Cooley

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Here is a seasonal reminder of two common annual compensation obligations for public companies:

S-8 prospectus

As you finalize your Form 10-K and annual report and possibly make annual refresh grants, now is a good time to review the S-8 and the related prospectuses for your stock plans and ESPP. Determine whether you have a sufficient number of shares registered on the current S-8. Consider any necessary updates to the prospectuses. For example, you may need additional tax supplements if you've started to make grants in new foreign countries; you may need additional Q&As if you plan to grant a new kind of award (e.g., RSUs) that is not currently discussed in the FAQs; or you may need to update existing answers if you've recently materially changed the terms of awards. A company is required to distribute an updated prospectus—including the Form 10-K and proxy statement—in connection with the delivery of these materials to its stockholders.

Specified employee determination

For many companies, April 1 is the effective date for the annual "specified employee" list under Internal Revenue Code Section 409A. This is a list of a public company's highest paid officers (officers with compensation in excess of $160,000 but limited to the lesser of (a) 50 employees or (b) the greater of 3 employees or 10% of employees) and any 5% owners or 1% owners with compensation in excess of $150,000. If a specified employee has deferred compensation that is subject to Section 409A, there are special rules on distributions in connection with a separation from service. For this purpose, "officers" are not limited to Section 16 officers and can include individuals who have the authority of an officer, even without the title. The "specified employee" determination typically will be made as of the end of a calendar year, and the resulting list of specified employees will be effective April 1 for a period of 12 months, though other identification dates are permitted by election. Once you have compiled the list of specified employees, review the compensation arrangements of such employees to ensure compliance with Section 409A, paying particular attention to deferred compensation in the form of certain severance benefits, accelerated vesting of RSUs, and payments under elective deferred compensation arrangements and supplemental executive retirement plans. Remember that payments of deferred compensation to a specified employee that are triggered by a separation from service must be delayed for six months (or, if earlier, until the employee's death).

If you have questions about this *Alert,* please contact a member of your Cooley team or one of the attorneys from the Compensation & Benefits Group listed here.

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Key Contacts

Tom Reicher **San Francisco**	**treicher@cooley.com** **+1 415 693 2381**
David Walsh Reston	dwalsh@cooley.com +1 703 456 8021
Thomas Welk San Diego	twelk@cooley.com +1 858 550 6016
Mark Windfeld-Hansen Palo Alto	mwindfeldhansen@cooley.com +1 650 843 5111

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