Cooley

Comp Talks

Key Takeaways:
Compensation Cornucopia: A Rapid-Fire Discussion of Hot Topics

At the Comp Talks session on November 17, 2021, **Compensation Cornucopia: A Rapid-Fire Discussion of Hot Topics**, our panelists – Cooley lawyers Ariane Andrade, Ajay Athavale, Ben Clark, Dan Herrmann, Austin Holt, Dani Nazemian and Nyron Persaud – discussed hot topics related to legal developments, market trends, and common (but avoidable) mishaps. Here are some of the key takeaways summarized by Cooley lawyers:

Related topic
Employment law considerations relating to vaccine mandates

The Securities and Exchange Commission recently reopened the public comment period for the Dodd-Frank Act clawback policy rules it originally proposed in July 2015, indicating that, once again, clawback policies are becoming a priority for the SEC. We recommend putting clawback policies on agendas for management and board-level discussions and kick-starting discussions with external advisers. Companies that have already adopted clawback policies should consider how to integrate the new requirements, and other companies should inventory the compensation arrangements that would be subject to the new rules and begin considering whether to go beyond the terms that are expected to be required in clawback policies.

Macroeconomic conditions have made it particularly challenging for some companies to maintain performance-based compensation programs that utilize a three-year performance period. Certain design alternatives, such as using multiple annual performance periods or implementing shorter and longer performance periods that run in succession, could help avoid adjusting performance goals or exercising discretion to provide for greater payouts than would have been earned based on actual performance.

In some cases, it is necessary to consider adjusting performance award goals to incentivize the desired outcome. A number of issues should be considered before approving any adjustments, including what adjustments are permitted under the terms of the awards, appropriate timing, accounting impact, disclosure implications, potential say-on-pay vote impact and supplemental awards as an alternative to adjusting existing awards.

Pointer

Review ISS pay practice FAQ #46 before disclosure.

The characterization of an executive termination has disclosure and, potentially, say-on-pay implications. When severance that was contractually intended for an involuntary termination is paid after a termination framed as a retirement or other voluntary termination, additional, clarifying disclosure may be required in order to avoid an adverse say-on-pay vote outcome.

When delegating authority to officers to grant equity awards, do not let your guidelines go stale – and be sure to track your numbers and document, document, document. If it is permitted under applicable law and the terms of your equity incentive plan, delegating grant-making authority to members of management can reduce administrative burden and allow you to move quickly when hiring in a competitive market. When officers make grants pursuant to delegated authority, documentation is critical, and we recommend maintaining a form of written consent that the delegated officer executes each time an award is granted pursuant to the authority.

As proxy season approaches, review director compensation and any applicable limits. Consider whether the compensation committee's independent consultant should review the director compensation program and limits on the amount of compensation directors may receive, especially in the event of stock price volatility and where compensation and limits are expressed as share numbers rather than dollar values. If a director compensation limit is in the equity plan, make sure there is a cross-reference to the limit in the director compensation policy to avoid inadvertently granting more than the applicable limit.

More on director compensation

Key takeaways from Cooley's September 2021 Comp Talks session on Director Compensation

Additional materials can be requested here.

Companies that are accrual basis taxpayers may be able to deduct in 2021 the amount of annual bonuses that will still be subject to contingencies at the end of 2021. This may be accomplished by (1) establishing a minimum bonus pool for the entire group of employees eligible to receive annual bonuses for 2021 performance and (2) paying out the full amount of the minimum bonus pool no later than March 15, 2022. However, IRS guidance indicates that use of the minimum bonus pool technique would constitute a change in the method of accounting, so companies considering this technique should consult with their accountants.

The pandemic has resulted in an increase in leaves of absence for a variety of reasons, and it is important to understand how equity awards are impacted by leaves of absence. Historically, employers have been fairly generous, often providing full vesting of equity awards during unpaid leaves of absence. However, the increased pandemic-related leaves of absence is causing companies to consider whether vesting should be tolled during a leave of absence, and how and when it should restart after a leave of absence.

Tax reform in 2017 eliminated certain opportunities for avoiding the limitation on compensation-related deductions under Section 162(m), which is important to understand as it relates to current and new compensation programs. There are also potential further upcoming changes, including the American Rescue Plan Act, which would expand the definition of "covered employee," and the Build Back Better Act, which would accelerate the expansion of the covered employee definition and aggregate compensation paid to a covered employee by all members of a corporation's control or affiliate group for tax years beginning after December 31, 2021.

Avoid overlooking certain employee stock purchase plan, or ESPP, terms that could inadvertently shatter the qualified status of the plan. In particular, confirm whether your ESPP has a termination date, after which no new offerings may start, and whether your ESPP has a limit on the number of shares that a participant may purchase on any purchase date.

Equity incentive plan and ESPP evergreen provisions may require action before year-end. In most cases, reducing or eliminating the number of shares that an annual evergreen increase will produce requires board action by year-end. Also, after annual evergreen increases take effect, the additional shares must be registered with the SEC and plan prospectuses should be updated.

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