

112TH CONGRESS
1ST SESSION

S. 101

To amend the Internal Revenue Code of 1986 to improve the operation of employee stock ownership plans, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 5), 2011

Mr. ENSIGN introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to improve the operation of employee stock ownership plans, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employee Stock Own-
5 ership Plan Promotion and Improvement Act of 2011”.

1 **SEC. 2. 10 PERCENT PENALTY TAX NOT TO APPLY TO CER-**
 2 **TAIN S CORPORATION DISTRIBUTIONS MADE**
 3 **ON STOCK HELD BY EMPLOYEE STOCK OWN-**
 4 **ERSHIP PLAN.**

5 (a) IN GENERAL.—Clause (vi) of section 72(t)(2)(A)
 6 of the Internal Revenue Code of 1986 is amended by in-
 7 serting before the comma at the end the following: “or
 8 any distribution (as described in section 1368(a)) with re-
 9 spect to S corporation stock that constitutes qualifying
 10 employer securities (as defined by section 409(l)) to the
 11 extent that such distributions are paid to a participant in
 12 the manner described in clause (i) or (ii) of section
 13 404(k)(2)(A)”.

14 (b) EFFECTIVE DATE.—The amendment made by
 15 this section shall apply to distributions made after the
 16 date of the enactment of this Act.

17 **SEC. 3. ESOP DIVIDEND EXCEPTION TO ADJUSTMENTS**
 18 **BASED ON ADJUSTED CURRENT EARNINGS.**

19 (a) IN GENERAL.—Section 56(g)(4)(C) of the Inter-
 20 nal Revenue Code of 1986 is amended by adding at the
 21 end the following new clause:

22 “(vii) TREATMENT OF ESOP DIVI-
 23 DENDS.—Clause (i) shall not apply to any
 24 deduction allowable under section 404(k) if
 25 the deduction is allowed for dividends paid
 26 on employer securities held by an employee

1 stock ownership plan established or author-
2 ized to be established before March 15,
3 1991.”.

4 (b) EFFECTIVE DATE.—The amendment made by
5 this section shall apply to taxable years beginning after
6 December 31, 1989.

7 (c) WAIVER OF LIMITATIONS.—If refund or credit of
8 any overpayment of tax resulting from the application of
9 the amendment made by this section is prevented at any
10 time before the close of the 1-year period beginning on
11 the date of the enactment of this Act by the operation
12 of any law or rule of law (including res judicata), such
13 refund or credit may nevertheless be made or allowed if
14 claim therefor is filed before the close of such period.

15 **SEC. 4. AMENDMENTS RELATED TO SECTION 1042.**

16 (a) DEFERRAL OF TAX FOR CERTAIN SALES TO EM-
17 PLOYEE STOCK OWNERSHIP PLAN SPONSORED BY S COR-
18 PORATION.—

19 (1) IN GENERAL.—Section 1042(c)(1)(A) of the
20 Internal Revenue Code of 1986 is amended by strik-
21 ing “C”.

22 (2) EFFECTIVE DATE.—The amendment made
23 by paragraph (1) shall apply to sales after the date
24 of the enactment of this Act.

1 (b) REINVESTMENT IN CERTAIN MUTUAL FUNDS
2 PERMITTED.—

3 (1) IN GENERAL.—Clause (ii) of section
4 1042(e)(4)(B) of the Internal Revenue Code of 1986
5 is amended to read as follows:

6 “(ii) FINANCIAL INSTITUTIONS, IN-
7 SURANCE COMPANIES, AND MUTUAL
8 FUNDS.—The term ‘operating corporation’
9 shall include—

10 “(I) any financial institution de-
11 scribed in section 581,

12 “(II) any insurance company
13 subject to tax under subchapter L,
14 and

15 “(III) any regulated investment
16 company if substantially all of the se-
17 curities held by such company are se-
18 curities issued by operating corpora-
19 tions (determined without regard to
20 this subclause).”.

21 (2) EFFECTIVE DATE.—The amendment made
22 by paragraph (1) shall apply to sales of qualified se-
23 curities after the date of the enactment of this Act.

24 (c) MODIFICATION TO 25-PERCENT SHAREHOLDER
25 RULE.—

1 (1) IN GENERAL.—Subparagraph (B) of section
2 409(n)(1) of the Internal Revenue Code of 1986 is
3 amended to read as follows:

4 “(B) for the benefit of any other person
5 who owns (after the application of section
6 318(a)) more than 25 percent of—

7 “(i) the total combined voting power
8 of all classes of stock of the corporation
9 which issued such employer securities or of
10 any corporation which is a member of the
11 same controlled group of corporations
12 (within the meaning of subsection (l)(4))
13 as such corporation, or

14 “(ii) the total value of all classes of
15 stock of any such corporation.”.

16 (2) EFFECTIVE DATE.—The amendment made
17 by paragraph (1) shall take effect on the date of the
18 enactment of this Act.

19 **SEC. 5. SMALL BUSINESS AND EMPLOYEE STOCK OWNER-**
20 **SHIP.**

21 (a) FINDINGS.—Congress finds that—

22 (1) since 1974, the ownership of many small
23 business concerns (as defined under section 3 of the
24 Small Business Act (15 U.S.C. 632)) in the United
25 States has transitioned from the original owner, or

1 owners, to an employee stock ownership plan (re-
2 ferred to in this section as an “ESOP”), as defined
3 in section 4975(e)(7) of the Internal Revenue Code
4 of 1986;

5 (2) data collected on the performance of these
6 small business concerns owned 50 percent or more
7 by an ESOP evidences that more often than not
8 these ESOP-owned small business concerns provide
9 significant benefit to the employees of the small
10 business concerns and the communities in which the
11 small business concerns are located;

12 (3) under the Small Business Act (15 U.S.C.
13 631 et seq.) and the regulations promulgated by the
14 Administrator of the Small Business Administration,
15 a business concern that qualifies as a small business
16 concern for the numerous preferences of the Act, is
17 denied treatment as a small business concern once
18 50 percent or more of the business is acquired on
19 behalf of the employees by an ESOP; and

20 (4) a small business concern that was eligible
21 under the Small Business Act before being so ac-
22 quired on behalf of the employees by an ESOP, will
23 no longer be treated as eligible, even if the number
24 of employees, the revenue of the small business con-
25 cern, and the racial, gender, or other criteria used

1 under the Act to determine whether the small busi-
2 ness concern is eligible for benefits under the Act re-
3 main the same, solely because of the acquisition by
4 the ESOP.

5 (b) EMPLOYEE STOCK OWNERSHIP PLANS.—The
6 Small Business Act (15 U.S.C. 631 et seq.) is amended—

7 (1) by redesignating section 44 as section 45;

8 and

9 (2) by inserting after section 43 the following:

10 **“SEC. 44. EMPLOYEE STOCK OWNERSHIP PLANS.**

11 “(a) DEFINITIONS.—In this section—

12 “(1) the term ‘ESOP’ means an employee stock
13 ownership plan, as defined in section 4975(e)(7) of
14 the Internal Revenue Code of 1986; and

15 “(2) the term ‘ESOP business concern’ means
16 a business concern that was a small business con-
17 cern eligible for a loan or to participate in a con-
18 tracting assistance or business development program
19 under this Act before the date on which 50 percent
20 or more of the business concern was acquired by an
21 ESOP.

22 “(b) CONTINUED ELIGIBILITY.—An ESOP business
23 concern shall be deemed a small business concern for pur-
24 poses of a loan, preference, or other program under this
25 Act if—

1 “(1) on a continuing basis a majority of the
2 shares of and control of the ESOP that owns the
3 business concern are held by individuals who would
4 otherwise meet criteria necessary to be eligible for
5 the loan, preference, or other program (as the case
6 may be);

7 “(2) control of the ESOP business concern is
8 vested in the shareholders of the ESOP; and

9 “(3) the ESOP that owns the business concern
10 complies with all requirements of a tax qualified de-
11 ferred compensation arrangement under the Internal
12 Revenue Code of 1986.”.

13 (c) EFFECTIVE DATE.—The amendments made by
14 this section shall take effect on January 1 of the first cal-
15 endar year beginning after the date of the enactment of
16 this Act.

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