

Introduction to Closely-Held Business Interests

For purposes of this section, a closely-held business can be defined as one in which ownership of a business is concentrated in the hands of only a few shareholders and in which there is no publicly traded market for the shares. A principal characteristic of closely-held business interests is that ownership and management is often the same person. Closely-held business interests held in fiduciary accounts most often include closely-held corporations but may also include sole proprietorships and joint venture arrangements. In most instances, these assets are used to fund the trust and are not purchased by the savings association acting in a fiduciary capacity. The governing instrument should have specific language regarding the trustee's responsibilities and powers for such assets.

There are a number of complex issues associated with the administration of closely-held business interests. The savings association must be guided by well-developed policies and procedures to ensure sound and prudent administration and to safeguard against exposure to potential liability. The savings association must also have sufficient skills, either internally or through external arrangements, to properly administer these assets. Any losses resulting from improper administration of the closely-held business will be the responsibility of the savings association.

Managing a closely-held business interest can present a number of problems, not the least of which is acquiring detailed knowledge about the business interest. Regardless of whether the savings association owns a majority or a minority interest, the time necessary to actually manage or be involved in the management is often quite extensive. Shared responsibilities with cofiduciaries also present problems to the trustee. While cofiduciaries can be both cooperative and knowledgeable concerning the business interest, others may be neither.

The savings association, as a discretionary trustee, may need to make decisions regarding the disposition of the closely-held business interest. In those instances where an interest in a closely-held business is used to fund the trust and the governing instrument is silent regarding the disposition of the asset, the trustee must analyze the business interest and determine, in the best interest of the account, whether to continue to operate the business interest or to dispose of it by sale or liquidation. The following items should be considered in the analysis:

- Financial condition
- Management
- Earnings
- Growth
- Marketability
- Product lines and services
- Competition

The savings association and its board of directors are exposed to potential liability when the institution, acting as fiduciary, undertakes the administration of closely-held business interests. In addition to the

concerns listed above, the savings association must always deal with closely-held business interests at arm's length to avoid any conflict of interest or self-dealing transactions.

One way to manage the closely-held business interest, if policy permits, is to have an employee of the savings association (officer) serve as an officer or director of the closely-held business interest. However, this involves a certain degree of potential liability to the savings association and to the employee/officer. Therefore, consideration should be given to obtaining indemnity insurance for these situations.