

Proactive Steps to Consider in a Down Economy

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Given the current economic climate, a number of the firm's clients are seeking legal counsel on how to proactively improve the effectiveness and efficiency of their organizations while also preparing for eventual potential claims and lawsuits. This Alert addresses some of the areas of concern for many corporations, both large and small, public and private. While all of these issues are not applicable to every company, some of the following may be worth considering.

Acquisitions/Dispositions/Joint Ventures

- If you have cash, there are many opportunities for acquisitions and joint ventures. Now may be the time to examine these options. Employee Stock Ownership Plans (ESOPs) or "going private" transactions may be viable options if the credit markets permit them.
- In contemplating mergers, acquisitions, joint ventures or other corporate transactions, consider representations and warranties insurance against potential unexpected pitfalls arising from the current economic challenges.
- Review prior transactions to see if you have indemnification or other types of claims against the prior owner. Review transaction documents for dispositions in advance of potential claims.

Executive Compensation/Employment Compensation

- Consider executive compensation packages. Now may be the time to reward those with a real impact. Many companies are examining how to reduce or eliminate the compensation expense associated with poor performers.
- Some public companies are considering repricing options (or replacement grants) or the granting of other equity incentives, given their current market price and potential loss of incentive.
- Confirm that plan administrators are meeting their fiduciary duties for 401(k) plans and pension plans, given the market movements.
- Boards may wish to review stock ownership guidelines to confirm that executives hold the proper value and amounts, given current share prices.
- Many executives and business owners are reviewing their estate plans to take advantage of reduced asset values.

Operations

- Carefully review supply contracts to determine if there are opportunities to renegotiate price and/or terms.
- Review carefully, through a timely insurance audit or otherwise, your insurance portfolio in the framework of thorough and realistic risk assessment strategies.
- Review other contracts to ascertain market opportunities.
- Review forms of purchase order, order acknowledgment and confirmations to confirm that they are "state of the art," reflecting current practice.
- Review communication policy to address possible worries of customers, suppliers and other constituencies.
- Do not forget that clients/customers drive the business and that visits and outreach to them during these times may pay future dividends.

Dispute Resolutions/Investigations

- Review major contracts to prepare for potential claims from others. It may be prudent to prepare litigation strategies in advance of lawsuits for some possible claims.
- Consider avoiding formal litigation and using alternatives, such as arbitration and mediation.

Corporate Governance

- Review directors and officers and errors and omission insurance policies and coverage.
- Review with the board policies regarding stock holdings, loans and pledges. Review 10b5-1 plans for possible terminations.
- Conduct a takeover drill. Be prepared with anti-takeover checklists and contacts.

Finance

- Consider refinancing options and alternatives. For those with obligations due in 2009 and 2010, many corporations are starting dialogue now with existing and potentially new or alternative lenders.
- Examine current borrowing terms and covenant compliance.

For Further Information

If you have any questions regarding the issues presented above or other ways to potentially improve profitability, in a cost-effective manner, during these challenging economic times, please contact any [member](#) of the [Corporate Practice Group](#) or the attorney in the firm with whom you are regularly in contact.