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PUBLIC COMPANY ACADEMY EXECUTIVE COMPENSATION UPDATES

May 2017

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PROXY ISSUES

Proxy Issues

- Most companies need to submit "Say-on-Frequency" this year, if last submitted in 2011
- Hot button issues for ISS
- If approving or amending an equity compensation plan, consider adding non-employee director compensation limits
- Begin preparing for pay ratio disclosure in 2018

Say-on-Frequency

- Public companies are required to have a vote at least every six years on the frequency of the Say-on-Pay vote
- Prevailing practice is annual Say-on-Pay vote
- If initial Say-on-Frequency vote was in 2011, the 2017 proxy needs to include a Say-on-Frequency vote

Hot Button Issues for ISS

- From a review of ISS 2016 proxy reports, two issues stood out:
  - Discretionary elements in annual pay programs
    - In SEC comment letters relating to proxies that described discretionary compensation and the factors considered, SEC pressed companies to describe how those factors actually weighed into the compensation decisions
  - How rigorous are the performance goals
    - Especially where goals are lowered year-over-year, the company should describe why the goal is a rigorous performance goal

Hot Button Issues for ISS

- In 2017, ISS continues to scrutinize:
  - Rigor of performance goals, especially where performance goals have been lowered
  - Special awards/megagrants
  - Change in performance metrics during the performance period
  - Payment of bonuses despite failure to achieve pre-established threshold performance criteria
  - Unusual severance or retirement payments
  - "Problematic pay practices"
- ISS continues to comment on existence of legacy 280G tax gross-ups

ISS Evaluation of Equity Plan Proposals

- ISS made several changes to its equity plan scorecard
- In order to receive full points for minimum vesting, all types of awards must have minimum vesting
  - Full points will be earned if the equity plan specifies a minimum vesting period of one year for all award types
  - No points will be earned if the plan allows individual award agreements to provide for less than a minimum of one year of vesting
- Discretionary acceleration of vesting is a separate category, with no points given if committee has power to accelerate vesting other than upon death, disability, or change in control
- Points given for tying vesting of dividends to vesting of the underlying awards

ISS Evaluation of Equity Plan Proposals

- ISS may override the equity plan scorecard for problematic pay practices such as:
  - Liberal "change in control" definition, which includes the ability to modify the change in control definition
  - 280G tax gross-up
  - Plan allows repricing of options without shareholder approval
  - Other plan features or company practices that are deemed detrimental to shareholders

ISS Evaluation of Equity Plan Proposals

- If plan is amended to allow increased share withholding for taxes (i.e., share withholding above the minimum rate) and the plan has liberal share counting with respect to those shares, ISS may recommend against the plan
  - This issue can be addressed by providing that the shares withheld above the minimum rate will not be added back to the share reserve
- Proposals seeking only approval to ensure tax deductibility of awards pursuant to Section 162(m) generally will receive a favorable recommendation as long as the committee administering the plan consists entirely of independent outsiders
  - ISS will not necessarily give a favorable recommendation if the 162(m) proposal is "bundled" with plan amendments contained in the same proposal

Non-Employee Director Equity Plans

- ISS updated its policy on evaluating non-employee director equity plans
  - Two new factors: relative pay magnitude and meaningful pay limits
- On a case-by-case basis, ISS will evaluate:
  - Estimated cost relative to peers
  - Three-year burn rate relative to peers
  - Presence of any “egregious” plan features

Equity Plan Proposals: Trends and Considerations

- ISS equity plan scorecard methodology
  - Overall considerations of where it is willing to sacrifice points for flexibility
  - One-year minimum vesting schedules
  - Compensation Committee discretion to accelerate vesting
  - "Change in control" definition and providing expressly for double-trigger vesting
  - Share recycling
  - Increased share withholding for taxes
  - Pay dividends based on vesting of underlying award
  - Update to repricing provision

Equity Plan Proposals: Trends and Considerations

- Balancing of Board discretion against potential negative accounting impacts and shareholder reaction
- Review of 162(m) goals and limits
- Meaningful limits on director compensation
- Beyond ISS and Glass Lewis, consider investor reaction to plan provisions
- Regular shareholder outreach

ISS Pay-for-Performance Methodology

- In 2017, ISS is including relative evaluations of return on equity, return on assets, return on invested capital, revenue growth, EBITDA growth and cash flow from operations growth in its pay-for-performance reviews
  - These financial measures are in addition to ISS's continued use of TSR as a key metric for its evaluation of executive compensation
- ISS has indicated that the new metrics will not impact the quantitative screening results during the 2017 proxy season, but ISS may refer to the new metrics in its qualitative review
  - Consideration of the new metrics may mitigate or heighten identified pay-for-performance concerns

ISS: Non-Employee Director Pay

- ISS has articulated its framework for evaluating non-employee director pay and non-employee director pay proposals submitted to shareholders for approval
- These types of proposals have become more common as a result of recent litigation alleging excessive non-employee director compensation

ISS: Non-Employee Director Pay

ISS will consider the following factors relating to management proposals seeking shareholder approval of non-employee director compensation:

- the relative magnitude of director compensation as compared to companies of a similar profile
- the presence of problematic pay practices relating to director compensation
- director stock ownership guidelines
- equity award vesting schedules
- the mix of cash and equity-based compensation
- meaningful limits on director compensation
- the availability of retirement benefits or perquisites
- the quality of disclosure of the director compensation

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IMPLEMENTING DODD-FRANK

Dodd-Frank Implementation Overview

Provision	Proposed	Final	Effective	Applicable to
CEO Pay Ratio	September 18, 2013	August 5, 2015	W/r/t compensation in fiscal years beginning on or after January 1, 2017 (reported in 2018 proxy statement). Transition for newly public companies	Reporting companies other than emerging growth companies, smaller reporting companies and foreign private issuers
Clawback	July 1, 2015	TBD	SEC – TBD; exchanges have one year to adopt rules following effectiveness of SEC rule; companies then have 60 days to adopt policy	All issuers listed on a national exchange. Covers compensation based on financial info for periods ending on and after SEC effectiveness
Pay for Performance Disclosure	April 29, 2015	TBD	TBD; phase-in for number of covered years in the new table	Reporting companies other than emerging growth companies and foreign private issuers
Hedging Disclosure	February 9, 2015	TBD	TBD	Reporting companies other than foreign private issuers

Brief Overview of the CEO Pay Ratio Rule

- The disclosure will be effective for the 2018 proxy season
- The rule generally requires companies to disclose in their proxy statements the ratio of the CEO's total pay to the median total pay of all US and non-US employees
- Possible that the effective date will be postponed

Calculating the Ratio: Action Steps

- Brief the Board and/or Compensation Committee on the requirements
- Organize a team of internal professionals to address the requirements
- Develop an action plan for compliance
- Implementation of the new rules will require certain decisions:
  - **Evaluate Alternative Methodologies for Identifying the Median Employee** Each company may select a methodology to identify its median employee based on the company's facts and circumstances, including total employee population, a statistical sampling of the population, or other reasonable methods.
    - For example, a company could identify the median of its population or sample using any consistently applied compensation measure from compensation amounts reported in its payroll or tax records.

Calculating the Ratio: Suggested Action Steps

– **Consider Cost-of-Living Adjustments**. The rules allow a company to apply a cost-of-living adjustment to the compensation measures it uses to identify the median employee

  - SEC has acknowledged that differences in the underlying economic conditions of certain countries in which companies operate would have an effect on the compensation paid to employees in those jurisdictions, resulting in a statistic that does not appropriately reflect the value of the compensation paid to individuals in those countries
  - The rules give companies the option to adjust for these differences
  - The rules allow a company to make cost-of-living adjustments to the compensation of its employees in jurisdictions other than that in which the CEO resides

Calculating the Ratio: Action Steps

- **Determination of Total Compensation**. Assess the company's ability to calculate all items of compensation or whether reasonable estimates may be appropriate for some elements. Companies may use reasonable estimates when calculating compensation for employees other than the CEO (with disclosure)
- **Select a Testing Date**. The rules allow a company to select a date within the last three months of its last completed fiscal year on which to determine the employee population for purposes of identifying the median employee
  - The company would not need to count any individual who is not employed on that date
  - Companies that employ temporary or seasonal workers should pay particular attention to this rule
  - The rules permit the company to identify its median employee once every three years

Calculating the Ratio: Action Steps

- **Non-U.S. Employees**. The rules allow a company to exclude non-U.S. employees from the determination of its median employee in two circumstances:
  - Non-U.S. employees who are employed in a jurisdiction with data privacy laws that make the company unable to comply with the rule without violating those laws. The rules require a company to obtain a legal opinion on this issue
  - Up to 5% of the company's non-U.S. employees, including any non-U.S. employees excluded using the data privacy exemption. Under this exception, if a company excludes any non-U.S. employee in a particular jurisdiction, it must exclude all non-U.S. employees in that jurisdiction

Calculating the Ratio: Action Steps

– **New Employees**. The rules allow a company to exclude certain new employees from its calculation

- o A company may exclude any employees obtained through a business combination or acquisition for the fiscal year in which the transaction becomes effective
- o Companies may annualize the total compensation for a permanent employee who did not work for the entire year, such as a new hire or an employee on an unpaid leave of absence
- o Companies may not annualize the compensation of part-time, temporary, or seasonal workers when calculating the required pay ratio

Calculating the Ratio: Action Steps

- **Independent Contractors**. Individuals employed by unaffiliated third parties or independent contractors would not be considered employees of the company. However, the rules do not appear to allow companies to exclude many of the individuals that other areas of the law would recognize as independent contractors
  - Companies should re-examine the workers they currently characterize as independent contractors
- **Other Benefits Provided to Employees**. The rules allow a company to include personal benefits that aggregate less than $10,000 and compensation under non-discriminatory benefit plans such as health and retirement plans, in calculating the annual total compensation of the median employee as long as these items are also included in calculating the CEO's annual total compensation

Preparation for New Internal Pay Ratio Disclosure

- Compensation Committee Discussions
  - Companies should prepare the Compensation Committees for the disclosure and put it in context
  - Companies should consider whether additional information/analysis or other internal pay equity disclosures may be helpful as they evaluate the disclosure

Mitigate Negative Reaction to CEO Pay Ratio Disclosure

- Ensure that competitive compensation opportunity levels are monitored against the median of an appropriate peer group
- Ensure that the executive compensation program design provides pay-for-performance linkage, including challenging goals and with a majority of target compensation in the form of long-term equity
- Apply "best practice" compensation policies, including robust stock ownership guidelines, clawbacks, and prohibition of hedging and pledging in company stock
- Maintain strong corporate governance practices
- Ensure that employees are competitively and appropriately paid based on industry standards
- Consider how the company will address and explain disclosure of the CEO pay ratio

NON-EMPLOYEE DIRECTOR COMPENSATION LITIGATION

Update on Non-Employee Director Compensation Litigation

- Recent lawsuits have challenged director compensation under Delaware law at several public companies (claiming breach of fiduciary duty, unjust enrichment, corporate waste)
- Core issue is that outside directors are viewed as interested parties with respect to their own compensation
- The directors received their grants under equity plans that did not specify the amount or the form of compensation to be granted to non-employee directors, and the non-employee directors who received the grants also approved them
- A director compensation program may lose the protection of the business judgment rule under Delaware law because of arguable self-interest, making it subject to the much higher “entire fairness” standard

Update on Non-Employee Director Compensation Litigation

- Most companies do not want to subject their compensation arrangements to that scrutiny or run the risk of defending the claims at trial
- As a result, companies may choose to settle
- Recent settlements indicate where the trend may go; sample size is very small, but the following may be part of the mix:
  - Dollar amount cap on director equity (not share cap)
  - Submission of cap to shareholder vote
  - Compensation Committee commitment and charter amendment to hire independent consultant to advise annually on cash and noncash director compensation
  - Enhanced disclosure on outside director compensation
- Proactively adopt some or all?

Update on Non-Employee Director Compensation Litigation

Recommendations

- Review how outside director compensation practices compare to proxy peers' practices
- Hard cap on director equity
  - Implement through a plan amendment and express as a dollar-amount limit, not as a number of shares
- Submission of the cap amendment for shareholder vote
  - Shareholder approval generally not required by NYSE rules, but approval is needed to secure the protection of the business judgment rule
  - Because the amendment is a hard cap, the provision will need to be resubmitted for a shareholder vote each time a company wants to increase it
- Enhanced disclosure on outside director compensation
  - Proxy disclosure should include (a) the philosophy on outside director compensation; (b) the process that the company, committee, and board followed to arrive at the amounts for the year; and (c) the specific annual award for each outside director

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NEW ACCOUNTING RULES ON SHARE WITHHOLDING FOR TAXES

New FASB Standard on Share Withholding to Satisfy Tax Obligations

- The prior rule:
  - To maintain favorable equity classification treatment for a share-based award, cash settlement of the award for tax withholding purposes could not exceed the *minimum* statutory withholding requirement
- The new rule - ASU 2016-09:
  - Permits tax withholding on share-based awards up to the *maximum* statutory rate in the relevant jurisdiction
  - Effective for annual reporting periods beginning after December 15, 2016 and interim periods within those annual periods for public companies
  - Effective for annual reporting periods beginning after December 15, 2017 and interim periods within those annual periods for non-public entities
  - Early adoption permitted
- Many equity compensation plans have the minimum statutory tax rate “hardwired” into the plan, so that an amendment is required to effect this change
- Companies intending to take advantage of this ability to permit increased withholding for equity awards must address various securities law, IRS, and payroll issues before increased share withholding can be implemented

Federal Tax Withholding on Equity Awards

- Federal income withholding obligations arise when share awards *vest* or are *settled* or (nonqualified options and SARs) *are exercised*
- Federal tax withholding on equity awards can be determined in one of two ways:
  - By treating the payment as a supplemental wage payment subject to the 25% withholding rate on supplemental wages up to $1 million (39.6% on supplemental wages of greater than $1 million); or
  - By applying the withholding amount generated by an employee's Form W-4

Mechanics of Changed Share Withholding for Taxes

- An employee may file a revised Form W-4 claiming a reduced number of exemptions or entering a specific dollar amount (on Line 6) of increased withholding as a means of increasing the withholding rate towards the 39.6% level
- The IRS process **does not allow an employee to specify a percentage rate** for federal income tax withholding on Form W-4
- The Form W-4 must apply to *all* wages paid to the employee while the Form W-4 remains in effect
- Procedures should be implemented to ensure that an employee who increases tax withholding through Form W-4 does not direct withholding of amounts in excess of the maximum applicable tax rate or, in the case of Section 16 officers, the estimated taxes on the equity award distribution
- So, the employee should not request an additional amount of withholding on Line 6 of Form W-4 that would result in a withholding percentage that is greater than the employee's highest marginal federal plus state tax rate, or else liability accounting will apply

Mechanics of Share Withholding

- From a tax perspective, a company does not have to treat all employees the same with respect to tax withholding on shares. Employers can therefore accommodate the preferences of their award recipients
- Companies should discuss the increased withholding with their payroll departments and stock plan administrators to understand any additional administrative limitations on implementation

Stock Exchange Listing Rules

- NYSE rules require shareholder approval of any “material revision” to an equity plan. However, under recent NYSE guidance, a plan amendment to provide for the withholding of shares based on the participant’s maximum tax obligation (or Compensation Committee discretion to authorize such withholding) is not a material amendment if the shares withheld were never issued
- NASDAQ FAQs have been updated to follow suit — generally, an amendment to increase the withholding rate to satisfy tax obligations would not be considered a material amendment to an equity compensation plan requiring shareholder approval

Section 16 Issues on Share Withholding for Taxes

- In order to exempt the disposition of shares through share withholding from being a "sale" of shares under Section 16 (insider trading rules), Rule 16b-3(e) requires <u>advance</u> approval by the Compensation Committee or the Board
- The Compensation Committee should approve the resolutions before any shares are withheld for Section 16 officers
- The company should not retain discretion to determine whether shares will be withheld, or the amount of share withholding, for Section 16 officers
- Rule 16b-3(e) requires that the advance approval be specific, but there is no guidance from the SEC as to how much specificity is needed
- An SEC CDI indicates that share withholding for Section 16 officers should not exceed the participant's estimated federal, state, local, and foreign obligations attributable to the payment of the award

Share Withholding for Taxes and Exercise Price Payment - New Section 16 Disgorgement Claims

- New Section 16 disgorgement claims seek to match open market purchases by Section 16 insiders with exempt-reported tax and exercise price withholding transactions elected by Section 16 insiders
- Letters were sent to dozens of companies and the claimants have filed multiple lawsuits following company refusals to disgorge profits from insiders

SECTIONS 409A AND 162(M): PLANNING OPPORTUNITIES & TRAPS FOR THE UNWARY

Code Section 409A

- Applies to any service provider with a "legally binding right" in one year to compensation that is or might be payable in a later year
  - Applies to employees, directors and independent contractors
- Applies broadly to all types of pay arrangements:
  - Equity awards (including discounted stock options)
  - Employment agreements
  - Severance arrangements
  - Change of control agreements
  - Cash bonus and performance incentive plans
  - Earn-outs
- Must comply with Section 409A, or fall within an exception to Section 409A

Penalties for Failure to Comply with Section 409A

- Consequences to employee
  - Current-year income taxation of all vested benefits
  - Additional 20% penalty tax
  - Premium interest tax equal to federal underpayment rate, plus 1% retro to vesting date, for all vested benefits
  - For operational failures, same penalties for benefits earned in any plan of the same type, even for plans where no failure occurred
- Consequences to employer
  - Under-withholding penalties for regular income taxes (additional 409A taxes not subject to withholding requirements)
  - Failure to report violation on Form W-2 or 1099-MISC

Complying with Section 409A: Permitted Deferral Elections

- General Rule: Must elect to defer compensation before beginning of first year in which related services are performed
- Subsequent Deferral Election: May elect to defer compensation after beginning of year in which services commence, if election made 12 months before scheduled payment date, and pushes out receipt of compensation by at least five years (12-month/5-year Pushout Rule)
- Numerous Exceptions:
  - First time eligibility in plan (and all plans of same type): initial deferral election permitted 30 days after initial eligibility, with respect to compensation earned after election date
  - Compensation that remains unvested for 12 months: initial deferral election permitted up to 30 days after employee attains binding right (but not later than date that is 12 months before vesting date)
  - Performance based compensation: initial deferral election permitted as late as six months before the end of performance period (but not later than the date the amount of compensation becomes readily ascertainable)

Complying with Section 409A: Permitted Payment Terms

- Permitted Section 409A payment triggers are:
  - Specified date or schedule
  - Separation from service (as defined by regulations)
  - Death
  - Disability (as defined by regulations)
  - Change in control (as defined by regulations)
  - Unforeseeable emergency
  - Lapse of substantial risk of forfeiture ("vesting")
- Six-month delay for payments made to key employees of publicly traded company, but only if payment trigger is separation from service

Complying with Section 409A: No Accelerations

- Payment of NQDC subject to Section 409A cannot be accelerated
- Legacy of Section 409A's origins in *Enron* scandal
- Exceptions
  - Payments under a domestic relations order
  - Payments to comply with ethics agreements with federal government, or ethics laws or conflict of interest laws of federal, state, local, or foreign government
  - Payments necessary to pay FICA taxes when deferred compensation vests
  - Payment upon income inclusion for 409A noncompliance
  - Limited cashouts
  - Plan termination and liquidation
  - Other limited exceptions

Exceptions from Section 409A

- No "legally binding right" when employer has discretion not to pay
- Short term deferrals: "vest and pay"
- Non-discounted options and stock appreciation rights
- Involuntary separation pay and window benefits (limited)
- Certain foreign compensation arrangements
  - Compensation paid to nonresident alien and not subject to US tax at time of (i) legally binding right or (ii) vesting
  - Tax equalization agreements (limited time frame)
  - Other, including separation pay required by law; broad based plans; plans covered by exemption under treaty; foreign social security systems

Exceptions from 409A: Spotlight on Short Term Deferrals

- Short term deferrals are excepted from Section 409A
  - "Vest and pay" exception
  - Applies to any amount payable not later than 2½ months after the year in which substantial risk of forfeiture lapses (compensation "vests")
- Key is defining "substantial risk of forfeiture." Compensation is nonvested if payment is contingent on:
  - Performance of substantial services
  - Satisfaction of a business condition
  - Does not include non-payment of services
- Compensation may be nonvested under Section 409A even if payable upon an involuntary termination of employment
  - Involuntary termination is treated for all Section 409A purposes as the lapse of a substantial risk of forfeiture. Includes a voluntary quit "for good reason," if the good reason is sufficiently substantial

Common Errors

- Deferred Compensation Plans
  - Definition of compensation not administered correctly
  - Mid-year enrollment for newly eligible participants
  - Application of bonus deferral elections
- Identifying separations from service
  - Reduction in hours
  - Leave of absence
  - Transfer to an affiliate on a different payroll system
  - Ongoing consulting work after termination of employment
  - Rehire following termination
  - Stock sale vs. asset sale

Restricted Stock Units (RSUs)

- RSUs generally are subject to Section 409A
  - In contrast to restricted stock, which is governed by Section 83
- Exempt from Section 409A as "short-term deferrals" if always settled within 2½ months after the end of the vesting year
  - Can accelerate vesting and payment without violating Section 409A
  - But, RSUs scheduled to be paid in annual installments generally cannot qualify as short-term deferrals
  - Also watch out for earlier vesting triggers (e.g., retirement, involuntary termination) where awards are not settled until a future date — but can still be short-term deferrals if subject to performance conditions

Terminating & Liquidating Acquired Plans

- Special exceptions to the anti-acceleration rule for termination and liquidation of target's nonqualified deferred compensation plan(s)
  - Termination must occur within 30 days before and 12 months after the change in control (as defined for purposes of Section 409A)
  - Liquidation must occur within 12 months after <u>the termination</u>
    - No requirement to pay everyone at the same time, but cannot let participants choose their payment year
  - Must apply same treatment to all plans of target that are aggregated for purposes of Section 409A
    - Need to review employment agreements, severance agreements, and legacy or informal arrangements that may be subject to Section 409A
    - But, does not have to include the buyer's plans
  - Must apply same treatment to all participants included in the change in control
  - Lump sum may trigger state income tax liability in non-resident state

Code Section 162(m): General Rule

- Compensation paid to a “covered employee” in excess of $1 million generally is not deductible by the corporation
  - Applies only to public companies
  - Certain types of compensation are disregarded
  - Does not affect employee’s tax treatment
- Limitation applies in the year the amount is otherwise deductible by the company
  - Timing of services is irrelevant

Identifying Covered Employees

- Covered employees include the CEO and the three highest paid officers (other than the CEO and CFO) for SEC disclosure purposes
  - Notice 2007-49: Does not include the CFO
- Covered employees are identified on the last day of the company's taxable year
  - Covered employee terminates before year end?
  - Ex-CEO continues to work as a part-time employee or consultant?

Performance Pay Exception

- Must be granted by a Compensation Committee consisting solely of two or more outside directors
- Compensation may be paid only upon the attainment of one or more pre-established, objective performance goals
  - Outcome of performance goals must be substantially uncertain at the time the award is issued
  - A performance goal is objective if a third party having knowledge of the relevant facts could determine whether the goal has been achieved
  - The performance goal must be established after no more than 25% of the "period of service" has elapsed (safe harbor if established within 90 days, for a performance period of more than one year)
- Committee may have discretion to decrease an award, but not to increase an award
- Before any payment is made, the Compensation Committee must certify that the goals have been satisfied

Performance Pay Exception

- Shareholders must approve the “material terms” of awards to covered employees. These include:
  - The employees or categories of employees that are eligible to receive the compensation;
  - The business criteria upon which the performance goal(s) may be based (but not specific targets); and
  - Maximum amount that could be paid to any employee, or the formula used to calculate compensation if the performance goal is reached. For equity awards, a share limit will suffice.
- Mechanics of shareholder approval.
  - Separate shareholder vote.
  - No deduction if the awards would be paid anyway.
  - Reapproval required every five years if the Compensation Committee has the authority to change the targets under a performance goal.

How Can You…

- Issue qualified performance-based awards that are based on a combination of objective and subjective factors?
- Exercise discretion to increase the amount payable after the 90-day/25% deadline expires?
- Exempt time-based equity awards from the Section 162(m) limit?
- Give the committee discretion to waive performance requirements?

Change in FASB Rules

- Many awards allow for measurement of performance metrics without regard to “extraordinary” items
- Prior FASB guidance defined “extraordinary” as “unusual and infrequent”
- New guidance eliminates the term “extraordinary” and allows for adjustment based on “unusual OR infrequent” items
  - ASC Topic 225-20 and Accounting Standards Update 2015-01
  - Provides greater flexibility to adjust performance metrics
- Change is mandatory for FYs beginning on or after 12/15/16, and optional for earlier periods that appear on income statements
- When should companies begin applying the new standard to performance-based awards?
  - Existing plan language may incorporate accounting rule changes automatically
  - Otherwise, change should be adopted when plan is next submitted for shareholder approval
  - Implementing change without shareholder approval risks negative section 162(m) treatment

Common Mistakes

- Performance requirements waived in the event of retirement, or involuntary or "good reason" termination
- Payments made before the performance period ends
- Performance goals adjusted to reflect changed circumstances without specific plan language that allows for the change
- Use of performance metrics that were not approved by shareholders
- Compensation Committee includes non-outside directors
- Failure to obtain shareholder re-approval
- These are the simple rules, not the hard ones!

Biography

Jeanie Cogill
Partner
New York
+1.212.309.6320
jeanie.cogill@morganlewis.com

Mims Maynard Zabriskie
Partner
Philadelphia
+1.215.963.5036
mims.zabriskie@morganlewis.com

Jonathan Zimmerman
Partner
Washington, DC
+1.202.739.5212
jonathan.zimmerman@morganlewis.com

Jeanie Cogill practices in the executive compensation, pension plan investments, and employee benefits areas of law. She advises public and private companies on all aspects of executive compensation arrangements, including equity incentive programs, golden parachute arrangements, performance incentive arrangements, severance programs, and nonqualified deferred compensation plans.

Mims Maynard Zabriskie advises on complex executive compensation and employee benefit plan matters, including the design, negotiation, and implementation of executive compensation, equity compensation, and tax–qualified retirement plans and shareholder approval of equity plans. She counsels large publicly and privately owned businesses, including Fortune 500 enterprises, technology companies, and universities on a range of legal issues related to executive compensation governance, and employee benefit plans.

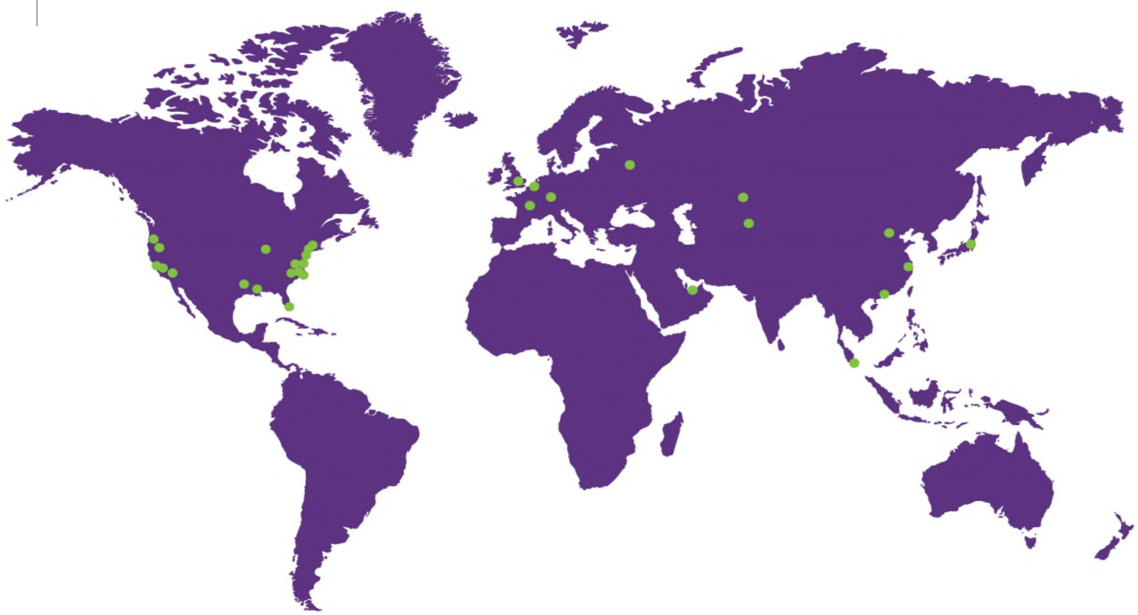
Jonathan Zimmerman helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on Internal Revenue Code and Employee Retirement Income Security Act (ERISA) compliance for retirement, health and welfare, and executive compensation plans. He has particular experience with Code Sections 409A, 162(m), and 280G, and with taxes and fees arising under the Affordable Care Act (ACA).

Our Global Reach

- Africa
- Asia Pacific
- Europe
- Latin America
- Middle East
- North America

Our Locations

Almaty	Dallas	London	Paris	Shanghai*
Astana	Dubai	Los Angeles	Philadelphia	Silicon Valley
Beijing*	Frankfurt	Miami	Pittsburgh	Singapore
Boston	Hartford	Moscow	Princeton	Tokyo
Brussels	Hong Kong*	New York	San Francisco	Washington, DC
Chicago	Houston	Orange County	Santa Monica	Wilmington



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THANK YOU