Cooley

Comp Talks

Key takeaways

International and Cross-Border Compensation Issues

At our Comp Talks session on December 13, 2023 – **International and Cross-Border Compensation Issues** – Cooley partners Paula Holland and Nicola Squire, along with Heather Marshall, senior director of executive compensation at Willis Towers Watson, discussed various international and cross-border compensation-related challenges and shared their views on navigating those hurdles. Below are some key takeaways summarized by Cooley associate Bethan Chalmers.

Awarding equity outside the US can be straightforward or complex, depending on the jurisdictions involved, the type of awards granted and the identity of the award recipients. Tax, securities laws and currency/exchange controls vary across the globe and need to be carefully navigated. Tax-efficient sub plans may be available in certain jurisdictions where companies and participants qualify, but reviewing compliance with local legislation is always recommended.

Coordination with the employer of record (EOR) is essential. Engaging service providers in countries via an employer of record (i.e., a third-party employer) has become very popular in recent years, and making equity awards to such individuals has become much more common. Remember to check whether your equity plan permits grants to indirect service providers, as coordination with the EOR is critical to ensuring compliance with all necessary tax withholding and local reporting obligations related to the awards.

All US-listed companies, including foreign private issuers, must adopt and comply with a Dodd-Frank-compliant clawback policy to recover erroneously awarded incentive compensation. The scope of the new Dodd-Frank clawback policy requirement is relatively limited and applies only to compensation linked to financial performance measures paid to executive officers. An accounting restatement is the single required trigger for clawback under Dodd-Frank. However, proxy advisers and investors have opined that policies should include triggers in addition to what Dodd-Frank requires, given the important role such policies play in encouraging appropriate risk management and protecting shareholders' interests.

UK companies listed in the US often face complexities with compensation disclosure requirements. It is not always obvious to UK companies how they will be assessed by institutional investors, such as Institutional Shareholder Services (ISS) and Glass Lewis, given the differences between home country requirements and expectations and US requirements and expectations for domestic issuers. It is not unusual for such companies to receive negative recommendations on pay programs that would likely receive high support if the issuer was a US company. However, there are signs that some large institutional investors may become more accepting of the competitive realities UK companies with a significant US presence face and the resulting impact on compensation levels and structures, as further discussed in Willis Towers Watson's recent article, "Is the UK approach to executive pay broken?"

In corporate transactions, always consider where the equity holders are resident. During the diligence stage of cross-border M&A, compliance failings with local tax-efficient regimes are often discovered, and these

failings may limit the flexibility otherwise expected in determining how awards may be treated under local plans. A cost-benefit analysis should be undertaken to assess whether the magnitude of any local tax savings merit deviating from the pre-agreed treatment of equity awards – for example, including an exercise mechanism for options with a sale of target shares acquired on exercise may deliver attractive capital gains tax treatment, while the cancellation of such awards for cash will generally result in income taxes and social security contributions. It also is vital to understand where equity award holders are resident to ensure correct tax withholding – and, if an EOR is involved, an accurate funds flow.

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