## TO SELF TRUSTEE A PLAN OR NOT, THAT IS THE QUESTION
## IT DEPENDS ON THE COMPANY, THAT'S THE ANSWER

Should a privately held business ask an institution to serve as the trustee for its retirement plan or should it ask two or three of its key employees to serve in that capacity? There are no right or wrong answers to the question - rather the decision should be driven by the philosophy and unique circumstances presented by the individual company.

**APPEARANCE OF INDEPENDENCE**

As a general rule, the use of an institutional trustee gives the impression of independence to staff employees. From the viewpoint of the staff, an institutional trustee would appear to insulate the plan from the management of the company. This is a matter of perception only - in most cases the reality is that management or a plan committee directs the institutional trustee in all meaningful decisions.

**COST**

Make no mistake about it - the institutional trustee will charge a fee for its services. Key employees, on the other hand, generally are not given any additional compensation for serving as trustees. If there is not a direct charge assessed by the institution, in all likelihood, it will be charged indirectly somewhere else. The old saying, "You don't get something for nothing!" certainly applies to free trusteeship by an institution.

**FLEXIBILITY - INDIVIDUALLY DESIGNED PLANS**

Utilizing key employees as trustees wins hands down when it comes to flexibility on a variety of fronts. First as to plan design. Some institutions will only serve as trustee when the company is adopting one of its own prototype plans. Recently a good sized company in New York changed its plan design from a "plain vanilla" profit sharing plan to an individually designed profit sharing plan with a comparability allocation. Even though this particular institution sponsored prototype comparability profit sharing plans, it refused to be a trustee to a plan that was designed by a pension expert. After careful analysis, this company determined that it would remain with the institution for investment purposes, but would self-trustee the plan. They wanted to retain the individual features their new plan design afforded them. They also determined that they were not picking up any additional liability by not utilizing the institution as trustee (more on this below).

Individually designed plans have always been important to companies that want to ensure that their retirement plan design maximizes staff and management objectives. For instance, a successful non-profit association in Washington, D.C. spent significant time working out a retirement plan design that would be most appreciated by their particular staff. The association felt that the salaries it could afford to pay were below those paid by for profit corporations in the area. Greater reliance was therefore placed on the employee benefit program. A vital component of this program was the retirement plans. A money purchase pension plan with a long vesting schedule was put in place to protect and encourage long term employees. A 401(k) plan was adopted (obviously this is a grandfathered plan) which would be appreciated by the short term employee, as well as the long term employee. Most of the key plan provisions were carefully thought out including the decision to have a matching contribution (half of which would be immediately vested and the other half subject to a three year vesting schedule), the entry dates, the choice of investments, the allocation of contributions among investments, and the ability to change allocations, with their own employee census in mind. The association decided that this was the optimal plan for its employees and spent a great deal of time talking about its desires with an ERISA attorney and an administration firm to arrive at the design. This hand holding, review of the law, and ability to draft a plan design that exactly suited their needs mandated an individually designed retirement program. Every couple of years, they fine tune the design, review options and change investment managers. The association also changed administrative firms at least once. These are advantages they "bought" by being self-trusteed.

Today, this advantage is even more important. The new profit sharing plan designs allowed by the 401(a)(4) regulations are very exciting. These designs need to be carefully thought out and implemented. Individually designed plans are more or less mandated by the regulations. Since many institutions are reluctant to serve as trustee with any individually designed plan, let alone the new plans allowed by the 401(a)(4) regulations, the only answer is to self-trustee the plan. Keep in mind, however, that the company has probably not changed its exposure to liability in any way.

Now let's examine this factor from the other side. Imagine a small company with two or three employees. This company is an ideal candidate for an institutional prototype - flexibility may simply be a factor that is not needed or desired.

**FLEXIBILITY - CHOICE OF INVESTMENTS AND/OR INVESTMENT MANAGERS**

When a plan is self-trusteed, obviously there is total flexibility with respect to the choice of investments and investment managers. If an investment manager is not performing up to par, it is an easy matter for the trustees to change to another investment manager. Conversely, when an institutional trustee is also responsible for investing plan assets in its own investment vehicles or products, which is not an uncommon occurrence, then it is more difficult, though certainly not impossible, to change the trustee. Often times, notice is required, accountings may be required and the new trustee will demand to be relieved of any fiduciary obligations prior to the time it is assuming trusteeship under the plan. Sometimes, penalties are assessed for early withdrawal of pension funds from certain institutional investments.

**LIABILITY**

To ensure that the prudent standard with respect to investments is met, every plan should have an investment policy. This policy should be well thought out and carefully drafted to protect the trustees and the plan administrator from Department of Labor audits or legal scrutiny from participants. The policy should contain broad objectives and procedures and it should be followed. If it is not going to be followed, don't bother writing down any policies or procedures.

Risks should be defined, various investments determined and, in a plan without directed investments by participants, broad guidelines as to allocations between the investments given. Investment managers should be selected with a view towards satisfying the investment policy, taking into account the methodology and style of the investment managers themselves. The performance of investments and the fees charged should be reviewed at least annually. The world of investments has gotten so sophisticated that there are now companies that do nothing but work with the plan administrators and/or trustees of retirement plans sponsored by privately held companies to ensure that they are meeting their fiduciary standards and to help them adequately assess the various investment managers available to them. It is important to understand that this type of analysis should in many cases be undertaken regardless of whether the plan has an institutional trustee or not.

An institutional trustee does not shelter a plan sponsor from liability, even though many smaller companies believe that it does. It is not hard to imagine a scenario where a small company has an institutional trustee for its plan which does all of the investing for the plan in its own sponsored investments. The investments over a ten year period earn well below average and a cursory review by the plan sponsor would have brought this dismal performance to light. Who should be liable for this consistently poor investment return -only the trustee? only the plan sponsor?

both parties? Suffice it to say, the prudent plan sponsor should not decide to ignore investment yields or its own investment policy just because the trustee of the plan is an outside institution.

A full analysis of who is deemed to be a fiduciary under the law, as expounded by the courts, is well beyond the scope of this article. The trustee and the plan administrator are almost always deemed to be liable fiduciaries. In some cases, the term fiduciary has been expanded to include consultants and advisors. If an institutional trustee can show that the investment policy for a plan has been directed by a plan committee, it will be largely successful in transferring liability to the plan committee. The question of liability is a major issue with the 404(c) regulations. The plan fiduciaries are allegedly off the liability hook if the requirements of 404(c) are met, but of course, one of those requirements is that the investment choices offered be prudent. If a participant can show that even one of the investment choices is not prudent, liability remains with the plan fiduciary. This is why many plans will not even bother trying to comply with the 404(c) regulations - the regs are considered to be more trouble than they are worth. This discussion goes beyond the scope of this brief analysis, but its purpose is to show that liability will not necessarily shift to an institutional trustee when the investment strategy of an institutional trustee is not prudent. Similarly, if the institutional trustee makes all decisions based upon directions from a plan committee or another named fiduciary, liability will remain with the named fiduciary.

When key employees are named as fiduciaries, they can be protected by indemnification by the employer. Employers or plans can purchase insurance for themselves and for their fiduciaries to cover liability or loss resulting from acts or omissions of their fiduciaries. The cost of this insurance must be weighed against the likelihood of any potential future liability.

**TURN-KEY OPERATIONS**

Often small companies prefer an institutional trustee which delivers a turn-key operation. By this we mean the institutional trustee will take care that the plan complies both in operation and in form with the Internal Revenue Code and DOL and IRS regulations. The plan will receive a valid determination letter, amendments when required, Form 5500s every year and correct notices to its participants. When an institution can provide this type of service in a quality fashion, it is appreciated greatly by small companies. The small company, however, should carefully read the fine print as to what it is really getting - in fact the prudent small company will have all documents and fee and investment agreements reviewed by legal counsel competent in retirement plan law before signing anything. This is because often the institutional trustee will clearly set forth in writing that it is not responsible for many of these items and the small company does not realize that it must bring its accountant, plan administrator or retirement plan attorney into the act until its too late. Many of the worst problems come about from plans being given erroneous advice by an employee of an institutional trustee who knows nothing about the law and is willing to give free advice. The company rightly or wrongly assumes that the trustee which is the institution has properly educated all of its employees and goes along with the erroneous advice. We have seen seven and five year cliff vesting in top heavy plans, money purchase and profit sharing plans both integrated with social security, only key employees in the plan for the first three years of its existence (since there is a three year wait for staff employees only!), and adoptive agreements sent home with a key employee who is told to fill it out the best he or she is able! On the other hand, we've seen plans run in a very prudent and capable fashion by institutions offering turn-key retirement plans.

In the final analysis, a company should decide whether it wants to ask an institution to serve as a trustee or have its key employees serve based on its own philosophy. Generally, self-trusteed plans will be cheaper to operate and easier to control as far as investments. Often the company will need its accountant and/or pension consultant or ERISA attorney involved to some extent to ensure successful operation. Some turn-key operations deliver exactly what they promise, others are lawsuits waiting to happen. In many areas, there is virtually no difference between a self- trusteed plan and an institutionally trusteed plan. In any case, it is essential that the plan sponsor continue to monitor the investments of the plan to insure they are prudent and to insure the plan is being operated in compliance with the law.

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