

Morgan Lewis

Managing an ESOP Company in
Challenging Economic Times

Managing Through Difficult Times: How the Board and the Trustee Should Interact

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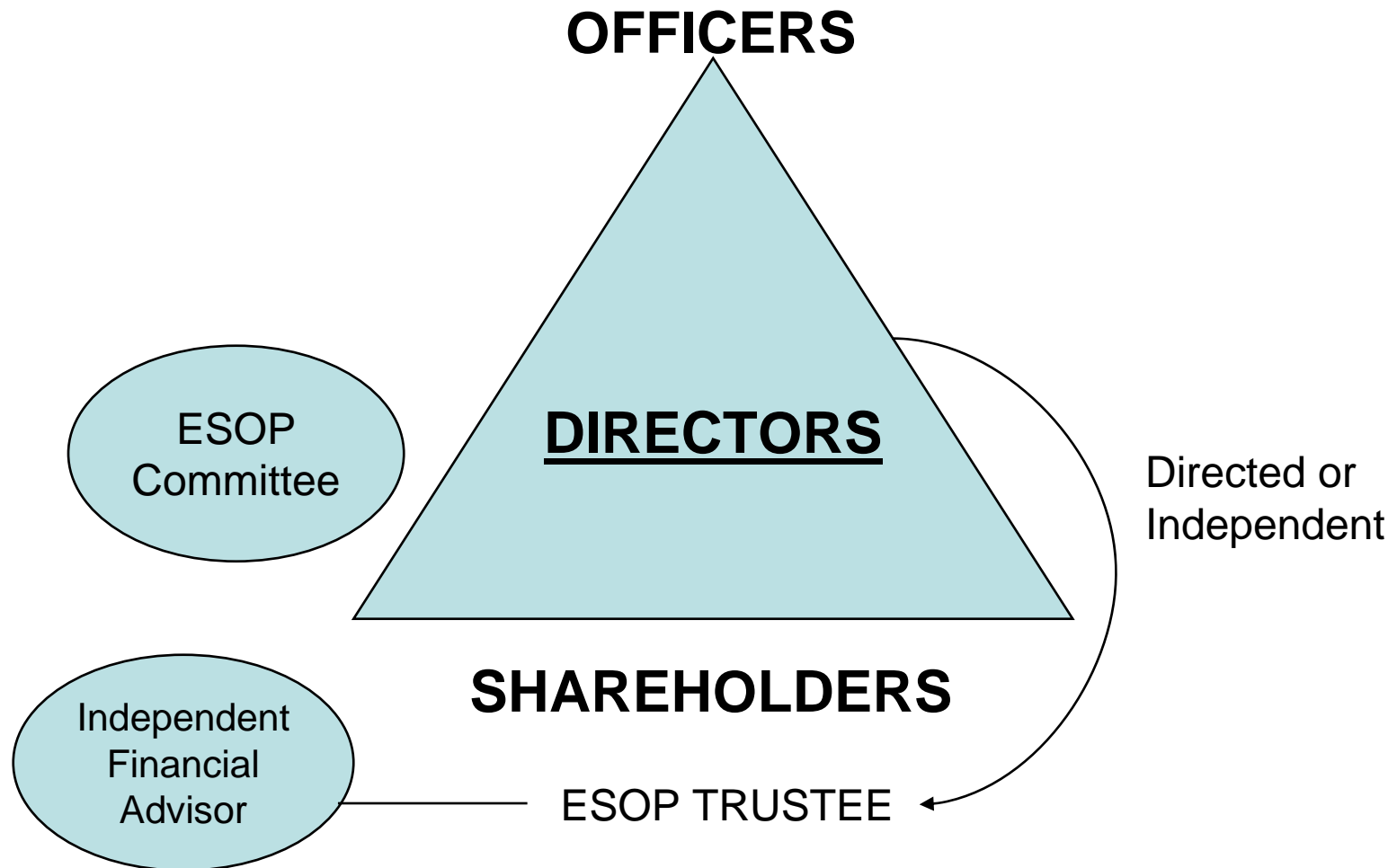
Introduction

- Background
- Focus of Presentation

Participants

- Board
- Officers
- ESOP Trustee
- Independent Financial Advisor
- ESOP Committee

The Relationship of Participants



Fiduciary Duties of Directors

- General Rule: Fiduciary Duties Owed to the Corporation and Shareholders
- Duty of Care
- Duty of Loyalty
- Breach of Fiduciary Duty Under ERISA
- Duty to Monitor

Duties and Liabilities of Non-Director Corporate Officers

- General Rule: Officers Owe Same Fiduciary Duties as Directors
- Officers' Conduct May Be Subject to a Higher Level of Scrutiny
- Applicability of Business Judgment Rule

Shareholder Rights

- Voting Rights
- Rights to Receive Dividends Declared by the Board
- Rights to Inspect the Books and Records of the Corporation
- Rights Related to the Transfer of Stock
- Rights to Bring Suit Against the Corporation for Wrongful Acts by the Directors and Officers
- Rights to Share Proceeds upon Liquidation
- Appraisal Rights
- Judicial Intervention Statutes

Fiduciary Duties of ESOP Trustee

- Exclusive Purpose
- Prudence
- Diversification
- Plan Documents

Specific Issues

- Restricted or Unavailable Capital
- Declining Valuations
- Layoff/Downsizing
- Internal Loan Compliance
- Distributions/Dividends
- 409(p) Compliance
- Insolvency
- Sale
- Opportunistic Acquisitions

Restricted or Unavailable Capital

- Breach of Loan Covenants
 - Freezing of line of credit
 - Triggering of “default” rate of interest
 - Requirement to pledge additional capital
 - Possible inability to refinance balloon notes

Restricted or Unavailable Capital (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Declining Valuations

- Impact of Current Market Conditions
 - Methodology
 - *Cash Flow Approach*
 - *Market Approach*
 - Timing
 - *Delay*
 - *Intervening Events*
 - *Interim Valuation*
- Management of Fluctuations in Value
- Prospect of Litigation

Declining Valuations (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Layoff/Downsizing

- Possible Partial Plan Termination
 - IRS Rev. Rule 2007-43 (June 2007)
 - Vesting
 - Repurchase liability
- Contraction in Payroll
 - Individual compensation cuts

Layoff/Downsizing (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

The Internal ESOP Loan

- Obligation to:
 - Company
 - Selling shareholder
- Reduction in Contributions
 - Section 415 limitations
 - Benefit levels
- Refinancing
 - DOL Field Assistance Bulletin 2001-1

The Internal ESOP Loan (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Distributions/Dividends

- Valuation Drop and Section 404(k)(2)(B)
 - Faster release of shares than repayment of loan
 - No shares pledged in final years

Distribution/Dividends (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Section 409(p)

- Impact of Decline in Value of Shares
- Impact of Layoffs
- Impact of Account Distributions/Conversions

Section 409(p) (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Insolvency

- Expanded Duties
- Issues Regarding Expanded Duties
 - Tests for determining insolvency
 - Vicinity of insolvency
- Scope of Expanded Duties

Insolvency (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Sale

- Purchase Price Less Than Most Recent Annual Valuation
- Purchase Price Less Than Inside Loan Amount
- ESOP Termination

Sale (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Opportunistic Acquisitions

- Structure of Transaction
- Financing

Opportunistic Acquisitions (continued)

- Role of the Board, Trustee, and Other Participants
 - Board
 - Trustee
 - Other Participants

Questions?

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