



**CONSIDER  
ESOPS IN  
LEGACY PLANNING  
FOR  
BUSINESS OWNERS**

3350 Players Club Parkway, Suite 330  
Memphis, TN 38125





with potential PEG purchasers. As Jim learned about the risks that are inherent in sales to a third-party such as a PEG, this strategy became less attractive. Jim realized that many of the key provisions of a purchase agreement such as representations, warranties, indemnifications, and escrows can result in a substantial amount of the supposed proceeds never being paid or being clawed back. More importantly, he realized that he began this process without first considering goals for himself, his employees, the company, and his family.

While the PEG could promise a big payday, Jim had spent the last 40 years creating and nurturing a certain company culture that he did not want to hand over to a PEG whose mission is to maximize returns for its investors. It is possible that the best interests of the PEG and its investors may be at odds with the best interests of the company's employees and its customers. Therefore, Jim terminated the third-party sale process and spent time with Joyce considering their goals and other liquidity options.

The Smiths' goals focused on creating a legacy of financial security for their children and grandchildren, as well as a sense of significance resulting from the establishment of a charitable trust to support their community, church, alma mater, and other worthy causes. Jim and Joyce also sought an equitable way to divide their assets between their children, a process that can be challenging for business owners. Like many business owners, two-thirds of the Smiths' net worth was tied up in the company. Therefore, if they left the company to Bob (the active child), Mary would be disadvantaged. On the other hand, leaving Mary a 50% interest in the company that Bob

managed would present a host of challenges.

Based on discussions with their team of professional advisors, Jim and Joyce decided the answer to their planning challenges was for the company to establish an ESOP that would purchase 100% of Jim's stock.

**Planned transaction.** Section 1042 provides a tax deferral to shareholders who sell C corporation stock to an ESOP. Therefore, the company revoked its Subchapter S election prior to the ESOP transaction in order to give Jim the option to elect the tax-favored treatment under that Code section.

The company financed the ESOP transaction with a \$20 million senior bank loan, fully amortized over five years, and a \$20 million subordinated seller note. Jim will receive \$20 million in cash at closing (from the senior bank loan) and he will receive payments of interest at the rate of 6% on the seller note until the senior bank loan is fully paid, at which time the seller note will be fully amortized over three years (or refinanced with a new bank loan). The seller note also has detachable warrants equal to 25% of the company's fully-diluted equity. The combination of a 6% interest rate and detachable warrants for 25% of the company's fully-diluted equity provides an all-in return on the seller note consistent with returns for commercial subordinated debt.

**Post-transaction position.** Immediately after the transaction, Jim and Joyce's assets include the \$20 million of investable assets they had prior to the transaction, plus \$20 million of cash they received at closing and a \$20 million seller note with detachable warrants. The planning process often ends when the ESOP transaction closes; however, Jim and Joyce's advisors recognized

this was just the first step in the process.

Jim elected Section 1042 tax treatment on his cash proceeds, and his financial advisor helped him select a diversified portfolio of income-producing stocks and bonds that satisfied the "qualified replacement property" (QRP) requirements of that Code section. Jim purchased those assets solely in his name so that at his death, the beneficiaries of his estate would receive a stepped-up basis in those assets, converting a tax deferral into a tax forgiveness that saves \$4.76 million of federal long-term capital gains tax (\$20 million  $\times$  23.8%).

**Charitable giving.** Jim and Joyce also had charitable planning goals in addition to tax, liquidity, and ownership succession planning goals. Ultimately, the Smiths sought to make a charitable gift equal to 50% of the value of Jim's stock. The Smiths considered the following three planning alternatives to achieve their charitable planning goals.

Jim first considered making a gift of half of his ABC stock to a charity or charitable trust prior to the ESOP transaction and then have the charity sell that stock to the ESOP. This approach would result in Jim avoiding paying long-term capital gains tax when the stock is sold because it will be sold by the charity rather than by Jim. He also would receive an income tax deduction for the value of the gift, subject to Internal Revenue Code limitations. This planning option had to account for the impact of a discount for lack of control (i.e., a minority interest discount) that is applied when determining the value of the charitable income tax deduction. Because Jim considered making a gift of a non-controlling interest (i.e., not more than 50%) in the company's stock, the value of the gift would be sub-

ject to the minority interest discount. Assuming a 20% discount, the value of the gift would be \$16 million rather than \$20 million.

The second alternative Jim considered was making a charitable gift of the \$20 million cash proceeds he received at closing. Because Jim preferred to avoid paying tax on his capital gain, he would invest his \$20 million cash in QRP and then make a charitable gift of the QRP. This gift would not be subject to the minority interest discount, which results in the value of the gift being \$20 million rather than \$16 million (as the option above).

Based on his planning goals and with the advice of his advisors, Jim made a gift of the \$20 million seller note (but retained the detachable warrants) to a charitable remainder trust (CRT), naming a donor-advised fund (DAF) established at his local community foundation as the remainder beneficiary. Jim's family was given the ability to direct grants from the DAF to qualifying charities each year. Jim and Joyce created a separate document that described their family values and instructed their children and grandchildren to meet semiannually to discuss and direct the disbursement of the grants to charities that supported those values. Jim and Joyce felt that this was a key component in helping perpetuate their values and legacy over succeeding generations. The value of the CRT gift (the remainder interest) was \$12.26 million, resulting in income tax savings of \$4.9 million (40%).

The calculation of the value of the CRT gift is based on Jim retaining a 6% income interest (\$1.2 million annually) for eight years. Jim and Joyce gifted this \$1.2 million CRT payment each of the eight years to a dynasty trust, which pur-

chased \$20 million of survivorship life insurance. Because the total premium of \$9.6 million was less than their combined lifetime gift tax exclusion of \$10.9 million, no gift tax was due on the gift, and the \$20 million life insurance proceeds would pass outside their estate, saving an additional \$8 million in estate taxes (40%).

The gift of the seller note is a "disposition of an installment obligation," resulting in a taxable gain equal to the difference between Jim's basis in the seller note and the fair market value of the installment obligation. Therefore, the result will be the same as if Jim had elected not to report the seller note under the installment method. He will report a long-term capital gain on the disposition of the note in the year of the gift to the CRT. For some taxpayers, this mismatch of tax being due in year one but cash being received in subsequent years could create a financial hardship. Fortunately for Jim, he and Joyce have an investment account with \$20 million of liquid assets and Jim received \$20 million in cash at closing from the ESOP. (When calculating Jim and Joyce's assets after the transaction, the \$4.9 million long-term capital gains tax Jim paid on the gift of the note to the CRT has been subtracted.<sup>6</sup>)

**Company's future.** Jim made a gift of the retained warrants to his son, Bob, who became the president and chairman of the board of the company. The warrants will provide a powerful equity incentive for Bob to continue to grow the company. The strike price of the warrants is based on the company's post-transaction drop in value. A 5% organic company growth rate, coupled with the deleveraging of the ESOP debt, will

produce a value of \$15.8 million of the warrants in eight years. The gift tax value of the warrants, which is based on the Black Scholes option pricing model, is \$2.22 per share for 333,333 shares, or \$739,999.

The amount of this gift plus the total amount of the annual gifts to the dynasty trust (\$10.34 million) is less than the \$10.98 million gift tax exclusion for 2017.

**Overall impact.** The charts in Exhibit 1 illustrates Jim and Joyce's assets before and after implementing the ESOP transaction and planning strategy.

In the process of achieving their financial and legacy goals, Jim, Joyce, and the company together have saved \$48.6 million in federal taxes, consisting of the following:

- Section 1042 income tax savings (23.8% of \$20 million)—\$4.76 million.
- Income tax deduction for \$20 million gift of seller note to CRT (40% of \$12.26 million remainder interest)—\$4.90 million.
- Estate tax savings on \$20 million dynasty trust (40%)—\$8.00 million.
- Gift tax savings on warrants (40% of [\$15.8 million future value less \$740,000 value of gift])—\$6.02 million.
- Present value of company tax savings over first ten years after ESOP transaction—\$24.92 million.

Using an ESOP transaction as part of an overall estate and gift tax planning strategy can allow business owners to maximize their legacy while minimizing taxes. Through the skilled advice of their advisor team, Jim and Joyce have used an ESOP transaction as more than a liquidity and ownership succession

<sup>6</sup> See Section 453(e)(1)(B) regarding dispositions of installment obligations.

planning strategy; they have achieved their comprehensive planning goals.

Jim and Joyce will be financially secure for life. Jim will continue to receive an annual salary of \$1 million from the company after the ESOP transaction, but since he is no longer a shareholder of ABC, he will no longer receive annual distributions of \$4 million; however, assuming their \$35.1 million investment account produces an annual return of 5%, Jim and Joyce will have an annual income of \$2.75 million per year. This income will be sheltered from tax for 4.45 years by the income tax deductions of \$12.26 million generated by the CRT gift. The \$20 million life insurance-funded CRT will provide a financial legacy for their community, church, alma mater, and other worthy causes and will serve as a platform to perpetuate Jim and Joyce's values.

The company's employees will continue to work in a culture they

have come to know and thrive under, and will not be subject to the whims of a PEG whose primary focus is maximizing returns for its investors. The liquidity created by the transaction will allow Jim and Joyce to treat each of their children fairly without having to deal with the challenges inherent in leaving company stock to an inactive child. Bob will serve as the company's CEO after the transaction, and the warrants will provide him a very generous financial incentive to continue to grow the company.

### Conclusion

While cashing in on one's lifework is a worthy goal, doing so while building a legacy that will last for generations represents a higher calling for many business owners. Jim and Joyce have created enduring legacies for their family, company, and community. For their family, they have provided financial security for their children, grandchildren, and succeeding generations. They

also have defined and created a system to reinforce their family's values through semi-annual family meetings.

For the company, they have created a liquidity event while protecting their employees from the risks inherent in a sale to a third party, such as downsizing and relocation. The ESOP also will provide their employees an equity-based incentive to increase employee productivity and enhance their employees' financial security. For their community, they have created a \$20 million trust that will make grants to worthy causes.

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*Section 1042 provides a tax deferral to shareholders who sell C corporation stock to an ESOP.*

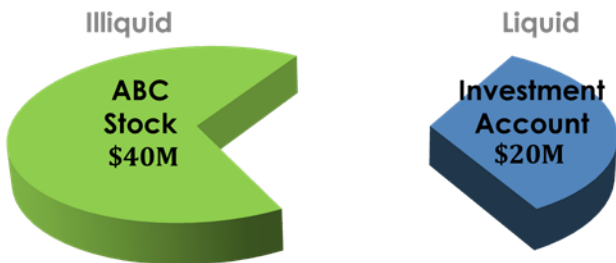
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## Exhibit 1

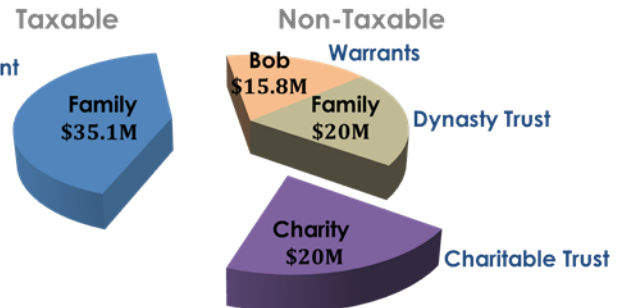
### Jim and Joyce's Assets

#### Pre-Transaction Assets \$60M (Taxable Estate)

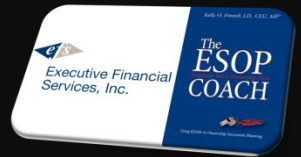


### Jim and Joyce's Legacy

#### Post-Transaction Legacy \$90.9M







## Kelly O. Finnell, J.D., CLU, AIF®

President

[kfin@execfin.com](mailto:kfin@execfin.com)

901.259.7979

- Founded EFS in 1981
- Publications:
  - *The ESOP Coach: Using ESOPs in Ownership Succession Planning*, available on Amazon
  - Co-author, "Consider ESOPs as an Estate Plan Component," *Estate Planning*, September 2014
- Frequent Conference Speaker
  - Great Plains Federal Tax Institute
  - Alabama Federal Tax Institute
  - Heart of America Federal Tax Institute
  - National Center for Employee Ownership (NCEO)
  - Business Enterprise Institute (BEI)
  - National Business Institute (NBI)
  - National Association of Certified Valuators and Analysts (NACVA)
- Education
  - University of Memphis Cecil C. Humphreys School of Law, J.D.
  - University of Memphis, B.A., *Magna Cum Laude*

## Andrew T. Holmes, LL.M., QKA

Vice President & Shareholder

[aholmes@execfin.com](mailto:aholmes@execfin.com)

901.259.7900



- Joined EFS in 2010
- Publications & Speaking Engagements:
  - Co-author, "Consider ESOPs as an Estate Plan Component," *Estate Planning*, September 2014
  - National Center for Employee Ownership (NCEO)
  - Business Enterprise Institute (BEI)
  - National Business Institute (NBI)
  - National Association of Certified Valuators and Analysts (NACVA)
- Education
  - Washington University in St. Louis School of Law, LL.M. in Taxation
  - Mississippi College School of Law, J.D.
  - University of Tennessee, B.S. in Accounting
- Professional Credentials
  - Qualified 401(k) Administrator (QKA), American Society of Pension Professionals & Actuaries (ASPPA)