



# ESOP POST-TRANSACTION ANALYSIS

As Department of Labor (DOL) investigation activity and private plaintiff litigation continues to increase, it is more important than ever that ESOP fiduciaries have, and maintain, a high level of understanding of their ESOP transaction(s). A proactive post-transaction analysis ensures that both plan sponsors and plan fiduciaries are well-prepared to handle investigations and/or litigation as they arise.

## HOW MCDERMOTT CAN HELP

McDermott will perform a critical analysis of your ESOP transaction in several strategic steps: We will complete an [assessment of key transaction documents](#), conduct a [post-assessment debrief](#) to review findings and determine next steps, and [produce go-to documents](#) to define obligations, processes and risks regarding the transaction.

## TRANSACTION ASSESSMENT

As part of this analysis, we will review and evaluate all aspects of the ESOP transaction, with DOL scrutiny in mind, including:

- The transaction team engagement process
- Financial and other corporate information provided to the valuator(s), including the development of projections and adjustments to EBITDA
- Transaction terms regarding the steps of the transaction that lead to full or partial ESOP ownership
- Evidence of negotiation of the transaction
- Warrant and SARs terms, terms of synthetic equity plans, control issues, seller compensation, term sheet requirements and other negotiated action items
- Implementation of covenants relating to corporate governance
- Applicability of representations and warranties and transaction indemnification requirements
- Calculation and payment of claw-backs
- Financial adjustment calculations made at closing
- Administration issues, such as any discrepancy between how the ESOP is being operated and how it was set up

## COMMITMENT TO OUR CLIENTS

Our expectation is that exceptional service, when combined with our industry knowledge, will serve as a basis of a successful and mutually beneficial long-term relationship.

**McDermott  
Will & Emery**

[mwe.com](http://mwe.com)

## OUR TEAM



**Ted Becker**  
Partner | Chicago  
[tbecker@mwe.com](mailto:tbecker@mwe.com)  
312 984 6934



**Chris Nemeth**  
Partner | Chicago  
[jnemeth@mwe.com](mailto:jnemeth@mwe.com)  
312 984 3292



**Erin Turley**  
Partner | Dallas  
[eturley@mwe.com](mailto:eturley@mwe.com)  
214 295 8020



**Allison Wilkerson**  
Partner | Dallas  
[awilkerson@mwe.com](mailto:awilkerson@mwe.com)  
214 295 8010

"We've partnered with McDermott Will & Emery...for several years; the firm continues to be an exceptional resource for our company. Their expertise is first-rate, and their guidance has proven invaluable. They are incredibly easy to work with."

- *Best Law Firms 2018*



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## POST-ASSESSMENT DEBRIEF

Upon review, we will conduct an interview to discuss the transaction and subsequent events. We then will prepare documents for the plan sponsor and/or fiduciary and a preliminary risk assessment that highlights key issues to help clients identify appropriate next steps to minimize the business risk that open-ended transaction questions may involve. We provide other ancillary services, depending on the circumstances of the particular engagement, such as an analysis of the purchase price and/or projection process to assist with inquiry by the DOL, as well as corporate governance advice, such as fiduciary training for board members or other fiduciaries.

## GO-TO DOCUMENTS

We will prepare go-to documents for reference and guidance. These documents, designed to mitigate the risks associated with DOL inquiry, include analysis that identifies post-transaction obligations, a summary memorandum highlighting key steps in your transactions, and a preliminary risk assessment.

## REPRESENTATIVE ESOP EXPERIENCE

- McDermott is representing the trustee in a putative class action brought by participants in the Thalhimier, Inc. Employee Stock Ownership Plan in which the plaintiffs alleged that the defendants breached their fiduciary duties by failing to discover an alleged fraud and approving contributions to the plan that were based, in part, upon unreliable valuations. (*Brincefield v. Studdard, et. al.* (D. Va.))
- McDermott defended a large, 100% ESOP-owned company in litigation resulting from Department of Labor allegations that ESOP overpaid in the \$100 million purchase of employer stock in 2010. The case settled on favorable terms to our clients. (*Acosta, Secretary of Labor v. Cactus Feeders, Inc., et al.* ((2:16-cv-00049) (N.D. Tex.))
- McDermott defended the bank trustee of the United States' third largest ESOP in a class action alleging breaches of fiduciary duties in the creation of ESOP and in voting at director elections. The case was settled with no contribution by the trustee.
- McDermott defended a major energy company and its directors in breach of fiduciary duty case alleging imprudent holding of company stock in ESOP. The case settled on favorable terms for our client. (*In re CMS Energy ERISA Litigation* (E.D. Mich.))
- On behalf of the American Society of Appraisers, McDermott prepared an amicus brief in *Brundle v. Wilmington Trust, N.A.*, a critical ESOP case pending in the U.S. Court of Appeals for the Fourth Circuit.

## ABOUT MCDERMOTT

McDermott Will & Emery partners with leaders around the world to fuel missions, knock down barriers and shape markets. With 20 offices on three continents, our team works seamlessly across practices, industries and geographies to deliver highly effective—and often unexpected—solutions that propel success. More than 1,100 lawyers strong, we bring our personal passion and legal prowess to bear in every matter for our clients and the people they serve.

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We apply our deep knowledge of both legal and business considerations to help design and implement custom solutions that:

**Support Corporate Objectives |  
Optimize Opportunities | Minimize Risk**

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