EMPLOYEE STOCK OWNERSHIP PLANS

AN EXTRAORDINARY FINANCIAL AND EMPLOYEE BENEFIT TOOL

FOR THE

CLOSELY-HELD COMPANY

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Attachment A – HOW A LEVERAGED ESOP TRANSACTION TYPICALLY WORKS

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INTRODUCTION

An employee stock ownership plan ("**ESOP**") is a tax-qualified retirement plan that also is an extraordinary, tax-advantaged corporate and financial planning tool for the closely held company and its owners. An ESOP is authorized by law and design to invest primarily in the shares of the company sponsoring the ESOP ("**Company**"). The ESOP can pay shareholders fair market value for all or part of their Company shares, help finance that purchase on a tax-advantaged basis and, at the same time, provide employees an ownership interest and incentive to meaningfully contribute to the Company's ongoing success.

ESOPs offer unique tax-advantaged solutions for difficult corporate, financial, shareholder, and community issues, including:

- **Owner Investment Diversification and Succession Planning** – An ESOP may allow the closely held business owner to take cash out of the business on a tax-advantaged basis for diversified investments; and, provide the market and serve as a financial partner for the transfer of ownership in the Company for successive generations of family and/or management.

- **Raising Capital as a Financial Partner** – An ESOP serves as a tax-advantaged financial partner to help buy out a co-owner's exit, for management buyouts, or even for corporate rebuilding, expansion or target acquisitions.

- **Keeping Local Business Local** – An ESOP provides an important alternative to the sale of a business to buyers outside its community and thereby helps keep a local business and its jobs in the community.

- **Employee Benefits** – An ESOP is a cost effective employee retirement benefit and wealth creation tool, and encourages teamwork and productivity through a shared ownership culture and vision.

Both C and S corporations may sponsor an ESOP with many tax-advantaged benefits; but, each corporate form has advantages that other does not. This outline discusses potential benefits of an ESOP, the more important rules governing an ESOP, spells out special S and C corporation rules and advantages, and the principal advantages and disadvantages of an ESOP.

See also **Attachment A** at the end of this booklet illustrating a typical leveraged ESOP purchase transaction.

PART I. GENERAL DESCRIPTION OF AN ESOP

A. General Overview. An ESOP is a tax-qualified retirement plan under the Internal Revenue Code ("**Code**") that also is subject to the federal pension law known as the Employee Retirement Income Security Act of 1974 ("**ERISA**"). ESOPs are designed to invest primarily in Company shares that are (i) common shares with dividend and voting rights as great as any other class of common shares of the Company (and any affiliates), or (ii) noncallable preferred shares that are convertible into such common shares at a reasonable conversion price determined as of the date acquired. Under the Code an S corporation may have only one class of shares except that such shares may have different voting rights but, an S corporation ESOP may acquire only those S corporation shares with the greatest voting rights.

An ESOP may provide for mandatory or discretionary Company contributions that are allocated to participant accounts in the ESOP. The contributions may be in the form of cash, Company shares, or both. If the ESOP borrows money to acquire Company shares, however, the Company must make cash contributions sufficient for the ESOP to meet its loan obligations. In the typical ESOP loan transaction, the Company's cash contributions to the ESOP are repaid to the Company immediately because the Company is the lender (see Part II.B below). Company shares acquired with borrowed funds are initially held by the ESOP in a suspense account and serve as collateral for the loan. As the ESOP loan is repaid, the Company shares are released from collateral and allocated to the accounts of active ESOP participants.

ESOPs are individual account, tax-qualified retirement plans. The Company makes contributions to the ESOP from year-to-year which are currently deductible; and, benefits are credited to a participant's account from year-to-year but not taxed until later paid to the participant. The tax-qualified status of ESOPs means they are subject to a number of requirements imposed by the Code and ERISA (with the primary requirements discussed below). These requirements generally are intended to prevent plans from discriminating in favor of owners and highly compensated employees, to set limits on the overall benefits allowed, to help assure timely vesting, accrual and payment of benefits to participants, and to assure such plans are maintained and administered in accordance with strict fiduciary rules.

> *Caution:* The Code and ERISA generally impose these retirement plan requirements taking into account all of the employees of all of the commonly owned or controlled trades or businesses including the Company sponsoring the ESOP. The term "Company" in this outline generally includes all commonly owned and controlled trades and businesses including the Company.

B. Vesting. A participant's individual account must fully vest pursuant to a vesting schedule set forth in the ESOP and subject to the Code's requirements. Two common vesting schedules are (i) 0% vesting for less than 3 years of service, with 100% vesting for 3 or more years, and (ii) 20% vesting per year of service starting with the second completed year, so that a participant is 100% vested after completing 6 years of service. An ESOP may include a more rapid (but not slower) vesting schedule. Although not legally required, most new ESOPs exclude from vesting a participant's service before the ESOP is established. If a participant terminates employment before full vesting, the non-vested portion of the participant's account is forfeited under the terms of the Plan and generally allocated among the remaining active participants. The vested portion of the participant's ESOP account is paid out after retirement or other termination of employment (as described in Part I.D below).

C. Participation and Coverage. The Code imposes minimum coverage requirements to assure that the ESOP does not unduly benefit highly compensated employees ("**HCE**") [for 2016 generally any employee who earns more than $120,000 (in 2015) or owns at least 5% of the Company]. Under these coverage requirements, the percentage of non-HCEs of the Company participating in the ESOP generally must be at least 70% of the percentage of the HCEs participating in the ESOP. In short, the ESOP must benefit a sufficiently large group of employees.

D. Participant Benefits. As of the end of each year, there generally is a "pool" of Company shares (and perhaps some cash) held in the ESOP resulting from Company contributions for the year (see Part II.B below). For most ESOPs, this pool of Company shares (and any cash) for the year is allocated as of year-end among the accounts of active participants in proportion to their annual "Form W-2" compensation; and, all participant accounts are adjusted for changes in the Company share value each year.

On retirement or other termination of employment, participants have the right to receive the cash equivalent of any Company shares credited to their account. ESOP benefits generally are paid in installments over a 5-year period starting in the year *after* (i) the year of retirement or death, or (ii) the 5th year after other termination of employment. Also, before retirement, a participant must have the right to elect to diversify up to 50% of the participant’s ESOP account out of Company shares [over a set 6-year period] once the participant has reached age 55 and participated in the ESOP for 10 years.

> *Important Cash-Flow Consideration.* The ESOP Company must fund these participant rights with cash benefits equal to the value of the Company shares credited to their accounts. These cash-out rights have significant long-term cash flow implications for the Company that must be examined as part of establishing and maintaining an ESOP.

E. Limitations on Contributions and Benefits. The maximum annual deductible contribution by the Company to an ESOP generally is 25% of the W-2 compensation of all participants in the ESOP for the year; and, the maximum annual allocation under the ESOP to a participant's account generally cannot exceed the lesser of $53,000 (in 2015) or 100% of the participant's annual wages. These limits may be increased for a leveraged C corporation ESOP. The limits apply in total to all defined contribution plans sponsored by the Company, including the ESOP. *See also* Part II.D below.

F. Trust and Trustee. All ESOP assets must be held in trust by a corporate or individual trustee. The trustee is held to strict fiduciary standards under the Code and ERISA. *See also* Part III below.

G. An Employee Benefit Program. An ESOP should be considered together with the Company's entire benefit package, including existing retirement plans. If there is an existing plan, it is often modified or combined with the ESOP. For example, company contributions historically made to a profit sharing or "401(k)" plan (such as matching contributions) often are made to the ESOP to help finance the ESOP loan payments. Because the ESOP is primarily invested in the closely held shares of the Company, it generally is desirable to maintain other retirement plan options that provide a more diversified investment opportunity for employees.

H. Special S Corporation ESOP Rules. S corporation ESOP companies pay no tax at the corporate or shareholder level to the extent of the ESOP ownership. For example, if the ESOP owns 100% of the Company, no earnings are taxable at the Company or shareholder level [whether

or not distributed to shareholders]. The Code, however, includes significant potential penalties on an S corporation ESOP Company and "disqualified persons" if the Code's "anti-abuse" rules are violated. A violation generally occurs where "disqualified persons" own or are deemed to own 50% or more of the S corporation Company. In addition to direct ownership, ESOP participants are deemed to own shares credited to their ESOP accounts, a proportionate amount of any unallocated shares serving as collateral for an ESOP loan (see Part II.B below), any shares owned by a broadly defined "family" member, and shares of "synthetic equity" (such as stock options, phantom stock and nonqualified deferred compensation).

Important Consideration: These potential tax penalties are an important consideration for every S Corporation establishing or maintaining an ESOP.

PART II. USE OF AN ESOP TO BUY OWNER SHARES

A. General Overview of ESOP Uses. An ESOP can serve as a critical financial planning tool for a closely-held business owner. Using the proceeds from the sale of Company shares, an ESOP helps owners diversify their investments out of their "one stock portfolio" of Company shares. ESOPs serve as a financial tool and partner to transfer partial or total ownership of the Company to the ESOP in a single transaction or multiple transactions over a period of years; and, if so desired, the owner can continue to work for and manage the Company during the ownership transition period.

ESOPs often serve a critical role in the owner's retirement and estate planning, and often serve an integral part in transferring ownership of part of the Company to other family members and/or key management employees. This may prove particularly effective where the owner gets a fair market value price and, if a C corporation, may defer or potentially not pay any tax on the gain (see Part II.C below).

An ESOP also can act as a financial partner to help a management group buy out the owner in a single transaction or through a series of transactions over a period of years. This helps the Company and its jobs stay in the local community.

In addition, the Company can get a deduction for Company shares contributed to the ESOP equal to the fair market value of the shares as of the date contributed. This contribution generates additional cash flow for the Company and owners from the tax deduction and can help the Company and owner meet the requirements for tax deferred savings on the sale proceeds (see Part II.C below). Also, this Company contribution of shares to the ESOP, resulting in ownership dilution, can further help business succession and estate planning goals of the owners.

B. General Structure of Typical ESOP Transaction. For the typical ESOP transaction, the selling owner and Company develop the overall proposed structure for the ESOP and the ESOP buy-sell and loan transaction, arrange financing and adopt the ESOP. A trustee and the trustee's independent financial advisor/appraiser (engaged by and for the ESOP trustee) work together to establish the fair market value of the Company shares involved in the proposed ESOP transaction. The owner and the trustee then negotiate over the price and terms of the sale of the Company shares to the ESOP.

Once the actual terms of the transaction are agreed upon by the trustee and selling owner, the ESOP and Company enter into "back-to-back" loans where the Company borrows the needed cash from a commercial lender (the "outside" loan), and the ESOP in turn borrows the needed cash from the Company (the "inside" loan). The ESOP pays the borrowed cash to the selling

shareholder in exchange for the shares, and the acquired shares are held in a "suspense" account as collateral for the inside loan. See Attachment A.

The Company thereafter makes tax-deductible cash contributions to the ESOP each year sufficient for the ESOP to meet the principal and interest payments due on the ESOP loan; and, the ESOP then pays that cash back to the Company to pay down the ESOP/inside loan. In turn, the Company pays that cash to the lender for the outside loan. Depending on the terms of the outside loan, additional cash from the Company may be required. As the ESOP/inside loan is repaid, shares are released from collateral and allocated to the accounts of active participants.

There is no requirement that the ESOP's acquisition of shares from the selling shareholder include debt. The Company can pre-fund the eventual purchase with fully deductible cash contributions to the ESOP that can help reduce or even eliminate the need for the Company to borrow funds to finance the ESOP transaction.

In addition, a shareholder may provide "seller-financing" by taking back promissory notes as part of the sale rather than looking for outside financing for all or part of the transaction. Such seller-financing can prove quite favorable to both the Company and the shareholder.

C. Tax Advantages to Selling Shareholder. Owners selling their shares in the Company typically pay tax on the sale proceeds gain (price less tax basis) at capital gain rates. Seller financing notes provide installment payments where the owner recognizes the sale proceeds over the years of the note typically at capital gain rates, while also realizing interest income taxed at ordinary income rates.

However, under Section 1042 of the Code a C corporation owner selling to an ESOP is not taxed initially on the gain if (i) the shareholder has owned the shares for at least 3 years; (ii) the ESOP owns at least 30% of the voting rights and value of the Company after the sale; and (iii) the shareholder buys "qualified replacement property" ("**QRP**") within 12 months after the sale. The owner's gain only is taxed at the capital gain rate when the QRP is later sold and then only in proportion to the amount sold (*e.g.*, if 10% of the QRP is sold, 10% of the gain is taxable). This tax-deferral treatment may prove particularly advantageous for estate planning purposes as (i) no gain is recognized for transfers of QRP by gift or on account of the owner's death; and, (ii) on death, the heirs get a stepped-up tax basis equal to the fair market value of the QRP at the date of death. In addition, the IRS has approved a number of transactions involving QRP and charitable remainder trusts where the Company owner has a lifetime income interest.

"QRP" is any "security" (generally stocks and bonds) issued by a U.S. domestic operating corporation (generally a company with more than 50% of its assets used in the active conduct of the trade or business) that does not have passive investment income (rents, royalties, interest, *etc.*) in excess of 25% of gross receipts for the preceding taxable year. Certain insurance companies and financial institutions are also considered operating corporations. QRP does not include municipal bonds, other tax-exempt investments, U.S. Treasury Notes, or mutual funds.

> *Added Important Considerations:* This special tax treatment is not available to S corporation shareholders, but a Company can be converted to a C corporation before the ESOP purchase of Company shares to achieve this tax advantage. If this special tax treatment is elected, however, the selling shareholder and "family" (spouse, siblings, lineal ancestors and descendants, with certain limited exceptions), are prohibited from receiving an allocation of shares to which the election applies either during a specified period, or, if

the selling shareholder owned (after family attribution) at least 25% of any class of company shares, from ever receiving an allocation of shares to which the election applies.

D. Tax Advantages to Company. Company contributions of cash to an ESOP are deductible. Unlike a conventional loan where the Company cannot deduct the repayment of loan principal, generally all contributions to an ESOP are deductible whether used by the ESOP to pay principal or interest. Under the typical ESOP "back-to-back" loan transaction (*see* Part II.B above), the amounts paid by the Company to the ESOP result in an equivalent deduction for the Company in paying down the principal on its "outside" loan (including seller-financing). Note that the Company also can contribute shares to the ESOP which are fully deductible at their fair market value as of the date of contribution.

Company contributions by either an S or C corporation generally are deductible up to 25% of the W-2 payroll of participants, whether allocated to participant accounts or used to pay principal or interest on an ESOP loan. In addition, a C corporation has no limit on the amount of interest that can be deducted and generally also may deduct dividends paid on Company shares held by an ESOP if the dividends are paid in cash to participants or their beneficiaries, paid to the ESOP and distributed in cash to participants or their beneficiaries within 90 days after the close of the ESOP's plan year, or used to repay an ESOP loan used to acquire the shares. Dividends on stock allocated to participants but used to repay an ESOP loan are subject to an additional test before they can be deducted. (S corporation earnings distributions used to repay an ESOP loan are subject to a similar test even though they are not deductible.) Dividends also are deductible by a C corporation ESOP company if participants are allowed to reinvest the dividends on a pre-tax basis under the ESOP.

Important considerations: Contributions by either a C or S corporation in excess of these deduction limits are not only not deductible but subject to a penalty tax. Note that S corporation earnings distributions, however, while not deductible are not subject to these deduction limits and may be used to help pay down the ESOP/inside loan obligations.

E. Impact on Financial Statements. Under generally accepted accounting principles, the outside loan, and the ESOP/inside loan (see part II.B above) with an offsetting contra equity account to reflect receivables from the ESOP, is recorded on the Company's balance sheet. These accounting requirements may have an adverse impact on existing or new credit facilities of the Company (*e.g.*, raising issues under loan covenants) or on other reporting or financial requirements of the Company (*e.g.*, under financial industry capital or construction industry bonding requirements).

Caution: This requires careful consideration in structuring ESOP transactions and the financing for such transactions.

F. Limitations on the Acquisition of Shares. There are no direct limitations under the Code or ERISA on the amount of Company shares that can be purchased by an ESOP for any given transaction. The amount of debt the ESOP and Company can service, however, may impose practical limitations; and, the Code limits the amount of annual deductible contributions and allocations to the accounts of participants (*see* Parts I.E and II.D above), which indirectly limits the amount of financing the ESOP can service on a tax-effective basis. See also Part II.E above.

PART III. FIDUCIARY RESPONSIBILITIES AND PROHIBITED TRANSACTIONS

A. General Rules of Conduct. Generally, the Company establishing the ESOP, its directors and officers, the ESOP administrator and the ESOP trustee, are "fiduciaries" to the ESOP. Fiduciaries must discharge their duties to the ESOP solely in the interest of participants and for the exclusive purpose of providing benefits to participants.

Fiduciaries must perform their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims (a very high "prudent expert" standard). Fiduciaries also must discharge their duties in accordance with the ESOP's plan documents to the extent consistent with ERISA.

A fiduciary is personally liable for any loss to the ESOP resulting from the fiduciary's breach of the fiduciary's duty to the ESOP. The ESOP plan documents should specify the particular duties of each fiduciary to the ESOP.

B. Prohibited Transactions. The Code and ERISA generally prohibit a fiduciary from causing the ESOP to engage in the acquisition or sale of any property, or the lending or guaranty of a loan, with a "related party" which by definition includes the Company and its owners. Violation of the prohibited transaction rules may result in significant penalties on these related parties (including the selling shareholder). Under the Code and ERISA, the acquisition of Company shares by an ESOP from an owner is exempt from the prohibited transaction rules *only if* the acquisition is for not more than fair market value as determined by a fiduciary using a written valuation by an independent appraiser. A loan to an ESOP made or guaranteed by a related party is exempt *only if* the loan is primarily for the benefit of the ESOP participants, is at a reasonable rate of interest, and the only collateral given by the ESOP is shares acquired with the loan proceeds.

> *Critical consideration:* The use of experienced ESOP professionals should assure compliance with these Code and ERISA exemption requirements and avoid such penalties. ESOP transactions are never routine, and putting together the ESOP team of professionals is a critical consideration for every proposed ESOP transaction.

PART IV. VOTING OF COMPANY SHARES

ESOP participants do not directly own or vote their ESOP account shares and never control the day-to-day governance of the Company even if the ESOP owns 100% of the Company. The ability of an ESOP Company's management to run business operations is not affected by the ESOP ownership.

Further, ESOP participants do not elect the board of directors unless the Company designs the ESOP documents to specifically so provide. Typically, the ESOP trustee or other named fiduciary holds all of the voting rights to the ESOP shares, whether or not allocated to participant accounts; and, typically, from year-to-year, the only vote of the ESOP shares is with respect to the slate for election of the members of the board of directors.

> *Important exception:* Under the Code, ESOP participants have the right to direct the voting of the shares allocated to their accounts in the event of certain significant corporate transactions (requiring such vote under state law), including the sale of substantially all assets of a trade or business of the Company, or a corporate merger, consolidation, recapitalization or reclassification, liquidation or dissolution of the Company.

PART V. GENERAL SUMMARY OF ADVANTAGES AND DISADVANTAGES

A. Potential Advantages of an ESOP. The ESOP creates a market for closely-held Company shares without the need to sell the whole Company. Further, an ESOP serves as a tax-effective financial partner for acquiring all or part of a Company.

Individuals who sell C corporation shares to an ESOP may defer or completely escape taxable gain on the sale of their shares. As a result, ESOPs are effective tools for business succession and estate planning, and often serve as a partner in management buyouts.

An ESOP can improve cash flow. The contribution of Company shares to an ESOP generates tax deductions equal to the fair market value of the shares. In addition, ESOP loan transactions have an advantage over non-ESOP loans because of the ESOP's tax advantages. Lenders should recognize the borrower's cash flow advantages in the pre-tax repayment of principal. Company shares acquired through an ESOP loan transaction are purchased with pre-tax dollars, and both principal and interest payments generally are deductible by the Company.

For an S corporation ESOP, the Company's earnings are not taxable at the Company or shareholder level to the extent the Company is ESOP owned (*e.g.*, 100% ESOP owned means 100% "tax free" earnings). These tax free earnings may be retained at the Company level to fund growth, pay more competitive wages, or meet other business needs.

ESOPs help avoid the sale of the Company to parties outside the Company and local community. ESOP owned companies and their employees and jobs stay and generally thrive in the local community.

ESOP companies have significant potential for developing a highly motivated workforce of owner-employees. A number of studies comparing ESOP and non-ESOP companies have found ESOP companies more competitive and less likely to fail. Employees have a very real opportunity to build wealth through ownership in the Company.

B. Potential Disadvantages of an ESOP. An ESOP loan transaction obligates the Company to make annual contributions to the ESOP which is cash neutral because the ESOP repays the cash to the Company on the loan. Typically, however, the Company also assumes an outside loan obligation to a lender. These loan obligations affect cash flow and are a liability on the Company's financial statements. In addition, the Company has an obligation to provide the funds for the ESOP to meet its obligations to retired or otherwise terminated employees. This obligation will increase as the Company's share price increases.

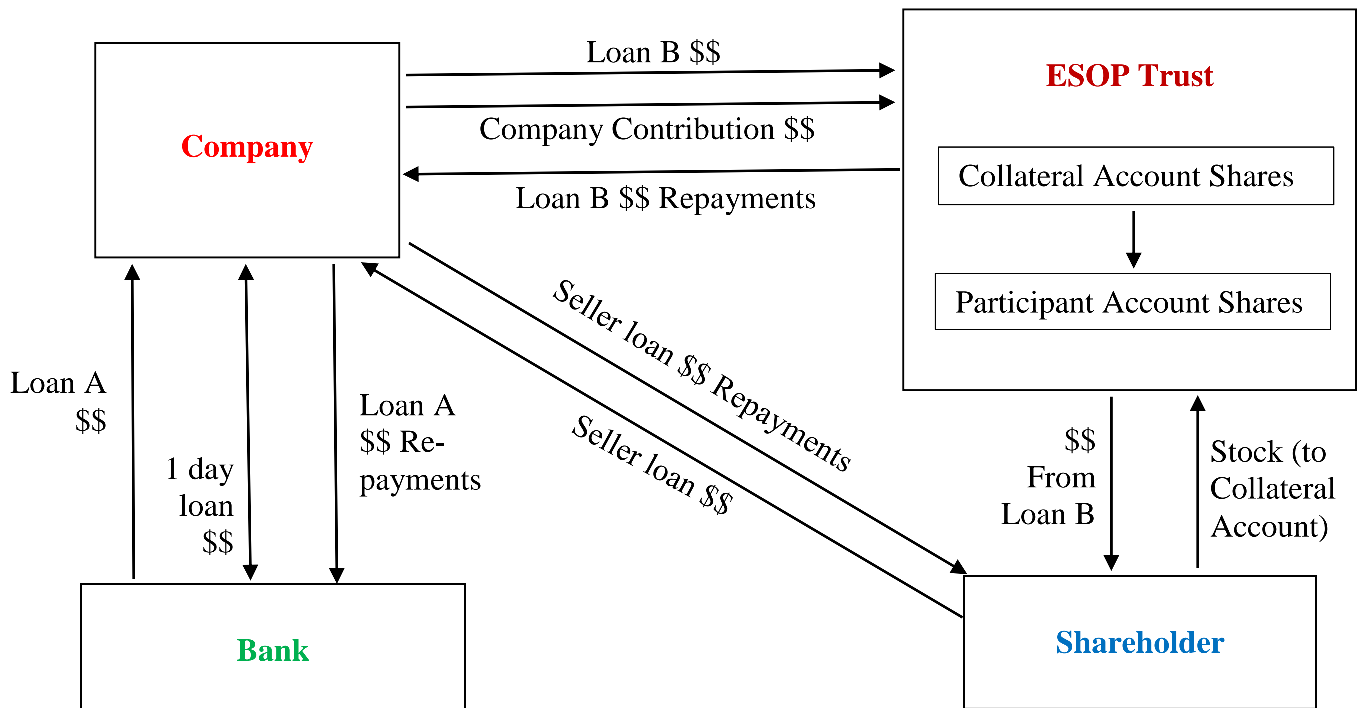
ESOPs are subject to complex legal requirements, and generally involve significant administrative costs, including fees for trustees, accountants, appraisers, and attorneys. Further, failure to comply with these legal requirements exposes ESOP fiduciaries, selling shareholders, and the Company to potentially substantial penalties and liabilities.

The ESOP also creates a new shareholder to whom the Company's officers and directors owe corporate fiduciary duties. This new shareholder may dilute the voting rights and ownership of existing shareholders. In addition, if the Company is classified as veteran owned, woman owned, etc., the ESOP may result in the loss of those statuses.

Because an ESOP is invested primarily in Company shares, the lack of diversification can result in a riskier investment for Company employees than that experienced under a non-ESOP retirement plan.

ATTACHMENT A

HOW A LEVERAGED ESOP TRANSACTION TYPICALLY WORKS



1. The Company adopts an ESOP and borrows money [Loan A] from an outside lender. Because banks will almost never provide the entire amount needed, transactions also normally have a seller financing component whereby the seller effectively loans the money to purchase his or her shares. For seller financing the Company obtains a 1 day loan from a financial institution for the amount the seller will lend to the Company. The Loan A proceeds and the 1 day loan proceeds are combined and are lent to the ESOP [Loan B]. The Loan proceeds then are used by the ESOP to purchase stock from the Shareholder(s). However, 90-100% of the 1 day loan proceeds are then loaned back to the Company by the Shareholder(s) in exchange for a promissory note. The Company then pays off the 1 day loan. The Company stock purchased by the ESOP is held in trust in a collateral account for Loan B.

2. The Company makes tax deductible contributions to the ESOP each year to permit the ESOP to meet its Loan B payment obligation. These dollars are paid back to the Company as Loan B payments. The Company then repays Loan A (and any seller financing) with these now pre-tax monies. Loan payments may also be made using dividends on the Company stock.

3. As Loan B is repaid by the ESOP, shares of Company stock held in the collateral account are released from that account and allocated to individual participant accounts in the ESOP. The calculation of shares released from collateral and their allocation to participants are both done in accordance with the loan and plan documents.

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