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OVERSIGHT — WHO NEEDS IT AND WHAT IS THE PROPER FORM?

What is oversight in a restructuring process? Generally, corporate governance and oversight reside with existing management and directors; however, as discussed in this article, additional forms of oversight may be required, especially in connection with financially distressed entities. Such oversight varies depending on whether the entity has elected to file for bankruptcy or is in the early stages of its restructuring. This article identifies and discusses the various oversight roles that can be implemented in a restructuring and the ramifications each role can have on the process.

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Oversight. Oversight is a word that is often met with negative reactions. But oversight, especially in the insolvency and reorganization context, can be positive — increasing the odds of turning a company around and result in a recovery for stakeholders that otherwise would not exist.

Court-supervised restructuring processes, such as a chapter 11 proceeding under the United States Bankruptcy Code, present several options for independent oversight, some of which are codified in the law and others that are merely a best practice or may be imposed by a lender. Indeed, oversight is a foundational principle in bankruptcy that ensures a fair, transparent restructuring process. Some oversight occurs during a formal bankruptcy case, while other forms of oversight occur prior to the commencement of a case. This article will first focus on oversight roles in a pre-bankruptcy context and will then review several post-bankruptcy oversight roles.

INTERNAL OVERSIGHT - INDEPENDENT DIRECTORS AND SPECIAL COMMITTEES

Good corporate governance often requires a company, regardless of its financial health, to have at least one independent director. Independence is generally defined to mean that the director has no material relationships with the company, either directly or as a partner, shareholder, or officer. An independent director should serve to provide a neutral, unbiased opinion for the relevant board of directors. Often, the importance of independent directors increases as a company experiences financial distress.

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