



The Indiana Chapter of
The ESOP Association

**So You've Received an Offer for
Your ESOP Company: What to Do
Next**

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Agenda

- Unsolicited Offer Policy
- Fiduciary Duties
- Degrees of Unsolicited Offers
- Trustee's Role
- Typical Sale Process

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Why Sell?



Why should I even sell the Company?

Fiduciary duty of board to act in good faith and prudently for the best interests of the shareholders.

Certain circumstances may drive the sale of your Company

- Unsolicited offer
- Non-ESOP Majority Shareholder



Reasons to Potentially Sell

- An unsolicited offer may reflect peak or premium valuation for the company
- A mature ESOP may face increase repurchase obligation pressure, as the workforce ages or turns over. A sale provides full liquidity to the participants.
- Board should assess whether remaining independent is a constraint on growth.
- Management may face key-person risk or uncertain management succession.

Unsolicited Offer Policy



Unsolicited Offer Policy

What is an Unsolicited Offer Policy? At a high level, the policy:

- Reduces time spent on “fishing expeditions” and avoiding distractions, misinformation, or premature negotiation
- Identifies who may receive and communicate with potential buyers to prevent informal or inconsistent discussions
- Sets clear procedures for screening, documenting, and escalating offers to ensure a complete record for fiduciary review
- Defines when and how the board, ESOP trustee, and advisors are engaged, recognizing the trustee’s independent duty to evaluate offers in the best interests of ESOP participants
- Protects the company and ESOP participants by ensuring decisions are made deliberately and in the best interest of stakeholders
- Can be used as a poison pill of sorts.

Implementation

- Typically work with your legal counsel to design the policy.
- Policy is typically adopted by the governance committee of the board of directors

Varying Degrees of Unsolicited Offers

Determine whether it is a bona fide offer.

Mass Mailers and Generic Outreach

- These look like cold emails, form letters, and industry mailers.
- Typically have no pricing, no buyer identity, and no transaction structure.
- Usually trash and no need for escalation, but document.

Casual Inquiries or “Testing the Waters”

- These look like informal calls to management or “Would you ever consider selling?” conversations.
- Typically do not have pricing, but the buyer is usually known.
- Important to not negotiate or discuss value until escalation to the board.
- Monitor and document, and escalate if there is some credibility or strategic fit.

Varying Degrees of Unsolicited Offers

Indications of Interest (IOIs)

- These look like written expressions of interest that discuss a valuation range or a transaction structure.
- May evolve out of a mass mailer or a casual inquiry.
- This is no longer a casual discussion, and escalation to the board for their involvement is appropriate.
- Trustee should be notified of receipt and prepared for engagement.

Letters of Intent (LOIs)

- These look like even more formal IOIs where price, structure, exclusivity, indemnity framework, and the due diligence process begins.
- Full fiduciary process is triggered, and the trustee must be actively involved.
- Your legal, financial, and valuation advisors should all be engaged.
- Do not agree to exclusivity until you receive board and trustee approval.



Fiduciary Duties



Board and Officer Fiduciary Duties

Duty of Care

- Make informed, deliberate decisions
- Exercise reasonable diligence and oversight
- Reliance on qualified advisors is permitted

Duty of Loyalty

- Act solely in the best interests of the company and shareholders
- Avoid conflicts of interest and self-dealing
- No preferential treatment of management

Duty of Good Faith

- Act honestly and for proper corporate purposes
- No intentional misconduct or reckless decision-making



Board and Officer Fiduciary Duties

Process Matters – Especially in a Sale Context

- Evaluating a sale is about process, not outcome.
- Decisions must be documented, independent, and well-advised.
- Board and management do **not** determine ESOP value or fairness.
- The ESOP trustee independently evaluates offers on behalf of participants.

While the board and management manage the process, the ESOP trustee independently evaluates the transaction on behalf of employee-owners. Which brings us to the ESOP trustee's fiduciary role.



Trustee Fiduciary Responsibilities

Duty to act solely in the best interests of the beneficiaries of the ESOP

- Focused on financial criteria, not on the community impact or jobs.
- Trustee will consider long-term prospects of the company and opportunity costs. A fiduciary should discharge his or her duties with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under similar circumstances.
- Courts are focused on the process by which the fiduciary makes its decisions rather than the results of the decisions.

Duty of Loyalty

- A fiduciary should discharge his or her duties with respect to a plan by acting solely in the interest of the participants and beneficiaries and for the exclusive purposes of providing benefits to participants and their beneficiaries.
- Cannot act out of self-interest, but rather in the best interests of the participants.

Sale Process



Typical Sale Process

- Process typically goes from LOI to closing in 12 to 16 weeks.
- Engage advisors as soon as the offer is credible.
- Always sign an NDA before sharing any information.
- Due Diligence takes a long time.
- Trustee perspective.

Management and Board Roles

Management Team

- Work with legal counsel and other advisors.
- Take primary responsibility during due diligence.
- Primary negotiator, subject to approval of the board.

Board of Directors

- Supervise deal process, management and advisors, but typically not closely involved.
- Document process to support decisions that are made.
- Final approval of deal

Trustee Roles

- Approval of sale transaction – sometimes approval requires a pass-through vote.
- Different sale process than the Company.

Managing Communications: Internal

- Need-to-know basis only – limit awareness to CEO, CFO, and board. As it progresses bring in other key decision makers.
- Employee messaging – No broad disclosure to employees, unless and until required.
- Single point of contact – Designate management lead(s) for diligence and buyer communications.



Managing Communications: Trustee

- Maintain independence – Trustee evaluates offers independently.
- No selective disclosure – Ensure trustee receives the same material information provided to buyers.
- Coordination through advisors – Trustee will have their own advisors, and they will coordinate with the Company's advisors to help manage timing and scope for the transaction.

Key Takeaways

- An unsolicited offer policy limits unwanted “fishing expeditions”
- Adopt an unsolicited offer policy proactively to control communications, preserve leverage, and mitigate fiduciary risk.
- Different offers require different responses.
- Process matters – decisions should be well informed, documented, independent, and well-advised.
- Early advisor engagement once an offer is deemed bona fide supports a defensible fiduciary record.

