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Golden Parachutes & 280G: Design Pointers on How to Win

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Executive Compensation Webinar Series
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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

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- Upcoming 2019 webinars:
  - 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)
  - Everything Perquisites: The 101 Training Course (8/8/2019)
  - 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)
  - How to Design Restrictive Covenants & Economic Forfeitures (12/12/2019)

- Sign up here: https://www.huntonak.com/en/insights/2018-executive-compensation-webinar-schedule.html

Our Compensation Practice – What Sets Us Apart

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- Compensation issues are complex, especially for publicly-traded issuers, 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.)

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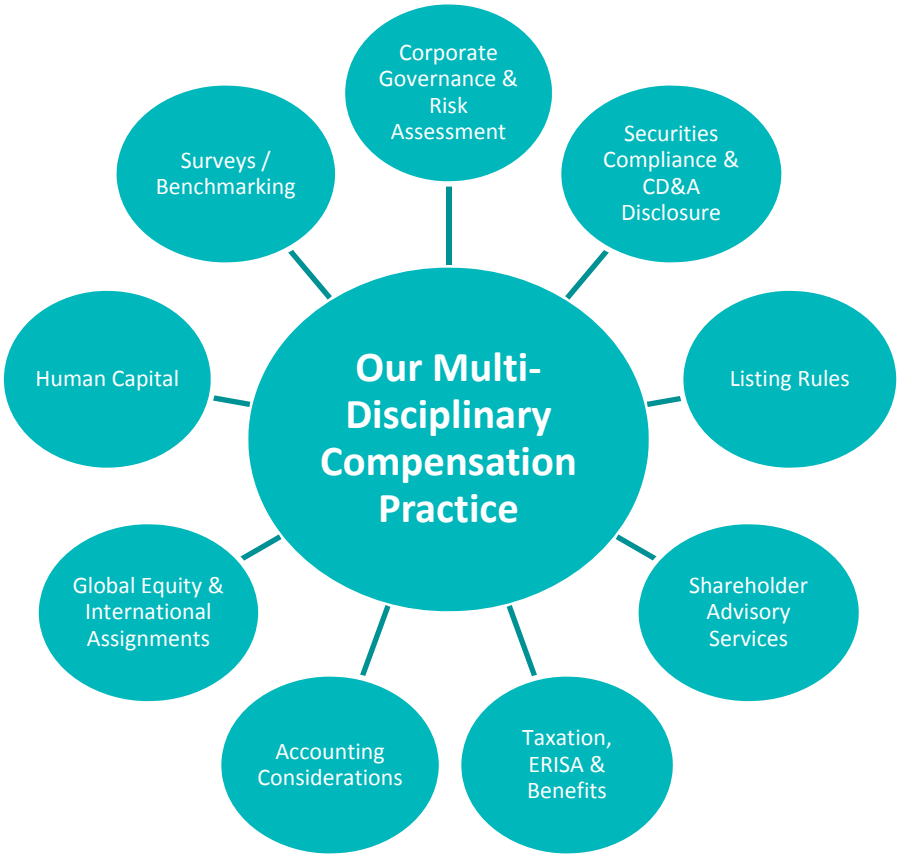
- The members of our Compensation Practice Group are multi-disciplinary within the various substantive areas of compensation. As multi-disciplinary practitioners, we take a holistic and full-service approach to compensation matters that considers all substantive areas of compensation



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

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- 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

Golden Parachutes – An Overview

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- Golden parachute payments are governed by Section 280G and 4999 of 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 CIC that are paid to a "disqualified individual" are subject to adverse tax consequences under 280G
  - Negate any of these 4 elements and 280G would not apply to that particular payment

- Once the above adverse tax consequences are triggered, the 20% excise tax (and corresponding disallowed deduction) applies to parachute payments that exceed 1x the base amount

Defined Terms

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- Disqualified individual
  - If at any time within 12-month period prior to CIC, the individual is an employee or independent contractor providing personal services, AND is either
    - A shareholder owning more than 1% of the Company's FMV;
    - Is an officer (a facts and circumstances test, however, any title that includes "officer" will be presumed to be an officer); or
    - Is a highly compensated individual (defined to include the lesser of the highest paid 1% of the Company's employees or the highest paid 250 employees of the Company)
  - The foregoing cannot exceed the lesser of:
    - 50 employees, or
    - The greater of (i) three employees or (ii) 10% of the employees
- Parachute payment
  - It is in the nature of compensation, and
  - Payment is contingent on a change in ownership or effective control of the Company
  - However, certain payments are excluded from the definition, such as:
    - Payments from a qualified retirement plan,
    - Payments representing reasonable compensation for services to be rendered after the CIC

Defined Terms (cont.)

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- Excess
  - A payment is excessive if the aggregate present value of all payments to a disqualified individual that would otherwise be parachute payments equals or exceeds 3x the “base amount”
  - Base amount is the disqualified individual’s average annualized compensation received from the Company for the 5 most recent tax years ending prior to the tax year within which the CIC occurred
- Change in control
  - Typically a sale of more than 50% of the total FMV or total voting power of the Company’s stock
- Change in effective control
  - One person (or a group) acquires during a 12-month period 20% ownership of the stock of the Company, or
  - A majority of the Board is replaced during a 12-month period who were not endorsed by a majority of the Board prior to the appointment or election of such members

Defined Terms (cont.)

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- Change in ownership of substantial portion of the Company's assets
  - A payment is excessive if the aggregate present value of all payments to a disqualified individual that would otherwise be parachute payments equals or exceeds 3x the "base amount"
  - Base amount is the disqualified individual's average annualized compensation received from the Company for the 5 most recent tax years ending prior to the tax year within which the CIC occurred

Mitigation Alternatives

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- Alternative No. 1 – Do nothing
  - Deduction would be disallowed and the disqualified individual would be subject to an excise tax
- Alternative No. 2 – Allow the payment but provide the disqualified individual with protection through a full or partial gross-up
  - Not a favorable design with ISS and certain other institutional shareholders
- Alternative No. 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, the excise tax applies to amounts exceeding 1x base amount

Mitigation Alternatives (cont.)

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- Alternative No. 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
  - This is also known as a "net better" provision
- Alternative No. 5 – Same as Alternative No. 4, but apply a cap so that if the payment triggers a 20% excise tax, that such payment will not exceed a certain dollar amount
- Alternative No. 6 – Implement a stockholder vote exception (only applicable to privately-held corporations), which generally means:
  - The disqualified individual irrevocably waives his/her right to the parachute payment that exceeds 2.99x his/her base amount,
  - Irrespective of the waiver, the payment is approved in a separate vote of the stockholders that is approved by more than 75% of the outstanding voting power,
  - Adequate disclosure to the stockholders must be made of all material facts,
  - The vote must establish the right of the disqualified individual to receive the payment
- Alternative No. 7 – Same as Alternative 6, but provide a gross-up if the corporation fails to seek stockholder approval (but note, this alternative could not apply to the condition of gaining stockholder approval due to the disclaimer requirement)

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Kellililienstern@HuntonAK.com

Mitigation Alternatives (cont.)

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- Alternative No. 8 – In the year preceding the year in which the CIC occurs, increase the disqualified individual's base amount in order to increase his/her 5 year average (thus increasing the 2.99x amount)
  - Accelerate vesting of equity awards,
  - Exercise non-statutory stock options,
  - Payout deferred compensation,
  - Increase bonus, and
  - Payout LTIP

- Alternative No. 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

Mitigation Alternatives (cont.)

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- Alternative No. 10 – Structure the payment to represent reasonable compensation for services to rendered in the future (thereby negating the "contingent" element)
  - Burden of proof is clear and convincing evidence, and if the burden is satisfied, then the amount of the reasonable compensation for future services 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. Addressing this point:
    - The payment does not have to be directly tied to the non-compete provision
    - Such payment represents compensation for services to be rendered after the CIC if it is "reasonable" in amount. Such amount is reasonable if it does not exceed the lesser of:
      - Reasonable compensation (determined using a benchmarking analysis against the peer group and after increasing the dollar amount up to the 90th percentile), and
      - The value of the non-compete, determined pursuant to an independent third-party appraiser, which is the difference between the enterprise value of the employer with and without the non-compete
    - Such payment reduces the excess parachute payment on a dollar-for-dollar basis
    - Thus, the value of the 280G reduction could be more than the severance pay directly associated with the non-compete

Don’t Forget Next Month’s Webinar

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- Title:
  - Best Practices for Conducting the Compensation Committee Meeting
- When:
  - 10:00 am to 11:00 am Central
  - April 11, 2019