding five fiscal years (including interim financial statements that update or supplement the last available audited statements), the Trustee will determine whether it is prudent to rely on the unaudited or qualified financial statements notwithstanding the risk posed by using unaudited or qualified financial statements.
3. If the Trustee proceeds with the transaction notwithstanding the lack of audited unqualified financial statements prepared by a CPA (including interim financial statements that update or supplement the last available audited statements), the Trustee will document the bases for the Trustee's reasonable belief that it is prudent to rely on the financial statements, and explain in writing how it accounted for any risk posed by using qualified or unaudited statements. If the Trustee does not believe that it can reasonably

conclude that it would be prudent to rely on the financial statements used in the valuation report, the Trustee will not proceed with the transaction. While the Trustee need not audit the financial statements itself, it must carefully consider the reliability of those statements in the manner set forth herein.

F. Fiduciary Review Process – General. In connection with any transaction involving the purchase or sale of employer securities that are not publicly traded, the Trustee agrees to do the following:

1. Take reasonable steps necessary to determine the prudence of relying on the ESOP sponsor's financial statements provided to the valuation advisor, as set out more fully in paragraph E above;
2. Critically assess the reasonableness of any projections (particularly management projections), and if the valuation report does not document in writing the reasonableness of such projections to the Trustee's satisfaction, the Trustee will prepare supplemental documentation explaining why and to what extent the projections are or are not reasonable;
3. Document in writing its bases for concluding that the information supplied to the valuation advisor, whether directly from the ESOP sponsor or otherwise, was current, complete, and accurate.

G. Fiduciary Review Process – Documentation of Valuation Analysis. The Trustee will document in writing its analysis of any final valuation report relating to a transaction involving the purchase or sale of employer securities. The Trustee's documentation will specifically address each of the following topics and will include the Trustee's conclusions regarding the final valuation report's treatment of each topic and explain in writing the bases for its conclusions:

1. Marketability discounts;
2. Minority interests and control premiums;
3. Projections of the company's future economic performance and the reasonableness or unreasonableness of such projections, including, if applicable, the bases for assuming

- that the company's future financial performance will meet or exceed historical performance or the expected performance of the relevant industry generally;
4. Analysis of the company's strengths and weaknesses, which may include, as appropriate, personnel, plant and equipment, capacity, research and development, marketing strategy, business planning, financial condition, and any other factors that reasonably could be expected to affect future performance;
  5. Specific discount rates chosen, including whether any Weighted Average Cost of Capital used by the valuation advisor was based on the company's actual capital structure or that of the relevant industry and why the chosen capital structure weighting was reasonable;
  6. All adjustments to the company's historical financial statements;
  7. Consistency of the general economic and industry-specific narrative in the valuation report with the quantitative aspects of the valuation report;
  8. Reliability and timeliness of the historical financial data considered, including a discussion of whether the financial statements used by the valuation advisor were the subject of unqualified audit opinions, and if not, why it would nevertheless be prudent to rely on them;
  9. The comparability of the companies chosen as part of any analysis based on comparable companies;
  10. Material assumptions underlying the valuation report and any testing and analyses of these assumptions;
  11. Where the valuation report made choices between averages, medians, and outliers (e.g., in determining the multiple(s) used under the "guideline company method" of valuation), the reasons for the choices;
  12. Treatment of corporate debt;
  13. Whether the methodologies employed were standard and accepted methodologies and the bases for any departures from standard and accepted methodologies;

14. The ESOP sponsor's ability to service any debt or liabilities to be taken on in connection with the proposed transaction;
15. The proposed transaction's reasonably foreseeable risks as of the date of the transaction;
16. Any other material considerations or variables that could have a significant effect on the price of the employer securities.

H. Fiduciary Review Process – Reliance on Valuation Report.

1. The Trustee, through its personnel who are responsible for the proposed transaction, will do the following, and document in writing its work with respect to each:

- a. Read and understand the valuation report;
- b. Identify and question the valuation report's underlying assumptions;
- c. Make reasonable inquiry as to whether the information in the valuation report is materially consistent with information in the Trustee's possession;
- d. Analyze whether the valuation report's conclusions are consistent with the data and analyses; and
- e. Analyze whether the valuation report is internally consistent in material aspects.

2. The Trustee will document in writing the following: (a) the identities of its personnel who were primarily responsible for the proposed transaction, including any person who participated in decisions on whether to proceed with the transaction or the price of the transaction; (b) any material points as to which such personnel disagreed and why; and (c) whether any such personnel concluded or expressed the belief prior to the Trustee's approval of the transaction that the valuation report's conclusions were inconsistent with the data and analysis therein or that the valuation report was internally inconsistent in material aspects.

3. If the individuals responsible for performing the analysis believe that the valuation report's conclusions are not consistent with the data and analysis or that the valuation report is internally inconsistent in material respects, the Trustee will not proceed with the transaction.

I. Preservation of Documents. In connection with any transaction completed by the Trustee through its committee or otherwise, the Trustee will create and preserve, for at least six (6) years, notes and records that document in writing the following:

1. The full name, business address, telephone number and email address at the time of the Trustee's consideration of the proposed transaction of each member of the Trustee's Fiduciary Committee (whether or not he or she voted on the transaction) and any other Trustee personnel who made any material decision(s) on behalf of the Trustee in connection with the proposed transaction, including any of the persons identified pursuant to H(2) above;
2. The vote (yes or no) of each member of the Trustee's Fiduciary Committee who voted on the proposed transaction and a signed certification by each of the voting committee members and any other Trustee personnel who made any material decision(s) on behalf of the Trustee in connection with the proposed transaction that they have read the valuation report, identified its underlying assumptions, and considered the reasonableness of the valuation report's assumptions and conclusions;
3. All notes and records created by the Trustee in connection with its consideration of the proposed transaction, including all documentation required by this Agreement;
4. All documents the Trustee and the persons identified in 1 above relied on in making their decisions;
5. All electronic or other written communications the Trustee and the persons identified in 1 above had with service providers (including any valuation advisor), the ESOP sponsor, any non-ESOP counterparties, and any advisors retained by the ESOP sponsor or non-ESOP counterparties.

J. Fair Market Value. The Trustee will not cause an ESOP to purchase employer securities for more than their fair market value or sell employer securities for less than their fair market value. The DOL states that the principal amount of the debt financing the transaction, irrespective of the interest rate, cannot exceed the securities' fair market value. Accordingly, the Trustee will not cause an ESOP to engage in a leveraged stock purchase transaction in which the

principal amount of the debt financing the transaction exceeds the fair market value of the stock acquired with that debt, irrespective of the interest rate or other terms of the debt used to finance the transaction.

K. Consideration of Claw-Back. In evaluating proposed stock transactions, the Trustee will consider whether it is appropriate to request a claw-back arrangement or other purchase price adjustment(s) to protect the ESOP against the possibility of adverse consequences in the event of significant corporate events or changed circumstances. The Trustee will document in writing its consideration of the appropriateness of a claw-back or other purchase price adjustment(s).

L. Other Professionals. The Trustee may, consistent with its fiduciary responsibilities under ERISA, employ, or delegate fiduciary authority to, qualified professionals to aid the Trustee in the exercise of its powers, duties, and responsibilities as long as it is prudent to do so.

M. This Agreement is not intended to specify all of the Trustee's obligations as an ERISA fiduciary with respect to the purchase or sale of employer stock under ERISA, and in no way supersedes any of the Trustee's obligations under ERISA or its implementing regulations.

IN WITNESS WHEREOF, the Secretary and GreatBanc have executed this Agreement in duplicate originals on the dates indicated by their respective signatures.

FOR THE SECRETARY:

FOR GREATBANC TRUST COMPANY:

PATRICIA SMITH  
Solicitor of Labor


By: \_\_\_\_\_ Date: \_\_\_\_\_

G. WILLIAM SCOTT  
Acting Associate Solicitor  
Plan Benefits Security Division

Title: \_\_\_\_\_

RISA D. SANDLER  
Counsel for Fiduciary Litigation

ROBERT L. FURST  
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 \_\_\_\_\_ Date: 6/2/2014  
SYMA AHMAD  
JEFFREY M. HAHN  
DAVID M. ELLIS  
Attorneys for Plaintiff



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FOR THE SECRETARY:

PATRICIA SMITH  
Solicitor of Labor

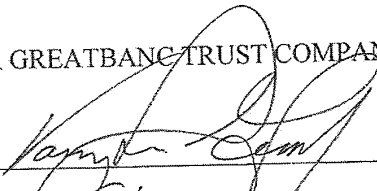
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JEFFREY M. HAHN  
DAVID M. ELLIS  
Attorneys for Plaintiff

FOR GREATBANC TRUST COMPANY:

By:  \_\_\_\_\_

Date: 6/1/2014

Title: Chairman