

FOLEY EXECUTIVE BRIEFING SERIES



**Wisconsin's Economic Forecast –  
Guiding Principles for  
Weathering the Storm**

January 12, 2009

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**Policies and Programs Proposed by  
President-elect Barack Obama**

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**The next 100 days**

- The Stimulus Package
- Health Care
- Taxes
- Energy
- Trade

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## Stimulus

- \$800 Billion
- Shovel ready projects – highways and mass transit
- Formula basis for states
- Deadline is slipping

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## Health Care

- Three reasons to expect reform:
- Democrats have called for systematic reform for decades
- A tribute to Kennedy
- Costs are soaring and 45 million are uninsured

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## Health Care Reform

- Three reasons to be skeptical:
- There is no consensus
- Margins are thin; 43 Republicans stopped Clinton, 41 can do the same; and Conservative Democrats want incremental reform
- See the stimulus; there is no money

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## Taxes

- \$300 million of cuts in the Stimulus
- \$500 payroll tax credit
- Faster depreciation on equipment; tax credit for new jobs created
- Bush tax cuts
- Mandate paid sick leave and paid family leave

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## Energy

- California as the Model not the outlier
- Waiver from clean air act on green house gas emissions
- Cap and Trade bill
- Leadership Browner, Jackson, Waxman—left of center

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## Trade

- US Trade Representative Ron Kirk
- Richardson is gone, but now?

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**Lessons Learned From our  
Troubled Suppliers**

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**Lesson: Know your Liquidity on a  
Daily Basis**

- Liquidity can create the need for court action
- When trade creditors get nervous, liquidity is depleted, due to demands for CIA, COD, or the like

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**Lesson: Make Sure Pricing Information  
is Accurate**

- Unreliable pricing data leads to under-pricing products with inaccurate margins and lost profits
- It can also impede critical business planning
- Reliable pricing information provides a basis for an operational restructure

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**Lesson: Ensure Financial Systems are Accurate**

- Faulty reporting systems lead to inaccurate financial and operational information, which delays the discovery of problems and which makes it difficult to project the future and react to changes

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**Lesson: Ensure a Corporate Culture That Encourages Information Flow**

- Companies should work to encourage the flow of critical information
- A culture of fear can stymie problem identification and delivery of pertinent information

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**Lesson: Be Realistic in Formulating Projections**

- Overly aggressive projections can negatively impact a company by damaging credibility with key constituents, such as customers and prospective purchasers

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**Lesson: Balance Industry Expertise and Ability in Independence Selecting Advisors**

- Industry familiarity has obvious advantages, but can also hinder an advisor's independence
- However, an advisor's lack of industry experience may hurt such advisor's credibility with constituents

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**Lesson: Ensure Capable Management to Execute the Business Plan**

- When undertaking any initiative, a company must have a firm grasp of the ability of management to execute the plan
- Continuity at leadership positions is essential; vacancies or high turnover hinder execution of the plan

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**Lesson: Use Restructuring Tools to Implement a Business Plan**

- A company must recognize and make use of the leverage that it has in order to operate profitably
- The Chapter 11 process is best used when implementing a strategy such as a tender offer, amendment of key contracts or the like
- Be proactive to be a winner as the economy forces restructure

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- Start operational restructuring before filing
- Develop one timing chart for all consultants, lawyers, and management, and measure weekly progress
- Take charge of the process
- Identify key employees and develop a plan to retain them
- Expect things to go wrong

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- Be completely transparent with customers
- See the glass as half full – others will see it as half empty
- Don't lose sight of your five-year vision
- Meeting and exceeding quality and delivery goals are essential for long-term success

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**Dealing With the Insolvent Dealer,  
Distributor or Sales Representative  
In Anticipation of Bankruptcy**

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- **Premium on Preparedness**
  - Check for perfection of security interests
  - Monitor credit limits closely to preserve “over-secured position”
  - Watch for unusual inventory builds
  - Monitor status of goods in transit
  - Manage payments that could be recovered as preferences

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- **What to do when Bankruptcy comes?**
  - Stop goods in transit
  - Assert and protect any right of reclamation
  - Protect any right of offset or recoupment
  - Petition Brcy Ct. for adequate protection of inventory or other perishable collateral
  - Refuse further extensions of credit
  - Pursue claims against guarantors and co-obligors

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- **What to do when Bankruptcy comes?**
  - File proof of claim
  - Amounts due for goods and services
  - Breach of contract damages
  - Failure to adequately service the market damages

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■ **Must a Supplier Continue to Perform as to a Bankrupt Dealer?**

- What about existing termination proceedings?
  - A completed termination will not be affected
  - An expired contract will not be affected
  - If further action is required by the supplier, the automatic stay will preclude the supplier from proceeding
  - If there is a cure period that is unexpired, the supplier may not proceed
  - In some courts termination may occur, if all that is left to happen is the passage of time

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■ **Must a Supplier Continue to Perform as to a Bankrupt Dealer?**

- Yes, until the contract is terminated

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■ **Must a Supplier Continue to Perform as to a Bankrupt Dealer?**

- The debtor can decide whether to accept or reject the distribution agreement, which is an “executory contract”
- In a chapter 7, the trustee has 60 days.
- In a chapter 11, the debtor may decide at any time before a plan of reorganization is confirmed, but the Court can require that it be done earlier
- Check to see if the contract is a term agreement and has expired

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- **If the distributor proposes to assume an executory contract:**
  - The court must approve
  - The debtor must cure non-monetary defaults
  - The debtor must compensate the supplier for any damages caused by breach or provide adequate assurances that it will provide compensation
  - The debtor must provide adequate assurances of future performance
  - No obligation to advance credit

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- **Suppose the distributor proposes to sell or assign the distribution rights as part of the bankruptcy proceeding?**
  - Courts are split on whether the supplier has to consent to the sale
  - If a supplier can show that the distributorship agreement is a “personal services contract” or if there is a grant of protected trademark rights, the supplier may be able to block the assignment

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- **Suppose the distributor proposes to sell or assign the distribution rights as part of the bankruptcy proceeding?**
  - The 3d, 4<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup> Circuit Courts of Appeal will likely permit the supplier to block the assignment
  - The 1<sup>st</sup> and 5<sup>th</sup> Circuits will likely not permit the supplier to block the assignment

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- **Drafting Considerations**
  - Make insolvency a default, not a bankruptcy filing
  - Emphasize the role of the dealer principal
  - Include criteria for assignment or sale of the business
  - In an unregulated state, include a termination “without cause” provision
  - Make the extension of credit discretionary
  - Include performance obligations and metrics

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- **Enforceability of Arbitration Provisions**

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