Practical Tactics
to
Negotiating Executive Employment Contracts

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Presented by:
Anthony J. Eppert
713.220.4276
AnthonyEppert@AndrewsKurth.com

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Anthony Eppert
Partner
Andrews Kurth LLP
Tel: +1.713.220.4276
Email: AnthonyEppert@AndrewsKurth.com

- Tony practices in the areas of executive compensation and employee benefits

- Before entering private practice, Tony:
  - Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit
  - Obtained his LL.M. (Taxation) from New York University
  - Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
    - Editor-in-Chief, Journal of Medicine and Law
    - President, Tax and Estate Planning Society

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- Upcoming 2016 webinars:
  - Designing Change-in-Control Pay (5/12/16)
  - Increasing the Life Expectancy of an Equity Plan's Share Reserve (6/9/16)
  - Compensation Governance: Designing 10b5-1 Trading Plans (7/14/16)
  - Building a Compensation Peer Group: A Step-by-Step Approach (8/11/16)
  - Preparing for the Next Proxy Season: Start Now (9/8/16)
  - Energy Companies: Compensation Governance Survey/Trends (10/13/16)
  - Identifying and Solving Pitfalls in Equity Compensation Administration (11/10/16)
  - The Importance of Miscellaneous Contractual Provisions: A Drafter's Perspective (12/8/16)

- Upcoming 2017 webinars:
  - To be announced in September
  - To suggest a topic for 2017, please e-mail Anthony Eppert

Purpose of this Presentation

- The purpose of this presentation is to take the attendee through an executive contract negotiation with a focus on the economic perspectives

- To that end, this presentation covers the following economic issues from both the company and Executive perspective:
  - Pre-negotiation considerations,
  - Recital provisions,
  - Duties,
  - Exclusive services,
  - Term of employment,
  - Compensation,
  - Equity,
  - Indemnification,
  - Employment Termination Triggers,
  - Severance pay,
  - 409A considerations,
  - 162(m) considerations,
  - Non-disparagement provisions,
  - Other terms, and
  - Minimizing application of 280G

Pre-Negotiation Considerations

- Who is the proper party to negotiate the business points on behalf of the company?
  - The Board of Directors (or its delegatee),
  - The Compensation Committee of the Board of Directors (or its delegatee),
  - The CEO or another officer, or
  - In-house legal counsels the proper party the CEO

- Should the parties begin negotiating the business terms on a term sheet that, once agreed upon, would be integrated into an offer letter or employment agreement?

- Should the company perform a benchmarking analysis to determine “how much” and “what type” of compensation should be offered?

Pre-Negotiation Considerations (cont.)

- If the business judgment rule is applied:
  - Then the decisions of a director will be presumed to have been informed, made in good faith, and accomplished with the belief that such was in the best interests of the company; the presumption makes it more difficult for a plaintiff to prove such director breached his/her fiduciary duties

- Tally sheets
  - Tally sheets can be instrumental to preserving the business judgment rule defense because tally sheets can be used to help prove that the directors made an "informed" decision
  - A tally sheet lists each component of an executive's compensation and tallies it up (a.k.a., a placemat)
  - The Compensation Committee should require the use of a tally sheet when negotiating with executive officers
  - It should be attached to the minutes

- Amounts to tally
  - Income for the year
  - Projected values under different performance and termination scenarios
  - Potential realized option and stock gains
  - Potential total wealth accumulation

Pre-Negotiation Considerations (cont.)

- In contrast, Executive's pre-negotiation considerations generally relate to:
  - Maximize capital gains tax over ordinary income tax,
  - Defer income (if desired),
  - Protect Executive's economic position upon consummation of a change in control,
  - Provide Executive with upside as the company's value appreciates, and
  - Minimize exposure to possible additional/excise taxes under Sections 409A and 280G of the Internal Revenue Code of 1986, as amended,
  - Help avoid or mitigate the 6-month wait rule under Section 409A (if desired)

Recital Provisions

- Recital provisions are not necessary, but are helpful in situations where the "story" could be important

- For example, detailed recitals might be appropriate where:
  - Executive is being hired by the company in conjunction with a corporate transaction such as an asset sale;
  - Executive is being offered equity as an "inducement" and such equity grant does not come from a stockholder approved equity plan
    - An appropriate recital helps to document the "inducement position" (*i.e.*, an inducement to hire is required under the applicable NYSE/NASDAQ stockholder approval exception)
  - Executive has an existing employment agreement with the company that is being replaced (or amended and restated) by a new employment agreement. In such cases, thought should be given to whether the new employment agreement would cause an impermissible substitution of benefits under Section 409A

Duties

- Addressing the section entitled “Duties”
  - This is a key provision on when or if:
    - Executive can later terminate for “good reason” and receive severance pay, or
    - The company later seeks to terminate Executive for cause
  - The purpose of this provision is to address Executive’s title, reporting responsibilities and job description duties
  - To provide the company with flexibility, structure the verbiage to have Executive report to a “position” instead of a named individual
  - The company has greatest flexibility if the Duties section is drafted generically as opposed to highly specific, thus providing the company with greater flexibility if Executive’s duties need to later change (*i.e.*, due to changing business needs)
    - Retaining flexibility in favor of the company is particularly important if the employment agreement contains a “good reason” trigger for termination
  - If applicable, this section should also address membership responsibilities on the company’s board or committees

Exclusive Services

- Provision addressing "Exclusive Services"
  - The purpose of this provision is to contractually require Executive to devote his/her full working time to the company
  - To the extent outside activities are permitted (*e.g.*, serving on another entity's board of directors), consider:
    - Requiring advance approval from the Board and/or placing a numerical limit on the quantity or type of outside activities; or
    - Specifically identifying any permitted outside activities

Term of Employment

- The purpose of this provision is to address the date on which the contract will expire, *e.g.*, upon the earlier of: (i) the 3rd anniversary of the Effective Date and (ii) the termination of Executive's employment under this Agreement
  - The "3rd anniversary" is an example of a natural expiration of the contract, which generally dictates that no severance pay would be owed UNLESS Executive was successful in the negotiation to require severance pay upon expiration of the contract

- Consider whether to add an "evergreen" provision that requires the contract term to be automatically extended for an additional [__] year periods unless prior written notice is provided within [___] days prior to the expiration of the term
  - Sometimes the amount of severance will be linked to the remaining term of the contract, including the remaining term with any evergreen. If such is the case, limiting the evergreen to one year terms is desirable from the company's perspective
  - If severance pay is not tied to the remaining term of the contract, consider whether an evergreen provision is even necessary (though in such instance an evergreen provision may avoid a future attempt to renegotiate the contract)

Compensation

- Base salary
  - It is good practice to indicate “when” Base Salary will be reviewed by the Board
  - Goal is to avoid off-cycle attempts by Executive to renegotiate his/her Base Salary

- Bonus
  - Generally, contracts offer Executive with a bonus, even though the timing and the amount of any bonus might be subject to the sole discretion of the Board
  - It is also common to set a target bonus equal to a % of Executive’s Base Salary
  - Be sure any provisions addressing the timing of a bonus payout comply with Section 409A

- Signing bonus
  - Signing bonuses are typically provided in cash or equity
  - Determine whether the signing bonus should be forfeited or subject to clawback if Executive terminates employment within a certain period of time or attempts to violate any provision of the contract

Compensation (cont.)

- Equity grants (see also Equity slides)
  - Indicate when the grant is to occur (to avoid sloppy grant practices and potential allegations of back-dating)
  - Is it to occur in the future when the Board acts? Or is it to occur on the Effective Date of the contract?
  - If the latter, ensure that the Board approves the contract because, absent a valid delegation of authority from the Board to another individual or committee, only the Board has the authority to grant equity
  - Consider whether key terms of the equity grant should be included within the contract, such as number of shares, strike price (if any), vesting schedule, any restrictive covenants, etc.
    - Alternatively, have the key terms attached as an Exhibit and ensure the merger clause of the executive contract incorporates the Exhibit

- Inducement grants
  - For companies with a limited share reserve under their equity incentive plan, consider using an inducement grant
  - Inducement grants can be provided outside of the company's stockholder approved equity incentive plan
  - Inducement grants are an exception to the stockholder approval requirements under NYSE and NASDAQ listing rules

Compensation (cont.)

- Benefits
  - Absent a start-up company situation, Executive would likely be entitled to participate in welfare plans and retirement plans sponsored by the company
  - Executive should ascertain whether highly compensated employees of the company are able to fully participate in the 401(k)
    - If not, due to non-discrimination testing, then the company could make contributions to a non-qualified deferred compensation plan for the benefit of Executive

- Expense reimbursement
  - Typically reimbursement will be subject to the company's reimbursement policies and procedures

- Fringe benefits
  - From the company's perspective, and to allow for company-wide future policy changes without Executive consent, it is best to list as few fringe benefits within the contract as possible
  - Examples include: (i) first class air travel, (ii) relocation assistance, (iii) financial planning assistance, (iv) business club memberships, (v) golf memberships, etc.

Compensation (cont.)

- Car allowance
  - Providing a dollar allowance is the cleanest
  - However, if instead a lease is to be provided, then consider who is responsible for the lease if Executive terminates prior to the end of the lease term? Who has the first opportunity to purchase the car from the lease?

- Relocation assistance
  - Reasonable costs of relocation are often covered. How is this defined? Does it cover sale of the prior home, a house hunting trip, broker fees/commissions, the whole family, the number of trips, etc.?

- Legal fees
  - Depending on the position, it is customary to cover legal fees incurred by Executive in conjunction with the review and negotiation of the contract

Equity: Options v. Stock Grants: ISOs

- An incentive stock option (an "***ISO***") is a stock option granted to Executive to purchase stock of the company
  - Numerous tax rules must be satisfied for an option to qualify as an ISO

- Generally, ISOs are preferred by optionees (compared to nonstatutory stock options, a.k.a., "***NSOs***") because of their favorable tax treatment
  - No taxable income is triggered to the optionee at the time of grant
  - No taxable income is triggered to the optionee at the time of exercise
    - However, the spread between the fair market value of the underlying stock and the exercise price would be an item of adjustment for purposes of calculating any alternative minimum tax
  - If the stock is held for at least 2 years from the date of grant AND at least 1 year from the date of exercise (the "***Holding Period***"), then any gain realized on a subsequent sale of the underlying shares would be taxed at long-term capital gains rates

- Neither the grant nor the exercise of an ISO provides the company with any compensation deduction

Equity: Options v. Stock Grants: ISOs (cont.)

- A "***Disqualifying Disposition***" occurs when the Holding Period (prior slide) is not satisfied. In such instances:
  - The optionee would recognize ordinary taxable income (and the company would have a corresponding compensation deduction) equal to the excess (if any) of the fair market value of the stock as of the date of exercise over the exercise price
  - Such compensation income would be added to the stock's basis to determine any capital gain that must be recognized on the Disqualified Disposition

- An open question is whether a net exercise of an ISO will destroy ISO eligibility as to the whole ISO? Or will ISO eligibility be lost only as to the portion that was netted?
  - The law is not settled on this issue (the law is silent or unclear)
  - A conservative position is to treat the whole option as having lost ISO status
  - However, the Code is a law of restraint, and since there is no direct tax law that would require the whole option to lose ISO treatments, a position could be taken that ISO treatment is not lost as to the remaining ISO stock

Equity: Options v. Stock Grants: Restricted Stock

- Generally, the grant of restricted shares would constitute a corporate transfer but not a tax transfer
  - A corporate transfer means Executive is entitled to voting and dividend rights even if the award is subject to forfeiture
  - If the award is subject to forfeiture (*i.e.*, a vesting schedule), then the tax transfer typically coincides with vesting

- Tax treatment to Executive assuming no 83(b) election was timely filed:
  - Unless an 83(b) election is timely filed, Executive would generally recognize ordinary taxable income equal to the fair market value of the award (less any amount paid) as of the earlier of: (i) the date the shares became transferable, or (ii) the date the forfeiture restrictions lapse (i.e., the date of vesting)
  - Until such time, any dividends received by Executive on account of a restricted stock grant would be treated as compensation, not dividends
  - After such time, any sale of the underlying stock would be treated as capital gain or loss equal to the difference between the sale price and tax basis

Equity: Options v. Stock Grants: Restricted Stock (cont.)

- Tax treatment to Executive assuming an 83(b) election was timely filed:
  - Executive could attempt to capture as much of the anticipated future appreciation of the underlying stock at long-term capital gains rates by making an "83(b) election" within 30 days from the date of grant
    - The purpose of an 83(b) election is to limit the ordinary taxable income element to the value of the stock on the date of grant (which could be much lower than the amount of ordinary taxable income Executive would otherwise recognize at the time of vesting)
    - This means Executive would be taxed at the time of the initial transfer
    - Then, any increase in the fair market value of the stock subject to the 83(b) election would typically be taxed at capital gains rates at the time Executive later sells the stock

- Tax treatment to the company:
  - If Executive is an employee, the company would have a withholding obligation and employment taxes at the time Executive recognizes ordinary income
  - Additionally, and at the same time, the company would have a corresponding compensation deduction

Equity: Options v. Stock Grants: A Comparison

EVENT	ISO	NSO	Restricted Stock
Date of Grant (Employee)	No federal income tax consequence to the optionee or the company	No federal income tax consequence to the optionee or the company	No federal income tax consequence to the participant or the company unless the participant timely filed an 83(b) election If the participant timely filed an 83(b) election, then the participant would recognize ordinary taxable income equal to the difference between the FMV of the shares on the date of grant and the price paid. The company would have a corresponding withholding obligation and compensation deduction
Date of Vesting (Employee)	No federal income tax consequence to the optionee or the company	No federal income tax consequence to the optionee or the company	If no 83(b) election was filed, then the participant would have compensation income (taxed at ordinary rates) equal to the difference between the FMV of the shares on the date of vesting and the price paid, if any. The company would have a corresponding withholding obligation and compensation deduction If instead the participant timely filed an 83(b) election, then vesting would trigger no federal income tax consequence to the participant or the company

Equity: Options v. Stock Grants: A Comparison (cont.)

EVENT	ISO	NSO	Restricted Stock
Date of Exercise (Employee)	No federal income tax consequence to the optionee or the company However, the "spread" under an ISO – *i.e.*, the difference between the FMV of the shares at exercise and the exercise price – would be classified as an item of adjustment in the year of exercise for purposes of AMT. In order to avoid the application of AMT, the optionee would have to sell the shares within the same calendar year in which the ISOs were exercised. However, such a sale within the same calendar year would constitute a "disqualifying disposition" (see next slide) The company would have no withholding obligation and would not be entitled to any deduction	Optionee would have compensation income (taxed at ordinary rates) equal to the difference between the option's exercise price and the FMV of the underlying shares on the date of exercise The company would have a corresponding withholding obligation The company would generally be entitled to a compensation deduction equal to the amount the optionee included as ordinary income	Not applicable

Equity: Options v. Stock Grants: A Comparison (cont.)

EVENT	ISO	NSO	Restricted Stock
Date of Sale (Employee)	The tax consequences depend on whether the sale is a "disqualifying disposition" (*i.e.,* no disqualifying disposition if the stock is held for at least: (i) 2 years from the date of grant AND (ii) 1 year from the date of exercise) If the sale is not a disqualifying disposition, then the optionee would recognize long-term capital gain (or loss) equal to the difference between the sale price of the shares and the exercise price. The company would be entitled to no corresponding deduction If instead the sale is a disqualifying disposition, the optionee generally would have compensation income (taxed at ordinary rates) equal to the difference between the exercise price and the FMV of the underlying stock at the time of exercise (the company would be entitled to a corresponding deduction). Such compensation income would be added to the stock's basis to determine any capital gain that would have to be recognized on the disqualifying disposition	Any gain or loss would be short- or long-term capital gain or loss, depending on whether the shares were held for one year following exercise The company would not receive a compensation deduction for any such gain or loss	Same as NSOs

Equity: Options v. Stock Grants: Stock Grant Example

- The following example compares the tax consequences of receiving restricted stock with and without an 83(b) election

- Assume the following facts:
  - Executive receives 10,000 shares of restricted stock on February 1, 2014, when the fair market value per share was $10
  - The award vests 100% on the 2nd annual anniversary of the date of grant (no interim vesting)
  - When 10,000 shares vest on January 31, 2016, the fair market value per share is $30
  - Executive then sells the shares for $400,000 in May 2016, when the fair market value is $40 per share

Equity: Options v. Stock Grant: Stock Grant Ex. (cont.)

- **Example 1:** An 83(b) election IS timely filed upon receipt of the award:

Ordinary income upon grant 2/1/14:	$100,000
Ordinary income tax 2/1/14 (40% x 100,000):	40,000
Ordinary income upon vesting 1/31/16:	-------
Capital gain at sale 5/16 ($400,000 - $100,000):	300,000
Capital gains tax 5/16 (23.8% x $300,000):	71,400
Aggregate Tax on Award:	**$ 111,400**

- **Example 2:** An 83(b) election IS NOT filed:

Ordinary income upon grant 2/1/14:	$ -------
Ordinary income upon vesting 1/31/16:	300,000
Ordinary income tax 1/31/16 (40% x $300,000):	120,000
Capital gain at sale 5/16 ($400,000 - $300,000):	100,000
Capital gains tax 5/16 (23.8% x $100,000):	23,800
Aggregate Tax on Award:	**$143,800**

- In this example, the tax cost to Executive for failing to make an 83(b) election is **$32,400** ($143,800 less $111,400)

Equity: Options v. Stock Grant: Stock Grant Ex. (cont.)

- The greater the increase in the value of the shares during the vesting schedule, the greater the tax cost to Executive for failing to make an 83(b) election

- When determining whether to make an 83(b) election, Executive must carefully consider the risk that Executive may terminate employment prior to full vesting of the award
  - Under Example 2, if Executive files an 83(b) election but terminates employment prior to any vesting, Executive would forfeit all the shares and would have paid $32,400 in tax for which he/she generally cannot claim a refund
  - Whereas if Executive had NOT filed an 83(b) election and terminated employment prior to any vesting, he/she would have forfeited all of the shares but would have paid no tax

- Worth noting is that some employers negate the above economic risk by providing Executive with a gross-up at the time an 83(b) election is made. Such a formula could be:

$$\text{Total Gross Up} = \frac{\text{FMV of Stock on Date of Grant}}{\text{1 Minus Applicable Tax Rate}}$$

Indemnification

- Generally, indemnification of executive officers and members of the board of directors is addressed in the articles of incorporation and bylaws of the company
  - Therefore, it is preferable from the company's perspective to NOT include such a provision within the employment agreement
  - But to the extent such a provision is provided in the employment agreement, care needs to be taken to ensure such a provision is not outside the scope of the indemnification otherwise contained within the articles of incorporation and/or bylaws

- Same issue applies in the context of an errors and omissions policy

Employment Termination Triggers

- A typical definition of “cause” includes:
  - A material breach by Executive of his/her obligations under the agreement;
  - A willful or continued failure to follow orders or perform;
  - A conviction or plea of nolo contendere to any felony or a crime involving dishonesty or moral turpitude or which could reflect poorly on the company;
  - Executive engaging in misconduct, negligence, etc. that is injurious to the company;
  - A material breach by Executive of a written policy of the company; and
  - Any other misconduct by Executive that is injurious to the financial condition of the company and/or its reputation
- Should a notice and cure period be provided?
  - See explanation under good reason
- Typically, the negotiation points are over the modifiers

Employment Termination Triggers (cont.)

- [cause, continued from prior slide]

- Consider defining the term "cause" to include a substantial under-performance (*e.g.,* failure to achieve minimum financial goals for two consecutive fiscal years)
  - Consider further that such a provision is not typical and would subject Executive to elements that could be outside his/her control

- Consider the Board's use of after-acquired evidence to determine whether Executive terminated employment for "cause." Otherwise, evidence supporting a termination for cause that is found after Executive's termination would not likely be used to retroactively re-characterize Executive's termination (thus, a payout of severance benefits would likely continue)

- Other considerations are contained in the slides discussing "good reason"

Employment Termination Triggers (cont.)

- A typical definition of "good reason" includes:
  - A material diminution in Executive's base salary or a failure by the company to pay material compensation when due;
  - A material diminution in the nature or scope of Executive's authority, duties, responsibilities or title from those applicable to him as of the Effective Date of this Agreement;
  - The company requiring Executive to be based at any office or location more than [__] miles from [_____]; or
  - A material breach by the company of any term or provision of this Agreement
- Should the definition of "good reason" be 409A compliant?
  - *See* "409A Impact" on a later slide
- It is favorable to the company to require both a notice and cure period before "good reason" can be triggered
  - Consider that if a notice and cure period is used in good reason, is it fair to also apply a mirror notice and cure provision to the definition of "cause"

Employment Termination Triggers (cont.)

- [Good reason, continued from prior slide]
- Should there also be a claims run out period, such that if good reason exists, Executive must provide notice within [___] days of such initial existence, otherwise, the claim giving rise to good reason is considered waived by Executive
  - Such should prevent Executive from "saving" the good reason trigger for a rainy day 6 months or a year after-the-fact
  - Consider whether "cause" should contain a mirror provision
- Need to ensure the term good reason complies with Section 409A in both definition and application

Employment Termination Triggers (cont.)

- [Good Reason continued from the prior slide]

- As reflected on the prior slide, consider adding a "good reason" definition that includes:
  - ". . . a material breach of any provision of this Agreement . . . " AND
  - Consider inserting a provision elsewhere in the agreement that provides something to the effect: ". . . failure of the Company to obtain a written agreement of any successor or assign of the Company to assume the obligations of the Company under this Agreement upon a Change in Control shall constitute, and be deemed, a material breach of this Agreement."

- The above should comply with the Section 409A safe harbor definition of "good reason," but there is no certainty on this position

- Additionally, the above could provide Executive with substantial negotiating power if the acquiror wants to retain Executive after consummation of the transaction (*i.e.,* because any deviation from the agreement could give rise to good reason) and the existing employment agreement is otherwise something the acquiror would want to renegotiate because it is deemed to "rich"

Severance Pay

- Absent extenuating circumstances, severance pay is generally provided only if Executive terminates employment for "good reason" or the company terminates Executive "without cause"
  - Sometimes an company will provide severance upon Executive's disability, but such provisions are not too common

- Typically, a termination by Executive without good reason or a termination of Executive by the company for cause would generally result with no severance pay to Executive

- Consider that severance pay should be "bridge pay"
  - Keep in mind that severance pay packages should be designed to act as a "bridge" between jobs
  - Consider whether it makes sense to offset the amount of any future severance pay by the amount of any income Executive earns from his/her new employer, if applicable
  - REMEMBER: ISS has thoughts on this issue. Too much severance pay could trigger a no vote on the company's next say-on-pay, or if egregious enough when combined with other problematic pay practices, a no vote on the re-election of the members of the Compensation Committee of the Board

Severance Pay (cont.)

- Should the amount of severance pay be a multiple of base salary? A multiple of base and bonus?

- Should the amount of severance pay be higher in change-in-control scenarios
  - [Be sure to coordinate with the upcoming slides discussing 280G impact]

- Should severance pay be provided upon any of the following triggers:
  - Executive's "disability"?
  - Executive's death?
  - A failure of the company to renew the employment agreement?

Severance Pay (cont.)

- Consider designing severance pay in the form of salary continuation (as opposed to a lump sum payment)
  - Absent a change in control, severance pay designed as salary continuation allows the Board to hold the "purse strings" necessary to enforce any post-employment restrictive covenants such as a non-compete clause, non-disparagement clause, etc. (*i.e.*, severance pay could be forfeited to the extent Executive violates a post-employment restrictive covenant)

- Be sure to require in the executive contract that Executive must sign a waiver/release of all known and unknown claims as a condition precedent to receiving any severance pay
  - A form of such waiver/release could be attached to the executive contract as an exhibit

Severance Pay (cont.)

- Should a change-in-control of the company trigger severance pay (*i.e*., single trigger)

- Or, should there be both a change-in-control followed by Executive's termination of employment (*i.e.*, double trigger)
  - Termination of Executive by the company without cause,
  - Termination of employment by Executive for good reason

- How far out should the 2nd trigger apply following a change-in-control in a double trigger scenario? 1 year? 2 years?

- Keep in mind that:
  - Single trigger events (*i.e.,* accelerated vesting upon a change in control) and modified single triggers (*i.e.,* walk-away rights within a short period of time immediately following a change in control) are considered problematic pay practices for ISS
  - For this reason consider using double triggers (which could include a "good reason" definition/trigger)

409A Considerations

- As a broad overview, the employment agreement must either be designed to:
  - Avoid the application of Section 409A, or
  - Comply with Section 409A

- If properly structured to comply with the short-term deferral rule, then Section 409A would not apply. The practical implications include:
  - If a "good reason" trigger is present, its definition must comply with Section 409A
  - If Section 409A does not apply, then the 6-month wait would also not apply for monies paid under the employment agreement (which obviates the need to enter into a post-termination consultant agreement for the sole purpose of providing Executive with dollars during the otherwise applicable 6-month wait period)

- If instead Section 409A applies, then:
  - The 6-month wait rule applies,
  - The employment agreement must comply with definitional requirements under 409A (*e.g.*, disability, change-in-control, etc.), and
  - Prohibitions such as anti-toggling and impermissible substitution of benefits would apply

Section 162(m) & Rev. Rul. 2008-13

- Generally, the performance-based exception to the $1mm deductible compensation limit under Section 162(m) does not apply if the compensation is paid without regard to whether the stated performance goal is satisfied

- Revenue Ruling 2008-13 clarified that a payment would not qualify as performance-based if under the terms of the executive contract (or other agreement) it is payable (**without regard to satisfying the performance objectives**) upon a termination of employment:
  - By the company without "cause,"
  - By the employee with "good reason," or
  - Upon the employee's "retirement"

- In order to comply with Rev. Rul. 2008-13, Executive would have to wait until the end of the performance period to be paid (assuming the employment agreement allowed for such)
  - And then paid as though Executive were employed on the last day OR
  - Paid pro rata through his/her termination date

Section 162(m) & Rev. Rul. 2008-13 (cont.)

- However, notwithstanding the prior slide, satisfaction of the objective performance goals may be waived upon:
  - The employee's death,
  - The employee's disability or
  - A change-in-control of the company

- Additionally, and notwithstanding the prior slide, Executive could negotiate for the bonus to be paid upon a termination without Cause, for Good Reason or upon his or her retirement. This could be accomplished by Executive forfeiting rights to the performance pay and instead being paid some other compensation, such as the greater of:
  - A multiple of Executive's base salary, or
  - The average of Executive's performance bonus paid to him/her over the past [three years]

Non-Disparagement Provisions

- Means that one party will not disparage the other party
  - The provision is typically enforced by the company against Executive by the former holding the "purse strings" of severance pay (*i.e.*, breach of the provision by Executive would stop the flow of severance pay from the company to Executive)

- Executives typically seek a mutual non-disparagement clause
  - However, such can be problematic for the company because the company cannot affirmatively control its employees

- A solution is to:
  - Limit the non-disparagement clause to bind Executive's actions
  - Then the company could provide Executive with a limited non-disparagement clause that would essentially require the company to instruct its Board members, executive team and senior management, to not say anything disparaging about Executive

Other Terms

- Ensure that the definition of "change in control" within applicable arrangements requires *consummation* of the transaction
  - There are a few public examples where payouts to executives were triggered upon signing the underlying transaction document even though the transaction was never consummated
- Require Executive's automatic resignation from the Board and all committees upon his or her termination of employment
- Include a survivability provision so that payment terms and restrictive covenants, for example, survive the termination of the executive contract
- Consider whether to contractually toll the non-compete provision for any period of time Executive violates the restrictive covenant
  - Some states do not allow equitable tolling and therefore would not otherwise toll the non-compete beyond the terms of the contract
  - Absent equitable tolling or a contractual tolling provision, it may be difficult for an employer to enforce, for example, a six-month non-compete provision (*i.e.,* it could take more than six months to get to court)
- Consider whether to implement robust clawback provisions

Minimize 280G Payments: Overview

- Consider using non-compete provisions to avoid the use of a 280G gross-up provision
  - As background, tax gross-ups are generally preferred by executives and disfavored by stockholders
  - Implementing a non-compete can act to reduce an otherwise golden parachute payment subject to the 280G excise tax
  - Such reduction is applied on a dollar-for-dollar basis equal to the lesser of:
    - Reasonable compensation (determined using a benchmark analysis against the peer group and after applying the 90th percentile)
    - The value of the non-compete, determined pursuant to an independent third-party appraiser, which is the difference between the enterprise value of the company with and without the non-compete
  - Thus, the value of the 280G reduction could be more than the severance pay directly associated with the non-compete

Minimize 280G Payments: Overview (cont.)

- Golden parachute payments are governed by Sections 280G and 4999 of the Internal Revenue Code of 1986, as amended (the "Code"). If applicable, these Code sections generally:
  - Impose a 20% excise tax on disqualified individuals for their receipt of an excess parachute payment, and
  - Deny a corporate deduction for the same

- Only "excess" (amounts exceeding 2.99x the base amount) "parachute payments" that are "contingent" on a "change in control" ("CIC") that are paid to "disqualified individuals" are subject to adverse tax consequences under 280G
  - Negate any of these 5 elements and 280G would not apply to that particular payment

- Once the above adverse tax consequences are triggered, the tax applies to parachute payments that exceed 1x the base amount

Minimize 280G Payments: Planning Alternatives

- Alternative 1 – Do nothing
  - Deduction would be disallowed and the disqualified individual would be subject to an excise tax
- Alternative 2 – Allow the payment but provide the disqualified individual with protection through a full or partial gross-up
  - This would raise concerns with stockholders and ISS types
- Alternative 3 – Implement a cutback so that the parachute payment would not exceed 2.99x base amount (*i.e,* the threshold test is NEVER satisfied)
  - May not be ideal for a disqualified individual who could be financially better off paying the excise tax (instance where payment would otherwise equal, for example, 7x base amount)
  - Conversely, a cutback could be financially advantageous to a disqualified individual if the payment exceeding 2.99x base amount would otherwise be less than the amount of the excise tax (instance where payment would otherwise equal, for example, 3x base amount)
    - Remember, excise tax applies to amounts exceeding 1x base amount

Minimize 280G Payments: Planning Alternatives (cont.)

- Alternative 4 – Implement a hybrid cutback whereby a disqualified individual would be entitled to receive the greater of a 2.99x cutback or payment of the excess parachute payment (with the 20% excise tax)
- Alternative 5 – Implement a hybrid cutback whereby an excess parachute payment would not exceed a certain dollar amount
- Alternative 6 – Implement a stockholder vote exception (only applicable to private corporations), which generally means:
  - Payment must be approved in a separate vote
  - Payment must be approved by more than 75% of the outstanding voting power
  - Adequate disclosure must be made of all material facts
  - Vote must establish right of disqualified individual to receive payment (means such individual must first disclaim all rights to such payments)
- Alternative 7 – Same as Alternative 6, but provide a gross up if the corporation fails to SEEK stockholder approval (however, this alternative could not apply to the condition of GAINING stockholder approval due to the disclaimer requirement)

Minimize 280G Payments: Planning Alternatives (cont.)

- Alternative 8 – Allow employee the opportunity to rebut the presumption with a tax opinion

- Alternative 9 – Structure the payment to be reasonable compensation paid for services rendered before the CIC
  - Burden of proof is clear and convincing evidence
  - If the burden is satisfied, the amount of the reasonable compensation reduces the excess parachute payment
  - In determining reasonable compensation, relevant factors include:
    - Nature of the services to be rendered,
    - Individual's historic compensation for such services, and
    - Compensation for those performing similar services where payment is not contingent on a CIC

Minimize 280G Payments: Planning Alternatives (cont.)

- Alternative 10 – Structure payment to represent payment for future services (thereby negating the "contingent" element
  - Burden of proof is clear and convincing evidence
  - If burden is satisfied, the amount of the reasonable compensation reduces the excess parachute payment
  - Payments for covenants not to compete can represent payment for future services if there is a reasonable likelihood that the agreement would be enforced against the individual

- Alternative 11 – In the year preceding a year of CIC, increase the disqualified individual's base amount in order to increase the 5-year average
  - Exercise stock options
  - Payout deferred compensation
  - Increase bonus
  - Payout LTIP

Don’t Forget Next Month’s Webinar

- Title:
  - Designing Change-in-Control Pay

- When:
  - 10:00 am to 11:00 am Central
  - May 12, 2016

Andrews Kurth Locations

AUSTIN
111 Congress Avenue
Suite 1700
Austin, Texas 78701
Phone: +1.512.320.9200
Fax: +1.512.320.9292

BEIJING
Room 2007, Capital Mansion
No. 6 Xin Yuan Nan Lu,
Chao Yang District
Beijing, China 100004
Phone: +86.10.8486.2699
Fax: +86.10.8486.8565

DALLAS
1717 Main Street
Suite 3700
Dallas, Texas 75201
Phone: +1.214.659.4400
Fax: +1.214.659.4401

DUBAI
Andrews Kurth (Middle East) DMCC
45th Floor
Mazaya Business Avenue, BB2
Jumeirah Lakes Towers
P.O. Box 118273
Dubai, UAE
Phone: +971.4.567.0767
Fax: +971.4.567.0768

HOUSTON
600 Travis Street
Suite 4200
Houston, Texas 77002
Phone: +1.713.220.4200
Fax: +1.713.220.4285

LONDON
Andrews Kurth (UK) LLP
16 Old Bailey
London EC4M 7EG
United Kingdom
Phone: +44.20.3053.8300
Fax: +44.20.3053.8299

NEW YORK
450 Lexington Avenue
New York, New York 10017
Phone: +1.212.850.2800
Fax: +1.212.850.2929

RESEARCH TRIANGLE PARK
4505 Emperor Boulevard
Suite 330
Durham, North Carolina 27703
Phone: +1.919.864.7200

THE WOODLANDS
Waterway Plaza Two
10001 Woodloch Forest Drive
Suite 200
The Woodlands, Texas 77380
Phone: +1.713.220.4800
Fax: +1.713.220.4815

WASHINGTON, DC
1350 I Street, NW
Suite 1100
Washington, DC 20005
Phone: +1.202.662.2700
Fax: +1.202.662.2739

ANDREWS KURTH