



AMERICAN BENEFITS

COUNCIL

Benefits Briefing:
Company Stock as a
Retirement Plan Investment

Friday, September 21, 2018
2 p.m. to 3 p.m. ET

Today's Speakers

Moderator:



Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

Guest Speakers:



John Matelis
Chief Financial Analyst
Newport Trust Company



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Overview

- **Company stock has been a prominent investment in retirement plans sponsored by U.S. corporations for decades**
- **Recent developments have prompted plan committees to revisit company stock**
 - Investment Rationale
 - Legal Framework
 - Risk Management
 - Plan Sponsor Activities
- **This webinar will focus on company stock holdings within:**
 - Defined Contribution (DC) Plans
 - Defined Benefit (DB) Plans

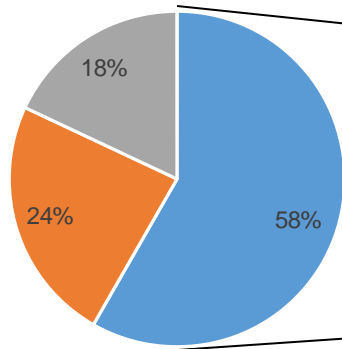
Defined Contribution Plans

- **Brief history of company stock in DC plans**
- **Reasons to offer a company stock fund as an investment option**
 - Promote employee ownership
 - Offer unique risk/return profile
 - Tax advantages
- **Fiduciary responsibilities and legal risks**
 - Prudent process to monitor
 - Stock drop litigation
 - *Post-Dudenhoeffer case law*

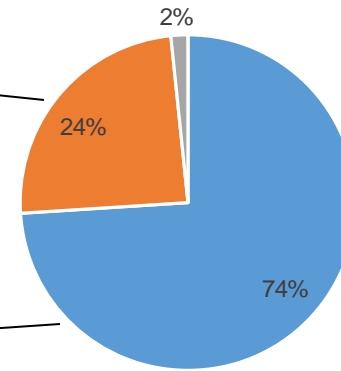
Market Research

- Company stock continues to be a core investment option within defined contribution plans sponsored by publicly traded members of the Council.

Council Members By Type



Council Public Members - DC Plans



■ Public ■ Not for Profits and Law Firms ■ Private

■ With Company Stock ■ Without Company Stock ■ Excluded*

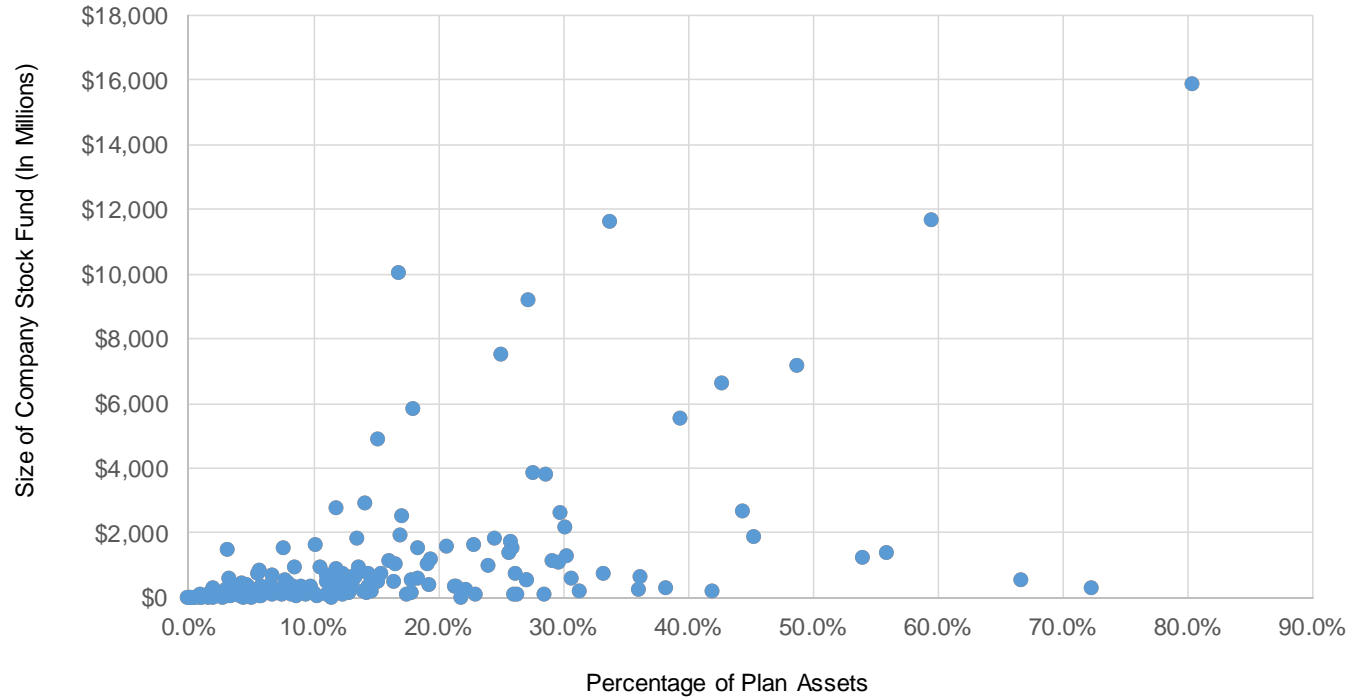
* Excludes four members that are newly independent and have not filed Form 5500s or participate in another member's DC plan.

Market Research

- **182 Council public members sponsoring DC plans with company stock:**
 - Total plan assets of ~\$1.12 trillion
 - Total company stock of ~\$189 billion
 - Average and median company stock balances of ~\$1 billion and ~\$300 million, respectively
 - Average concentration of 14.8% of plan assets

Market Research

**Council Public Members Sponsoring
DC Plans with Company Stock**



Legal Framework

◦ General Fiduciary Duties (ERISA Section 404(a))

- Loyalty
- Prudence
- Diversification
 - Exception for investment in qualifying employer securities
- In accordance with plan documents

◦ ERISA Section 406 prohibits

- Sale or exchange of property between a plan and a party in interest
- Acquisition, on behalf of the plan, of any employer security in violation of ERISA Section 407(a)

Legal Framework

- **Prohibitions/Limits under Section 407(a)**
 - Prohibits investment in any:
 - employer security that is not a qualifying employer security, and
 - employer real property that is not qualifying employer real property
- **Definition of Eligible Individual Account Plan**
- **Definition of Qualifying Employer Security**

Legal Framework

- **Exemption under Section 408(e)**
 - Permits plan purchase or sale of qualifying employer securities
 - For adequate consideration
 - If no commission is paid with respect to the purchase/sale
- **Availability of Individual Exemptions**

Legal Framework

- **Addressing the statutory tension**
 - The Moench presumption (Moench v. Robertson (3rd Cir. 1995))
 - Presumption of reasonableness
 - Somewhat differently applied in different jurisdictions
- **Fifth Third Bancorp. v. Dudenhoeffer (S. Ct. 2014)**
 - No presumption of reasonableness under ERISA
 - Pleading of claim based on publicly available information
 - Pleading of claim based on insider information

Legal Framework

- **Post Dudenhoeffer Litigation**
 - *Pfeil v. State Street Bank & Trust* (6th Cir. 2016)
 - *In Re Wells Fargo ERISA 401(k) Litigation* (D. Minn. 2018, currently on appeal to 8th Cir.)
- **Additional Requirements under Internal Revenue Code**
- **Securities Law Considerations**

Risk Management

Plan Design

- Plan Language
- ESOP Designation
- Cash Match
- Participant Caps
- Freeze Stock Fund
- Managed Accounts

Plan Governance

- Settlor v. Fiduciary Functions
- Fiduciary Charter/ Designation
- IPS
- Prudent Process
- Fiduciary Training
- Formal Review

Other Actions

- Internal Oversight
- Participant Communications
- Targeted Outreach
- Insurance
- Investment Advisor
- Independent Fiduciary

Eliminate Risk

- Sunset a Company Stock Fund

Defined Benefit Plans

- **Reasons to contribute company stock to a defined benefit pension plan**
 - Improve funded status
 - Offset future required contributions
 - Conserve cash
 - Investment return
- **Key considerations**
 - Economic tradeoffs and corporate priorities
 - Market factors and tax treatment
 - Pension funding, investment and risk transfer strategies
- **Over the last 10 years, public companies have made at least 50 contributions of qualifying employer securities valued in excess of \$15 billion**

Legal Framework

◦ Section 407 Limits

- Employer security must be qualifying employer security
- Fair market value of qualifying employer securities held by plan may not exceed 10% of the value of plan assets
- 25% of class limitation

◦ In-kind contribution is a transaction between a plan and a party in interest

- Statutory Exemption Available

Legal Framework

- **DOL may grant an individual exemption if -**
 - administratively feasible
 - in the interest of plan participants and beneficiaries, and
 - protective of the rights of plan participants and beneficiaries
- **Interested parties must receive notice and opportunity to be heard**
- **Fiduciary Considerations**
- **Corporate Considerations**

Contributions other than Stock

- **Statutory exemption for qualifying employer real property**
 - Real property that is leased from the plan to the employer
 - A substantial number of geographically diverse properties
 - Suitable for more than one use
- **In-kind contributions of other assets require an individual prohibited transaction exemption**
- **Over the last 10 years, the DOL has granted 15 exemptions permitting in-kind contributions.**
 - Examples: private equity, stock, unimproved real property, promissory notes, preferred membership interests, U.S. treasuries, intangible assets, guaranteed investment contract

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