The purpose of this Post is to highlight some of the administrative issues that should be vetted any time the Compensation Committee of a publicly-traded company effectuates a grant of equity to key employees. The below list is not exclusive and is listed in no particular order:

**Share Counting Provisions**

- **Verify the Equity Plan’s Share Reserve Not Exceeded.** With respect to the upcoming grants, the Company will need to verify that the equity plan’s share reserve will not be exceeded. This has two parts. First, to the extent the equity plan has liberal share counting, the Company will need to track equity grants (which are a subtraction from the share reserve) AND track forfeitures of equity awards (which are an addition to the share reserve). Second, the Company should determine whether a sufficient number of shares would exist if the outstanding performance awards were settled at their maximum levels (i.e., some companies only track share counting of performance-based awards at their target levels).

- **Verify Compliance with Any Holdover 162(m) Sub-Limits.** Prior to the Tax Cuts and Jobs Act (“TCJA”), most equity plans of publicly-traded companies contained
share grant limitations that were intended to comply with the performance-based exception to the $1mm deduction limits under Section 162(m). These were typically structured as an individual and annual limit. Though TCJA eliminated the performance-based exception, a number of equity plans have retained such limitations as “good governance.”

- **Verify Compliance with any Requirement that the Equity Award Contain a Minimum 1-Year Vesting Schedule.** As background, part of the “plan features” pillar of ISS’s equity plan scorecard (“**EPS**”) is that a certain number of points are allocated if the issuer’s equity plan has a requirement that at least 95% of the share reserve is granted with a minimum vesting schedule of 1 year. If applicable, the 5% carve-out should be tracked. For example, often grants of equity to non-employee directors are made in arrears (i.e., payment for services previously performed), and as a result, these grants are issued to directors fully vested. Such grants will work to deplete the 5% carve-out.

- **Verify Share Reserve on Form S-8.** Equity plans with liberal share counting provisions count share depletion on a “net basis,” however and irrespective of the foregoing, share depletion under Form S-8 rules are counted on a “gross basis”. Over time a disparity can exist such that, in the extreme example, shares remain for issuance under the equity plan whereas the shares protected under the Form S-8 have been fully exhausted. See our prior post entitled “**Tip of the Week: Number of Shares to Register under a Form S-8**” for more details.

- **Verify Compliance with Director Sub-Limits.** As background, a number of equity plans contain non-employee director sub-limits for purposes of bolstering any shareholder ratification defenses. See our prior post entitled “**Discuss Director Compensation During the Fall 2018 Board Meetings**” for more details.

**If Applicable, Verify Compliance with any Prior Delegations of Authority**

- **Background.** Absent a valid delegation of authority, only the Board of Directors has the authority to grant equity. Typically, the Board delegates such authority to the Compensation Committee pursuant to the Compensation Committee Charter. And sometimes the Compensation Committee provides for a further downward delegation to a sub-committee or to the CEO in order for the latter to act quickly in new hire situations (as opposed to waiting until the next regularly scheduled Compensation Committee meeting).

- **Verify the Grant Complies with the Parameters of the Delegation.** Such downward delegations are often drafted to comply with Section 157(c) of the Delaware General Corporation Law. As a result, grants of equity by delegates should be tracked for compliance with the delegated authority (e.g., reporting mechanisms, using pre-approved award agreements, complying with share cap restraints, etc.)

**Share Award Recipients Cannot Be Entities**

- **Service Provider Must Be a “Natural Person.”** Under Form S-8 rules, the recipient of an equity award must be a natural person. As a result, equity awards cannot
be made to entities and also be covered under the Form S-8 (though there are rules that would allow in individual of the intended entity to receive the equity award in name only and on behalf of the entity).

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