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DELIBERATE DECISION MAKING: ESOP VALUATION CONSIDERATIONS IN THE COVID-19 ENVIRONMENT

SPEAKERS:

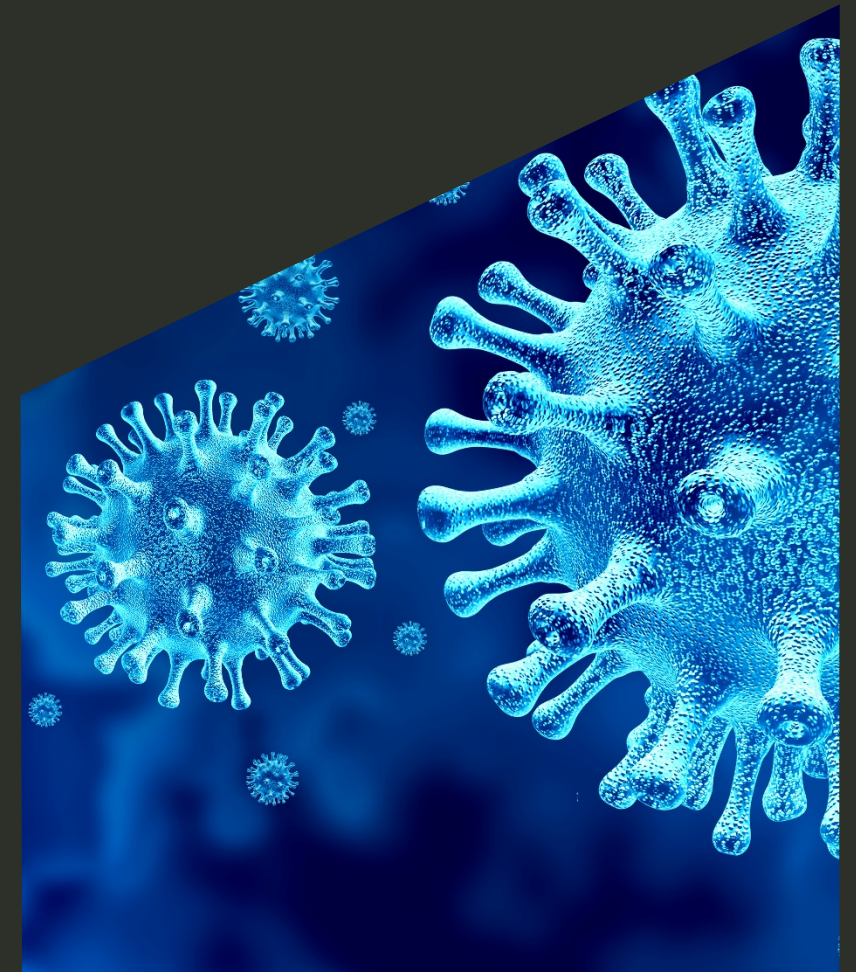
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April 9, 2020

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AGENDA

- CARES Act: Focus on PPP Loan
- 2019 Annual Valuation Process
- Interim Valuation: What Is It?
- Interim Valuation: Considerations
- Process, Governance, and Participant Communication

Note regarding Q&A: please use the Q&A feature in the Zoom window to submit your questions. All attendees will be muted and will be unable to verbally ask questions. Questions answered during the call will not be attributed to the participant who submitted the question. In the event we are unable to address all questions due to the time constraints, we will follow-up with you after the webinar.

CARES ACT: FOCUS ON PPP LOAN

Coronavirus Aid, Relief, and Economic Security (CARES) Act – Signed in law on March 27, 2020

- Intended to help small and large businesses, individuals, and the health care sector meet financial challenges caused by the economic uncertainty caused by the unprecedented COVID-19 pandemic.
- Title I of the CARES Act (“Keeping American Workers Paid and Employed”) facilitate the Paycheck Protection Program (PPP)

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT – PPP LOAN

Paycheck Protection Program (PPP) Loan

- CARES Act added to Section 7(a) of the Small Business Administration (SBA) Loan program
- Eligibility Requirements (< 500 Employee Threshold)
- Certifications for the PPP Loan
- Available Loan Amount
- Use of the PPP Loan
- Forgiveness of PPP Loan Amounts
 - Limitations
 - Traps for the Unwary
- ESOP Owned Company Considerations

LEGISLATION IMPACTING THE PPP LOAN

Economic Injury Disaster Loans (EIDL)

- ESOP owned companies with < 500 Employee Threshold
- Loan Terms
- \$10,000 emergency grant
- Duplication of loan amounts (use) issues

Ability to Defer Payroll Taxes

- Forgiveness of PPP Loan – company ineligible for this deferral

Employee Retention Credit

- Not available if PPP Loan is obtained

Family's First Coronavirus Response Act

- Wages paid under FFCRA for which credit is received are not “payroll costs” for PPP Loan

CORONAVIRUS RESOURCE CENTER

McDermott's Coronavirus Resource Center, brought to you by a multi-disciplinary team, will keep you informed of the latest developments and provide comprehensive insight to help you navigate this crisis.

Comprehensive resources, including videos, webinars, insights, and FAQs can be accessed by visiting [coronavirus.mwe.com](https://www.mwe.com).

Key Employee Benefits & Executive Compensation resources:

- COVID-19 FAQs: FOR EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION
(<https://www.mwe.com/insights/covid-19-faqs-for-employee-benefits-executive-compensation/>)
- CARES ACT SOCIAL SECURITY TAX DEFERRAL AND EMPLOYEE RETENTION CREDITS
(<https://www.mwe.com/insights/cares-act-social-security-tax-deferral-and-employee-retention-credits/>)
- IMPACT OF THE CARES ACT ON EXECUTIVE COMPENSATION
(<https://www.mwe.com/insights/impact-of-the-cares-act-on-executive-compensation/>)



2019 ANNUAL VALUATION PROCESS

ANNUAL VALUATION – LEGAL REQUIREMENTS

- Why does the ESOP have to have a valuation as of December 31, 2019*?
- What information goes into the annual valuation?
- What is the annual valuation used for with respect to the ESOP?

* Calendar year requirement

ANNUAL VALUATION – COMPANY INFORMATION

- “Known or knowable” Standard
- The annual valuation is “in process... can’t we include intervening events.”
- The Trustee determines value
 - Interaction with the trustee
 - Responding to the trustee’s request for information (hint: “as of” dates)
 - Pitfalls for internal trustees



INTERIM VALUATION: WHAT IS IT?

THE “VALUATION DATE”

Can my company perform an Interim Valuation for stock held by the ESOP?

- Driven by the ESOP document
 - “The Trust Fund will be valued as of each Valuation Date [annual valuation]...or on such other dates as determined by the Plan Administrator...”.
 - The decision may be assigned to the Plan Administrator and/or the Trustee
 - The decision may be permissive or mandatory
- Decision to determine the value of assets held by the ESOP is likely a fiduciary decision
- The Trustee determines value

USING THE INTERIM VALUATION

My ESOP includes language for the Interim Valuation - for what purposes may it be used?

- Driven by the ESOP document
 - “For purposes of distribution under this Plan, the value of a Participant’s Account balance is its value as of the applicable Valuation Date immediately preceding the date of distribution”.
 - Allocation issues?

If my ESOP does not include language for the Interim Valuation, can it be added?

- Impact on benefit calculations for those *currently* entitled to a distribution
- Court decisions regarding these requirements



INTERIM VALUATION: CONSIDERATIONS

THINKING ABOUT AN INTERIM VALUATION?

Not a single issue decision...

- As of what date would the valuation be performed
- Impact of COVID-19/response on business/projections
- Impact on synthetic equity
- Distribution obligations in the current plan year
- Modification of the distribution policy
- Weighing benefits to all participants
- Process for getting an interim valuation
 - Cost
 - Information
 - Impact on benefits/distributions/cash flow

THINKING ABOUT AN INTERIM VALUATION?

(Cont.) Not a single issue decision...

- Company cash flow considerations
- Historical actions
- Current economic impact on industry/macro economic client
- Regulatory/participant complaint



PROCESS, GOVERNANCE, AND PARTICIPANT COMMUNICATION

PROCESS

- Who makes this decision?
 - Plan document
 - Charter documents
- What information is considered?
- What provider(s) were consulted?
- What decision is made?
 - Maintenance of the status quo is a decision
- Hindsight review of the process....?

GOVERNANCE

- Board of Director and/or Plan Administrator Requirements
- Trustee Involvement
 - Inside trustee issues?
- Communication between the plan administrator and the trustee
 - Even if the answer is “stay the course”?
- Monitoring obligations
- How will governance be reviewed?

PARTICIPANT COMMUNICATION

Goal: Managing Expectations

- Uncertainty is scary
- May have increased communication in 2010
- Consider communications regarding:
 - Added plan features/requirements
 - Available elections and timing of such elections
 - Valuation timing
 - Distribution matters
 - Timing
 - Form
 - Diversification
- Active vs/and Terminated Participants

THANK YOU / QUESTIONS?



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