

How to Negotiate Executive Employment Contracts

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About Anthony “Tony” Eppert



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- 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

Upcoming 2018 and 2019 Webinars

- Upcoming 2019 webinars:
 - Upcoming Proxy Season: Compensatory Thoughts from ISS (Annual Program) (1/17/2019)
 - Equity Awards: Design Tips for Navigating Blackout Periods (2/14/2019)
 - Golden Parachutes & 280G: Design Pointers on Being a Winner (3/14/2019)
 - Best Practices for Conducting the Compensation Committee Meeting (4/11/2019)
 - Anatomy of ISS (5/9/2019)
 - Tips to Increase the Longevity of the Equity Plan's Share Reserve (6/13/2019)
 - Multi-Disciplinary Facets to Net Withholding: It Ain't Boring (7/11/2019)
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 - Preparing for Proxy Season: Start Now (Annual Program) (9/12/2019)
 - Stock Ownership Policies & Clawback Policies: Design Pointers (10/10/2019)
 - Employee Stock Purchase Plans: The Introductory Course (11/14/2019)
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- Sign up here: <https://www.huntonak.com/en/insights/2018-executive-compensation-webinar-schedule.html>

Our Compensation Practice – What Sets Us Apart

- Compensation issues are complex, especially for publicly-traded companies, and involve substantive areas of:
 - Tax,
 - Securities,
 - Accounting,
 - Governance,
 - Surveys, and
 - Human resources

- Historically, compensation issues were addressed using multiple service providers, including:
 - Tax lawyers,
 - Securities/corporate lawyers,
 - Labor & employment lawyers,
 - Accountants, and
 - Survey consultants

Our Compensation Practice – What Sets Us Apart (cont.)

- The members of our Compensation Practice Group are multi-disciplinary within the various substantive areas of compensation. As multi-disciplinary practitioners, we take a holistic and full-service approach to compensation matters that considers all substantive areas of compensation



Our Compensation Practice – What Sets Us Apart (cont.)

- Our Compensation Practice Group provides a variety of multi-disciplinary services within the field of compensation, including:

Traditional Consulting Services

- Surveys
- Peer group analyses/benchmarking
- Assess competitive markets
- Pay-for-performance analyses
- Advise on say-on-pay issues
- Pay ratio
- 280G golden parachute mitigation

Corporate Governance

- Implement “best practices”
- Advise Compensation Committee
- Risk assessments
- Grant practices & delegations
- Clawback policies
- Stock ownership guidelines
- Dodd-Frank

Securities/Disclosure

- Section 16 issues & compliance
- 10b5-1 trading plans
- Compliance with listing rules
- CD&A disclosure and related optics
- Sarbanes Oxley compliance
- Perquisite design/related disclosure
- Shareholder advisory services
- Activist shareholders
- Form 4s, S-8s & Form 8-Ks
- Proxy disclosures

Design/Draft Plan

- Equity incentive plans
- Synthetic equity plans
- Long-term incentive plans
- Partnership profits interests
- Partnership blocker entities
- Executive contracts
- Severance arrangements
- Deferred compensation plans
- Change-in-control plans/bonuses
- Employee stock purchase plans
- Employee stock ownership plans

Traditional Compensation Planning

- Section 83
- Section 409A
- Section 280G golden parachutes
- Deductibility under Section 162(m)
- ERISA, 401(k), pension plans
- Fringe benefit plans/arrangements
- Deferred compensation & SERPs
- Employment taxes
- Health & welfare plans, 125 plans

International Tax Planning

- Internationally mobile employees
- Expatriate packages
- Secondment agreements
- Global equity plans
- Analysis of applicable treaties
- Recharge agreements
- Data privacy

Purpose of this Presentation

- The purpose of this presentation is to discuss the process associated with executive contract negotiations, with a focus on the economic points

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

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 counsel

- Consider utilizing a term sheet structure to negotiate business points (instead of negotiating business points from the draft employment agreement), that would later 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.)

- Structure the negotiation in a way that preserves the “business judgment rule” defense for the Board
- 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
 - Tally sheets 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, pre-negotiation considerations for Executive 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 if 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 is not associated with 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 exception that otherwise requires stockholder approval)

 - 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

- 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
 - In order to provide the Company with flexibility, structure the language 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 within this section or by attaching an Exhibit

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 under the contract
 - If restrictive covenants are covered by the contract, then verify that such survive any termination of the contract, including an expiration of the contract (i.e., the survival section is typically contained within the Miscellaneous provisions near the end 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

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
 - If Executive requires a provision that prohibits a reduction of Base Salary, then consider adding a carve-out that would allow for reductions to the extent they are proportionate to employee-wide or executive-wide cutbacks

- 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 the form of cash or equity
 - If a signing bonus is provided, then 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 (publicly-traded company issue)
 - 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)
 - Otherwise, consider adopting a non-qualified deferred compensation plan or arrangement 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 of fringe benefits include: (i) first class air travel, (ii) relocation assistance, (iii) financial planning assistance, (iv) business club memberships, (v) golf memberships, (vi) car allowance, etc.

Compensation (cont.)

- Perk - 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?

- Perk - 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.?

- Perk - 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 is 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 a 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)

Equity: Options v. Stock Grants: RSAs

- Generally, the grant of restricted shares would constitute a corporate transfer as of the date of grant 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: RSAs (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

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 haggle is over modifiers to the above (e.g., material, continued, etc.)

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
 - A similar provision that is more veiled could include (i) Executive failed to comply with the expectations of the Company or (ii) Executive failed to follow the directions of the Board
- Consider adding an after-acquired evidence clause to allow the Board, after a termination of the Executive’s employment without cause, to retroactively re-characterize such termination as a termination 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)
 - From the Executive’s perspective, if an after-acquired evidence clause is used, then add language to provide that any such use of an after-acquired evidence clause would negate any previously executed waiver and release that was previously signed near the time of the Executive’s termination of employment
- 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
 - The purpose of such a provision is to 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

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 foregoing 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 a 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? [see 162(m) slide, below]
- 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)
 - Should salary continuation stop to the extent Executive found a job with replacement income?

- 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 should be attached to the executive contract as an exhibit (“ . . . substantially in the form attached hereto as Exhibit A.”)

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
- With a double trigger, how long should the protection period last? Put another way, when must the termination occur post-transaction to provide the Executive with severance pay? 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

- The performance-based exception to the \$1mm deduction limit under Section 162(m) was eliminated. However, remnants of the design continue to remain. **[This Slide and the next Slide discuss the rules that no longer apply to new executive contracts, but for which a “practice” has developed]**
- Background: 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”
- Background: 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.)

- Background: 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

- Background: To avoid the foregoing, some executive contracts provided for a 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]

- **[Again, this Slide and the prior Slide discuss the rules that no longer apply to new executive contracts, but for which a “practice” has developed]**

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 insert equitable tolling as a matter of law, and therefore would not otherwise toll the non-compete beyond the express 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

Don't Forget Next Month's Webinar

- Title:
 - Upcoming Proxy Season: Compensatory Thoughts from ISS (Annual Program)

- When:
 - 10:00 am to 11:00 am Central
 - January 17, 2019