Cooley

Comp Talks

Key Takeaways:
Compensation Issues and Trends Unique to Tech Companies

At the Comp Talks session on October 21, 2021, **Compensation Issues and Trends Unique to Tech Companies**, our panelists – Cooley partner Barbara Mirza and associate Nicola Squire – discussed a variety of issues impacting tech companies, including, among others, industry-specific challenges such as an increasingly remote workforce, rapid growth, and the competitive market for both employees and non-employee directors. Here are some of the key takeaways summarized by Cooley lawyer Dionne Thomas:

Tech Companies Have Unique Compensation Considerations. Tech companies are under pressure from investors to achieve stock price gains, which can impact compensation design and strategy. The rapid growth environment and scaling demands that tech companies operate under can also create recruiting and retention challenges. Although many industries are facing a tight market for talent, the panelists noted that this is especially true for the tech industry where there is less stigma associated with employees making frequent job changes. Because the tech industry is generally more location-agnostic than other industries, these companies tend to have larger remote and international workforces, which introduces additional jurisdictional requirements and complexities around handling equity awards, corporate taxes, payroll administration and compliance with employment laws. Another consideration unique to tech companies is the increased governmental and social scrutiny related to the impact that the tech industry has on certain environmental and social issues.

Companies can streamline the equity grant process. The ability to remain nimble in a competitive, rapid growth environment is paramount to a tech company's ability to scale its operations. Delegating authority to an equity grant committee enables a company to grant equity awards to non-officer employees more frequently than would occur based on the cadence of regular compensation committee meetings. These committees typically make grants according to parameters set forth in an equity grant policy that provides grant size ranges for various job bands, an overall limit on the number of awards granted under the policy and a standard vesting schedule (subject to requirements of the jurisdiction of incorporation).

Inducement plans can mitigate share pool depletion. An inducement plan can be a helpful tool in connection with preserving the company's share pool; however, there are certain procedural hurdles associated with granting inducement awards that the company must follow, including issuing press releases to disclose the grant details. The panelists noted that even though inducement awards are not approved by stockholders, inducements awards are still included in proxy advisory firm burn rate and overhang calculations.

International workforce expansion requires careful planning. Companies should pay particular attention to how service providers outside of the U.S. are engaged (e.g., are individuals employees of the company or subsidiary, independent contractors, or service providers engaged through a professional employer organization). The type of engagement can

have both compensatory and non-compensatory implications, including whether service providers are eligible to participate in equity incentive plans, ownership of the service provider's intellectual property rights and whether a third party is needed to assist with the administrative aspects of payroll and reporting requirements.

Competition for non-employee director talent presents unique challenges. The panelists noted that the market for directors, particularly diverse directors, has become extremely competitive and is likely to remain that way given the increased regulation of board composition. The compensation committee or board should carefully assess the terms of any equity award that deviates from the company's non-employee director compensation policy with its legal counsel and compensation consultants before the grant is made, and the negotiations should occur before the potential director's start date.

Companies should carefully assess any changes to compensation programs of remote workers. Employees are increasingly requesting to work from remote locations, including to locations with lower cost of living. Companies should take care when considering adjusting compensation programs to carefully analyze the applicable plan documentation and any relevant employment laws. In addition, for employees relocating outside of the U.S., companies should carefully consider any potential cross border tax implications, which can become more complex when equity awards are involved and may include a requirement to apportion based on time spent in a particular jurisdiction, treatment prescribed under a double tax treaty or use of available tax credits.

Beware of HSR penalties. Technology companies that have made significant pre- and post-IPO equity awards will want to be mindful of any HSR fillings that are required upon exercise of options or settlement of RSUs that exceed specific thresholds. A delayed HSR filing will result in substantial penalties.

ESG issues in compensation are evolving. Tech companies are typically favored by ESG funds, as they often are asset-light and without an obvious environmental footprint. However, the panelists noted that tech companies are vulnerable to ESG scrutiny with respect to a number of issues, including energy usage of data centers, governance issues (dual class structures and the entrenchment of control) and diversity and inclusion issues. The panelists suggested that as ESG becomes more mainstream, institutional investor expectations will continue to intensify and companies should consider whether to implement performance metrics related to ESG issues in their compensation programs in order to demonstrate commitment to these issues.

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