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**ESOP VALUATIONS  
DURING RADICAL CHANGE**

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**What's Going to Happen to  
Our Valuation**

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- + • January 5, 2020 - The World Health Organization ("WHO") first reported cases of pneumonia in Wuhan, China.
- + • January 7, 2020 - China confirms they have identified the virus as COVID-19.
- + • January 21, 2020 – The first case of COVID-19 is confirmed in the U.S.
- + • January 31, 2020 – The U.S. Government announced it will deny entry to foreign nationals who have traveled in China in the last 14 days.
- + • February 19, 2019 – The S&P 500 and NASDAQ markets close at all-time highs.
- + • March 1, 2020 - Florida declares a public health emergency. Over the next several days, Kentucky, New York, Maryland, Utah and Oregon declare states of emergency.
- + • March 3, 2020 - The Federal Reserve cut the federal funds rate by 0.5% as signs of an economic slowdown emerge.
- + • March 11, 2020 - The WHO declares the COVID-19 outbreak a pandemic.
- + • March 13, 2020 – The U.S. declares a national emergency to combat COVID-19.
- + • March 16, 2020 – The Federal Reserve slashes the federal funds rate to between 0% and 0.25% and announced a quantitative easing program of \$700 billion.

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	December 31	February 19	March 27
Dow Jones Industrial Average	28,538.44	29,348.03	21,636.78
Standard & Poor's 500*	3,230.78	3,386.15	2,541.47
NASDAQ Composite*	8,972.60	9,817.18	7,502.38
Russell 2000	1,668.47	1,692.57	1,131.99
Standard & Poor's Midcap*	2,063.02	2,098.57	1,422.92

\* - All time high close

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- + December 31, 2019 Valuation
  - + Company Financial Statements
    - + Bank
    - + Bonding
    - + Other
  - + Annual Participant Statements
  - + Dividends / S-Distributions
  - + Diversification
  - + ESOP Plan Distributions
  - + Account Segregation
  - + Transactions
  - + 409 (p)

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+ Fair Market Value / Adequate Consideration

“The price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties having reasonable knowledge of relevant facts.”

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+ Valuation : Based on Facts Known or Reasonably Knowable

+ SSVS-1 states: “the valuation analyst should consider only circumstances existing at the valuation date”.

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The COVID-19 pandemic has had meaningful impacts on the U.S economy starting in February of 2020. U.S. stock markets have fallen as much as 30% since reaching there all time high in February and economist have slashed expected growth for 2020. However, based on the timeline above, such factors were not “known or knowable” as of the valuation date and therefore do not impact our valuation.

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+ VALUATION UPDATE

- + Is it permissible?
- + Should it be done?
- + When Should it be Done?
- + Who Determines if a valuation update should be done?
- + What does it apply to?

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HORIZON BANK

+ VALUATION UPDATE – Should it be done?

- + Size and Materiality to Consider
- + Is Company affected by COVID-19
  - + Defense
  - + Healthcare
  - + Food
- + History of Interim Valuation

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+ VALUATION UPDATE – Is it Permissible?

- + READ THE ESOP PLAN DOCUMENT
- + READ THE ESOP PLAN DOCUMENT
- + READ THE ESOP PLAN DOCUMENT

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- + VALUATION UPDATE – Is it Permissible?
  - + ESOP Plan Document
  - + Amend the Plan Document
  - + Without a Plan Amendment????
  - + When / What does Amendment or Valuation Update Apply to?

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- + VALUATION UPDATE – Who Determines
  - + READ THE ESOP PLAN DOCUMENT
  - + ESOP Plan Sponsor?
  - + ESOP Plan Administrator?
  - + ESOP Trustee?
- + Can the Trustee Force an Update if in the Best Interest...
- + THIS DECISION WILL BE CONSIDERED A FIDUCIARY ACTION!!!

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- + Where Plan allows interim valuations, determination of interim valuation by Plan Administrator is subject to arbitrary and capricious standard of review.
- + See *Mitchell v. Falley's Inc.*, 958 F. Supp. 548, 553 (D. Kansas 1997) (ESOP specific case); see also *Craig v. Smith*, 597 F. Supp. 2d 814, 821 (S.D. Ind. 2009); *Jasper v. M.H. & B.L. Jasper, D.D.S., P.C. Profit Sharing Plan*, 340 F. Supp. 2d 1017, 1021-1022 (E.D. Mo. 2004) (non-ESOP cases).

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- + If Plan does not have language permitting interim valuations, then you may not do so (and Trustee has no basis to force). See *Bryant v. Community Bankshares, Inc.*, 265 F. Supp. 3d 1307, 1326-1327 (M.D. Alabama 2017).

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- + Can you amend the Plan to include an interim valuation date? Probably not for participants already separated from service or otherwise due a distribution or diversification election.
- + See *Pratt v. Petroleum Production Management Inc. Employee Sav. Plan & Trust*, 902 F.2d 651, 660 (10<sup>th</sup> Cir. 1990)

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- + VALUATION UPDATE – When Should it be Done?
  - + 3/31 , 4/30 , 5/31 , 6/30 , Later??
  - + When and how will current crisis end
    - + V shape Downturn?
    - + U shape Downturn?
    - + Longer Downturn?
  - + When does ESOP normally do
    - + Distributions
    - + Diversification
    - + Statements

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+ VALUATION UPDATE – What does it apply to?

- + Diversification
- + ESOP Distributions
- + Account Segregation (Reshuffling)
- + Warrants
- + SARs

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+ VALUATION UPDATE – What form / format should it take?

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+ What are we going to communicate??

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